The obligatory will between Iraqi law and Islamic jurisprudence

Basem Abdul-Hussein Weni[1] ,
Iranian Ministry of Science ,Shiraz Governmental University, College of Law, Iran
Basem Abdul-Hussein Weni[1] : bas.1975zh@gmail.com

Haider Jawad Kadim Al-Baroud[2]
Iranian Ministry of Science ,Shiraz Governmental University, College of Law, Iran
Haider Jawad Kadim Al-Baroud[2]\ hayderalbarood@gmail.com

Dr. Mahbouba Mina[3]
Iranian Ministry of Science ,Shiraz Governmental University, College of Law, Iran
Dr. Mahbouba Mina \ mmina@shirazu.ac.ir

ABSTRACT

We dealt with the subject of the obligatory will in this study based on Islamic jurisprudence and Iraqi law, as we initially explained the concept of the will in general, and we clarified the concept of the will and the extent of its legality in jurisprudence and law, as there was one approach that allowed it, which is the doctrine of zahirism, but from the majority of jurists, it became clear to us: The origin of the will is scarcity and desirability, and we discussed its legal and legal organization, as well as the conditions for its entitlement and the mechanism for its extraction and distribution to its beneficiaries, in two sections detailed with demands and branches, as it became clear to us after explaining the opinion of the zahirism (apparent) doctrine and the opinion of the majority of jurists about the legality of the obligatory will, the inadequacy of the zahirism (apparent) evidence about the necessity of this will in the right of those who inherit, as it became clear from the opinion of the majority of jurists, that any will on which the zahirism (apparent) basis was based on the legality of the obligatory will, has abrogated its obligation and remains desirable, and that the rule of the original will is scarcity and desirability and other mandated provisions have changed its secondary ruling.

As for the legal aspect, some man-made laws have made the obligatory will take precedence over the rest of the other wills, even if between them there is an obligatory religious will, and this is in violation of Islamic law, by giving precedence to the legal duty over the religious duty.

We have noted that the Iraqi law did not clearly detail the recipients of the obligatory will. It did not show us that this will is limited to the first class of grandchildren, or does it include the lower classes, contrary to what the Egyptian law shows in detail and clarity, and the Iraqi law did not expressly indicate that the distribution of the amount of the obligatory will is according to A rule (for the male is like the luck of the two females) unlike his Egyptian counterpart, which was clear in that.

Keywords: Islamic jurisprudence and Iraqi law, zahirism

Introduction:-

All praise be to Allah, Lord of the Worlds, and prayers and peace be upon the most honorable of the prophets and messengers, and his family of the good and pure, and after...

One of the most obvious things in the life of peoples and nations is their spending on a set of humanitarian principles, especially those directly related to people's rights, and maintaining the balance of society in the face of the inevitable changes in the future of its history by turning these principles into a habitual behavior after the voluntary response to them is achieved. And moving in its light, as it was not left suspended in space, but was brought down to reality, and humanity lived it as a fixed reality, generation after generation, as its origins grew with instinct and its goals were in harmony with human desire, ambition and aspirations. Perhaps one of the most prominent of those principles that turned into permanent behavior in the lives of all people is the principle of the will, which is written for immortality, and thus every principle whose value is not known unless it is a behavior. The foundation of the will in the conscience and feeling of the person and its consistency with the human desire to maintain a kind of relationship with the existing life after its departure is an innate desire in which the master and the slave are equal.

Obligatory Will:

A comparative legal jurisprudence study in Iraqi law and Islamic jurisprudence

The first topic: The concept of the will:

If we look at the concept of the will in its reality and its various types, it is one of the means of distributing wealth and dividing it fairly and equitably and not accumulating it with one hand. The will was known in the heavenly laws that preceded Islam. It was present in all religions, including Judaism, that is, the Jew has the right through the will to dispose of all his money. And bequeathing them to (1) whomever he wills according to his desires and whims, and the same is the case in Christianity, but Islam has dealt with it in a precise and clear way, and the original wills are optional and delegated to those who want to make up for what he has missed in his life of good deeds.

There are types of wills that may be obligatory on a person, but this obligation is a religious obligation, not a judicial one, as it is obligatory with all the rights of Allah Almighty by which he imposed duties such as zakat.

The first requirement: the nature of the will:

It is the transfer of what the son is entitled to, male or female, as long as he/she was alive, in the inheritance of either of his parents in the event of his death before either of them by virtue of the law to his children, provided that it does not exceed one third of the estate. Article 74 of the Personal Status Law states: (If the son dies, male or female, before the death of his father or his mother, he is considered alive upon the death of either of them, and his entitlement is transferred from the inheritance to the children, whether male or female, according to the legal provisions, as it is an obligatory will, provided that it does not exceed one third of the estate).

Section one: Defining the will in general and the obligatory will in particular

The will in the law of personal assets and the laws of the will in the Arab and Islamic countries are almost combined in their definition: that it is known in the inheritance adding after death, and the will is considered among the legitimate and legal actions and arises by the individual will of the person and is classified as one of the actions added to after death and it is one of the means by which By means of transferring ownership to the other unilaterally.

Where it is held by verifying the existence of evidence of a person's will for a specific act or obligation that entails bearing his legacy after his death, with a right, and there is talk in this section about the linguistic and idiomatic meaning of the will in general and the obligatory will in particular, as well as the wisdom of their legislation.

The most likely definition (it is the restitution of a known share of the estate by force to the

offspring of the son who died during the life of his bequeather on a specific condition) (ownership and a known share).

First: the will in general

Linguistically, a will: It is the one which bequeathed a thing, I will it if it is connected to it, and it is said that it is the land of the trustee, i.e. connected to the plant. Likewise, the will is what was bequeathed and is called a will because it is connected to the matter of the deceased.

The will is called the act of the benefactor, and it is absolutely here that it is a source for the act of bequest, so it is said that the bequest is a bequest and his bequest, and the bequest is called a will because the deceased connects with it what was in his life after his death, and it is also called on the recommended thing of money and the like.

It is worth noting that the language did not differentiate between a will and a bequest, because it did not differentiate between the transitive verb (lam) and the transitive verb (to), both of which are called will and bequest, but the majority of jurists have differentiated between them by making the sign of the will on ownership added to What is after death (2) and the significance of the bequest is to make the other the trustee of the one who carries out his order after his death(), and the will in this sense, that is, its linguistic meaning, is added to the material wills as well as the moral wills, and examples are as if ((A person recommends to another person to own a certain thing or to obtain a benefit. As for moral wills, you recommend that your son adhere to religion), and this is what the prophets (peace be upon them) did.

And the Almighty said ((And Abraham instructed his sons [to do the same] and [so did] Jacob, [saying], "O my sons, indeed Allah has chosen for you this religion, so do not die except while you are Muslims)) (3).

The wisdom of the will

Man, by virtue of his nature and his innate nature, is considered to have a strong love for money, and this love may tempt him to neglect what is obligatory on him or neglect many matters. Fasting, prayer, pilgrimage, and zakat, or neglected to perform it until his life extended, and here he wants to avoid or remedy that, perhaps he has relatives other than heirs who deserve help and assistance, and he may be one of those who helped them in his life and wants that this help not be cut off from them after his death, even if With something simple, and for these reasons and others, God Almighty legislated a will for a person to be able to make up for what he may have missed in his past of righteous deeds, so he allowed him to give alms in some of his money at the end of his life to increase his good deeds if this person died while he insisted on his will and also has a benefit in the life of this world If his life is long and the days are narrow, then he can take back from his will when the need for it motivates him (4).

And the will is one of the means in the development of social and economic integration, because Islam legislates many reasons for the members of the community to contribute to economic integration, including zakat, loyalty, bequests, cooperation in righteousness and piety, and in particular that in a will a great benefit to others without causing material or moral harm to the guardian in his life (5).

Second: The obligatory will:

Linguistically, the concept of obligatory is obligated, something is obligatory, i.e. mandatory. And it is obligatory or obligated by Allah, necessitate (deserve) (6).

As for the obligatory bequest in the terminology of jurists, it is the will of a person to fulfill what he owes from the right of Allah Almighty, or the bequest, of his estate after his death, when there is no evidence to prove this right is owed (7).

This type of will does not fall within the provisions of the obligatory will, the subject of the research, because the obligatory will in the terminology of Ibn Hazm and the one concerned in our research is an obligation on everyone who left money, and it is imposed on every Muslim who wills for his relatives who do not inherit. They do not inherit from a banning or a prohibition.

Third: The wisdom of legislating the obligatory will:

The religion of Islam and Islam, as is well-known, rejects stagnation and petrification, and recommends progress and development with the future, but it is restricted within the legal limits, and that the law of Allah Almighty is subject to development with time according to the civilized development of man. Accordingly, it was necessary and necessary provisions to reconsider many jurisprudential issues in line with the spirit of the age, in order to update some texts, to suit the reality in which we live, provided that they do not touch the foundations of Sharia. Among the new cases in society that the Arab legislator sought to put in place effective solutions to, is that from many cases a person dies in the life of his parents and this deceased may have children, so he is forbidden Births from the inheritance of their grandfather or grandmother because of the presence of those who withhold them according to the general rules of inheritance, and thus deprive the deceased and his offspring of his inheritance, which he would have deserved if he lived until the death of his parents, and his children become in extreme poverty while their uncles are able to live, and accordingly the legislator wanted to prepare the children, those who have been deprived of their origins and inheritance from the opportunity of a decent life and protects them from loss and homelessness, so He ordered for them a share of the estate equivalent to the share of their father or mother, provided that it does not exceed one third of the estate, and this share is called the obligatory will (8).

Fourth: Types of wills

The will is divided into several divisions with different considerations, through its perspective. To the man-made laws of personal status, we find that the will is divided into two types in terms of the ruling that is proven to it, and it is the optional will: where the person is free to make a will, and if he does not wish, he does not leave a will. Before his death, in conditions specified by the law, which we will discuss in detail, and the discussion in this section or section will be limited to the types of wills in terms of their legal ruling and in terms of the recommended.

First: Types of wills, with a note related to them:

In light of the foregoing, the will can be divided into two types, according to its related note:

1- Will of ownership:

It is a free ownership suspended on death, as the testator establishes the ownership of a specific person or persons, whether they are his relatives or not, and any other party, after his death for a specific thing of his money, or the benefits of those objects and implemented within the limits of one third and when exceeding one third depends on the leave of the heirs.

2- The covenant will:

It means to assign a person to dispose of something related to him or to others or to recommend to a specific person or more after his death to carry out a will as drawn by him, for example, recommending his preparation and burial.

Types of will according to its legal ruling:

It is divided into five types of obligatory wills, delegated wills, forbidden wills, disliked wills, and permissible wills.

1- Obligatory will:

This type of will is a religious obligation, not a legal one. If a person has rights to Allah Almighty that he did not perform in his life, such as zakat and penances, and vows in which people's rights are included, such as the will to return deposits and debts, or if he has a honesty (9), then the will is obligatory for this person, because the performance of the right is a duty and an example Based on that (Allah Almighty has enjoined this matter in his book of the Almighty by saying: "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing." (10).

2- The Delegated will:

It is the bequest that is in the face of goodness for the people of knowledge and righteousness and for relatives who do not inherit any

delegated in charity, and it is what was in it a closeness to Allah Almighty, like a bequest for the poor.

Building mosques and hospitals. This is what the Messenger Muhammad (peace and blessings of Allah be upon him and his family) urged, saying, " "When a person dies, his deeds are cut off except for three: Continuing charity, knowledge that others benefited from, and a righteous son who supplicates for him.".

A- The forbidden will:

It is the will in which there is a definitive text forbidding it, whether it is a sin or the motive for it is a sin, such as recommending the construction of a gambling club, a place for prostitution, or a store for selling liquor. Or a bequest with the intent of harming the heirs, and this is what the Creator forbids by saying, the Almighty, "after any bequest which was made or debt, as long as there is no detriment [caused]...."

B- The hated will:

The compulsion by a will is what the legislator dislikes to do, such as a bequest to one who commits taboo, and a bequest to the people of immorality and immorality, lest the immoral person use it for his immorality.

C- Permissible Will:

It is a will for a party that is not news or a specific party, such as a will for relatives, foreigners, and the rich, or for a person described as knowledge, righteousness, or need.

The second subsection: Distinguishing the obligatory will from what you suspect:

The concept of the obligatory will and its types were clarified in the previous requirement, and in order not to confuse this will with other important matters, it must be distinguished from what it suspects, as the legal nature of the obligatory will is considered one of its most important problems.

First: the similarities (11):

1- The obligatory will and the inheritance, both of which are obligatory, and they are not rejected by the testator or by the heir, and they do not require the acceptance of the testator. The inheritance does not require the acceptance of the heir.

2- An obligatory will is similar to the inheritance when there is a plurality in the division, after it has been proven that it is entitled to its beneficiaries according to the rule (for a male like the luck of two females).

3- It is proven by the force of law, that is, it does not need the will of the testator, when the testator dies without making a will for those grandchildren whose origin died in his lifetime. They deserve what their origin is worth of inheritance.

4- Intentional killing resulting from aggression that prevents the entitlement of the obligatory will, as well as prevents inheritance.

Secondly: the differences (12):

1- The obligatory will is attached to the branches in exchange for what they missed from the inheritance of their origin before the original inherited from its origin. That is, compensation is required for the offspring for what he missed by the death of his parent during the life of his father or mother.

2- In the event that the grandfather or grandmother gives, without compensation, to the offspring of the son who died during their lifetime, a measure of the inheritance, then this amount shall be considered enriched by the obligatory will.

3- In the obligatory will, every asset obscures its branch without the branch of another.

4- The obligatory will in some laws is obligatory for children to appear and if they descend, and children of bellies are in the first degree, and it is forbidden for children of bellies in the second degree.

5- The will is obligatory in the event of a third of the estate.

The second requirement: the legality of the obligatory will:

The obligatory will is one of the disputed issues that have sparked controversy, whether at the level of jurisprudence or the law. The jurists differed about transcribing the obligatory aspects of the verses of inheritance, as well as the Arab laws, some of which stipulated them and others did not address them, and in order to clarify their legality, we will divide this research into two branches, the first branch is the legality of the will in Islamic jurisprudence,

and the second branch is the legality of the obligatory will in the law.

Section one: The legality of the obligatory will in Islamic jurisprudence:

The opinions of the jurists differed about the necessity of the will. Some of them issued a fatwa that it is obligatory based on the verses of the Noble Qur'an and hadiths of the Prophetic Sunnah, and others went to the recommendation of the will in its origin and did not say that it is obligatory except in some cases, based on the verses and hadiths that have abrogated that obligation and in order to clarify the position of the jurists on the obligatory will and other wills, the contemporary jurisprudence is considered to be its legal basis for the opinions of some of the ancient jurists, headed by Mohammad bin Hazm Al-Dhahiri, in the matter of the obligatory will when the death of the child preceded the parent and he was appointed and a partner in earning the wealth of the family registered in the name of the father or the mother, but the death that rushed, and destroyed him Before his inheritance, he and the rest of his offspring lose the right to obtain a share of that wealth based on two bases. In the first, the loss of one of the conditions for entitlement to inheritance, which is the realization of the life of the heir before the death of the testator, and the second, the rule of close withholding that obscures the distant. Accordingly, the positive legislation in the field of personal status comes to adopt the jurisprudential trend that says with the obligatory will to close the door of need and pay the unfairness that befalls the right of the heirs.

The second section is the legality of the obligatory will in the law:

The obligatory will, which is applied locally in Iraq and some Arab countries, is a new type of will that allowed for its being obligatory because it is taken sufficiently and not religiously. In other words, this obligation attached to the will is a judicial obligation and not a religious one, as the judge is the one who directs it from the deceased to those who are entitled to it according to the law, whether the bequeathed to them before his death or not, and the will is proven exclusively whether the heirs agree or not.

An obligatory will is defined as (the assumption of a will by a grandfather or grandmother for the grandchildren to the extent of their father or mother's share if the father or mother died before the death of the grandfather or grandmother or both, provided that this share does not exceed one third of the estate) (13).

The second topic :-

The rule of the obligatory will

A will is obligatory if a person owes a debt to his father, i.e. he is in debt, and no one knows but Allah, the testator and the owner of the debt. Here, the will is required because the fulfillment of the debt is a duty, and whatever the duty is not accomplished except by it, then it is an obligation

Likewise, the bequest is obligatory for others who have no right to inheritance and were poor, and the testator is rich, for here the bequest is obligatory for these relatives, and the evidence for this is the 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.)).

The first requirement: the conditions for entitlement to the obligatory will

In order for the obligation to be fulfilled in the will, there must be several conditions set by the law. This entitlement, after fulfilling its conditions, may collide with several obstacles that prevent the branch from entitlement to the will.

The obligatory will was organized according to the conditions of the legislator in the Arab law in which it worked. Until the tribes and grandchildren deserve it, and the law did not release it except under restrictions. When these conditions are fulfilled, the grandfather or grandmother must make a will in an amount equal to the share of the origin of these tribes or grandchildren within the limit of one third,

and when they neglect or refuse this will, the inheritance is obligatory for them according to the law.

But when these conditions are not met, or one of them fails, then the obligation is negated and it becomes not obligatory neither in the life of the grandparents nor after their death.

It was said in the conditions set by the laws for the entitlement of the obligatory will, we would like to clarify the position of Islamic Sharia jurists on the conditions for the entitlement of the obligatory will. And as we explained previously, those who say that a will is required for non-heirs, did not specify the money that must be bequeathed, nor the minimum or maximum, but the obligation of the bequest came with what was left of goodness, so, it is bequeathing it to the next of kin as they were deprived of the inheritance for any reason, and they did not specify its beneficiaries with the tribes or the grandchildren whose immediate ancestry died before the grandparents, but rather (Ibn Hazm) made it obligatory for the parents and non-heir relatives and even (Ibn Hazm), and he is the one who is considered one of the hardliners in the necessity of this will as it came in his saying, "Whoever died and did not make a will, it is obligatory to give alms on his behalf in whatever is possible, and this must be done, because the imposition of the will is obligatory".

Several conditions can be extracted for the entitlement of the obligatory will, whether related to the Egyptian Wills Law or the Iraqi Personal Status Law (14).

Subsection One: Conditions relating to the dead son

1- The death of the son before the origin

This condition is considered axioms, and it is an agreement between the Arab laws that are attached to the obligatory will, as it was stipulated in Article 76 of the Egyptian Will and Article 74 of the Iraqi Personal Status Law, and they have been previously referred to. Without this condition, the obligatory will would not have been lost, meaning if the son died after his origin, there is no need to search for the obligatory will, because here he deserves the inheritance and his right is transferred to his sons after him. This death may be real, such as natural death, which is the loss of a human's soul from his body, which is common, or a legal death, i.e., it is by virtue of the law, such as judging the missing person with death after being cut off from his news and not knowing his whereabouts and his life from his death. His death is judged by the judge after a specified period, and this is what the Egyptian Wills Law expressly states in its article (76): (If the deceased does not bequeath to the offspring of his son who died during his lifetime or died with him, even if legally).

However, the Iraqi legislator did not explicitly address judgmental death like the Egyptian counterpart, but rather mentioned death in general in its article (74): (If the child dies...), and since the text was absolute and not specific to the death branch, it includes real death and judgmental death.

However, the ruling of this matter can be clarified through what was included in Paragraph (C) of Article (86) of the Iraqi Personal Status Law, which dealt with the conditions of inheritance, where among the conditions was a condition that the life of the heir would be realized after the death of the testator, in addition, the Article (74) of the Iraqi Personal Status Law, which stipulates the obligatory will, came devoid of stipulating this special case and did not refer to the case of the death of the with son his origin together, and accordingly the branch of the deceased son with his origin and his will is not entitled to his duty, reflecting the Egyptian law.

As for the absence of any branch close to the inheritor, here the grandson whose origin died with his grandfather is the close heir and therefore is considered an heir and is not the holder of an obligatory will.

2. The deceased son had realized in his life

It was stated in Article (76) of the Egyptian Law of Will (just as what this child would have been entitled to as an inheritance in his estate had he been alive at his death), as well as in the text of Article (74) of the Iraqi Personal Status Law: (...and his entitlement is transferred from

the inheritance. to his children, whether male or female).

Through these legal texts, it becomes clear to us, that in order for the descendants and descendants to deserve the obligatory will stipulated by the advanced laws, the origin of the deceased descendant, the father or the mother, must be an heir during his lifetime from the deceased parent, i.e. the grandfather or grandmother, and not deprived of inheritance for any reason. Deprived of inheritance does not deserve an obligatory will.

In view of the foregoing, if a person dies and leaves a son and a son's son, here the son of the son takes his father's share, as an obligatory will, provided that it does not exceed one third of the estate, If the deceased son was prevented from inheriting during his life, for example, he would be different with his father in religion, then here the grandson does not deserve an obligatory will.

Likewise, if a person kills his father or mother, then this killer is deprived of the inheritance and is considered non-existent in the right of inheritance and withholding. They deserve the inheritance, not the obligatory will (15).

Subsection Two: Conditions related to the branch due to the obligatory will

1- That the offspring should not be an heir: that is, the grandson is not entitled to his share in the inheritance by way of inheritance. Accordingly, If he is entitled to the inheritance, the obligatory will is withheld from him because he has become a visible heir who deserves a share of the inheritance, and that the obligatory will was imposed instead of what he was entitled to from the inheritance of his origin if he remained alive, and accordingly, the obligatory will is not obligatory for him if he is an heir, even with a small part.

Accordingly, if a woman dies and leaves behind a husband and a daughter, and the daughter of a son, here the husband takes his share, which is a quarter, and the daughter from her own takes half, but the daughter of the son takes one sixth to complete the two-thirds. The obligatory bequest was not worthy of being an heir, and this is according to the majority of jurists, except for the Imamiyya school of thought (16).

2 - Existence oThe presence of the branch upon the death of the testator: According to the general rules of inheritance and the will, that the inheritance must be entitled to the presence of the heir upon the death of the testator, and this is one of the established principles of the Egyptian Court of Cassation, and the rest of the courts in other countries, where it was decided that it is decided, jurisprudence and legal, that one of the conditions of inheritance is the life of the heir that achieves a stable life after the death of the testator (17).

Also, the presence of the inheritorat the death of the testator in order to deserve the will, and this is stipulated by Article (68), the first paragraph of the Iraqi Personal Status Law, which included the presence of the inheritor at the time of the testator's death, in order to deserve the will.

3- That the testator did not give in his life the worthy descendant of the obligatory will equal to the share of his origin by way of donation or fictitious sale, or bequeathed to him in advance what he deserves from the obligatory will, and this is confirmed by Article (76) of the Egyptian law: The will: He gave it without compensation by another act as much as he should.

Accordingly: If the grandfather or grandmother gives these grandchildren their father's share before his death, then no will is obligatory for them. It is considered an optional will suspended on the leave of the heirs, as he had given some of the descendants of the obligated descendants without some meal to those who were deprived of it.

The second requirement:

The procedure for extracting the obligatory will:

This requirement is devoted to finding out the mechanism of extracting the obligatory will and knowing the methods of how to extract the obligatory will, and then we will address the contention of the obligatory will with other wills.

*** Section one: Methods of extracting the obligatory will:**

Here it turns out to us that what is meant by the method of extracting the obligatory will is the mechanism by which the amount or quorum of the obligatory will is extracted, i.e., determining the share that the grandson is entitled to, according to the law and extracting it from the estate of the grandfather or grandmother, since the amount of the obligatory will is not fixed in all cases, as well as those who are entitled to it are not fixed, even if the amount of the obligatory will is limited to grandsons, and this will may be combined with optional wills.

The obligatory will may be limited to a son's share or a daughter's share, depending on the dead asset, provided that it does not exceed one third of the estate, and that the number of its beneficiaries may be one person or more, whether of one or multiple origins, and sometimes this will combines with an optional will. These multiple cases, how is this will extracted? How is the distribution to the beneficiaries in the event that their numbers are large, and what is the solution if its amount exceeds one third of the estate? Do you think the law has established a mechanism to extract this amount?

The laws are being compared, as well as the rest of the Arab laws that stipulate the obligatory will, did not explain in their texts how to extract the obligatory will by arithmetic methods, only mentioning some restrictions and conditions that must be taken into account when extracting this will, as the texts contained a degree of assets that were built upon in the process or The mechanism of extracting the will for the grandson.

Through the texts that were mentioned, whether related to Article (76) of the Egyptian Wills Law or Article (74) of the Iraqi Personal Status Law, several controls should be restricted when extracting the obligatory will and giving it to its beneficiaries, including the following (18):

1- The obligatory will should not exceed one third of the estate, because the law has set a maximum limit for it. A third of the estate should not be exceeded.

2- That it be extracted from the estate on the grounds that it is a will and not an inheritance, and the purpose behind this is that the wills are executed from the entire estate and in order for the deficiency to befall all the heirs, not just the sons.

Accordingly, the commentators of the law differed on the mechanism of extracting this will, and based on the foregoing, there are three ways to extract the amount of the obligatory will, which are as follows (19):

*** First method:**

The amount of the obligatory will according to this method is extracted by dividing the estate, considering the deceased child alive and extracting his share of the estate, then transferring it and distributing it to his sons.

To illustrate this method, let us take this example:

Example: A man died leaving behind a wife, a son, three daughters, and a daughter of a son who died during the life of his father and sibling sister:-

sibling sister	son/three daughters/ daughter of a son	**Degree**
M	P $\frac{7}{8}$ S	$\frac{1}{8}$

Accordingly, the inheritance is divided into eight shares, so the wife takes one share and the rest is distributed to the children according to the rule (for the male, the same as the share of two females). A living son takes two shares, and a son whose life has ended has two shares, and it is given to his daughter as an obligatory will, and each daughter has one share.

Second method:

The content of this method imposes that the obligatory will is a will equal to the share of one of the heirs, so that the estate is distributed among the living heirs, then a share is added in the name of the obligatory will with the same share as the son's share if the dead branch is a son and the same as the share of a girl if the dead branch is a girl, and then the estate is

distributed among The new asset after adding the stock of the dead branch.

Example /

A woman died leaving behind a husband, two sons, two daughters and a daughter whose father died during the life of his origin and the inheritance amounted to ($270,000).

In the beginning, the inheritance is divided between the living heirs only so that the husband will have (1/4) and the rest will go to the living sons "for the male like the luck of the two females," as the original issue (4) is corrected to 24 because the three are not divided by (6), so the husband will have (6 shares) and each son (6 shares) and for each daughter (3 shares), then add the same as the shares of one of the sons, and thus the estate is divided over the new quorum, which is (30), so the husband's share becomes (54,000 dollars), and for each living son (54,000 dollars), the two daughters' share (54,000 dollars) and the son's daughter's share ($54,000).

Here there is a criticism of this method, due to the absence of one of the restrictions or conditions imposed by the law that must be taken into account when extracting the obligatory will, as the amount of the obligatory will must be the same as the share of the deceased son, if he remained alive at the death of the testator, and accordingly, if we promise Dividing the estate on the assumption that the deceased son is still alive, if we find or notice that his share is less than what is followed in this method.

Third method:-

The third method is considered one of the most important common methods in the Arab countries in extracting the obligatory will, and upon it the laws have been established, and this method can be summarized in three steps (20).

1- It imposes: that the dead child in the life of his origin is still alive and an heir, after which the estate is distributed to all the living heirs, including this son who was assumed to be alive and his share of this legacy is indicated.

2- After knowing the share of the origin of the deceased branch from the origin of the estate, as it is if it is less than one third of the estate or equal to one third. In the event of an increase over a third, it is subtracted to a third, and then it is distributed to the children of the dead offspring, dividing the inheritance "for the male like the luck of the two females."

3- After deducting the share of the deceased from the origin of the estate, the rest of it is divided among the living heirs again, regardless of the dead branch and distributed to them according to the general rules of inheritance.

To illustrate, we give the following example:-

Example: A woman died leaving behind a husband and a son, and the son of a deceased daughter during the life of her mother and the estate is estimated at $140,000.

1- At first we divide the estate assuming that the deceased girl is still alive

Son of daugter	Hasband
p $\frac{3}{4}$ s	$\frac{1}{4}$

Here, the issue is (4 shares), the husband has one share, the son two shares, and the girl who is assumed to be alive has one share, so the husband's share is ($47,500), the son's share is ($95,000), and the deceased girl's share is ($47,500).

2- And after knowing the share of the deceased girl, which is ($47,500), which is less than a third of the estate, it is subtracted from the estate and given to the son of the daughter who has the required will.

3- We subtract the amount of the obligatory will from the origin of the estate, and the rest is distributed among the living heirs, which is the husband and the son, regardless of the deceased daughter, and the remainder is 142,500, so the issue becomes as follows

The husband takes a quarter ($35,625) and the rest is for the son ($106,875).

Section Two: Crowding the obligatory will with other wills

What is meant by the crowding of wills within the scope of the law is that there are multiple wills so that their total value exceeds one third of the estate, the heirs do not allow this increase, or there were originally no heirs who authorized the increase, but the inheritance is not sufficient for all of these wills. The contention is in two cases:

First: In the event that there is more than one will and one third is not sufficient, and the heirs are not allowed to add more, then the problem of over-crowding appears.

Second: There is also more than one will, and that one third is not enough, and the heirs permitted that, but there is another problem that led to crowding out, which is the inadequacy of the estate for these wills (21).

Overcrowding, then, does not occur unless the bequests are many, and the money does not meet their implementation, whether this money that is allocated for its implementation is a third or more of it, and the heirs are permitted, but if it is expanded by a third, it is implemented without the authorization of the heirs, and without crowding. The heirs allowed the increase and the inheritance is sufficient for that (22).

Based on the foregoing, and if there is more than one will in the estate of a person and among these wills, a will is obligatory by law.

What is the solution if the total value of these wills exceeds one-third of the estate, and the heirs did not allow the increase, or the heirs allowed the increase, but the estate is not sufficient for it, so does crowding occur between the obligatory will and the other wills? To whom is priority given to fulfillment?

If there are multiple wills, and one of them is obligatory by law, and one third of the estate accommodates all of these wills, all of them are implemented, and then there is no competition between these wills.

In the case of multiple wills, including a will that is obligatory by law, and that one third of the estate narrowed by these wills, and the heirs are not permitted what exceeds one third, here the law has settled this matter, as well as the absence of any crowding in the event that the obligatory will is found because it is presented in the fulfillment of the One third of the estate over the rest of the other wills.

Here, the Iraqi Personal Status Law stipulates in Article (74) paragraph (2): (The obligatory will under paragraph (1) of this article shall be submitted to other wills in the fulfillment of one third of the estate)

We may note that the Iraqi law has made the obligatory will by law prior to other wills, And here we mean obligatory, that is, religious obligation, not judicial, and the submission is not limited to optional wills only, as stated in the amendment of the Iraqi Personal Status Law in the Kurdistan Region of Iraq, as the fifth paragraph of Article (24) of amendment: (If the obligatory will crowded with the optional wills, the first shall take precedence over the second):

Based on the foregoing, if there is an obligatory will and an optional will in the estate of the deceased, then the solution is to follow the following steps (23):

1- The amount of the optional will is extracted from the estate temporarily, unless it does not exceed one third.

2- After extracting the amount of the optional will, the remainder of the estate is divided among the heirs, including the origin of the deceased branch, in order to know its share of the estate, which is given to its branch in the name of the obligatory will, provided that it does not exceed one third of the estate, including the optional will, and in the event of an increase, his share is one third.

3- The amount of the obligatory will is subtracted from a third of the entire estate, and the remaining third is given to the owner of the optional will, If there is a remainder, and if it does not remain, the holder of the optional will does not take anything except with the permission of the heirs.

4- The remainder of the estate shall be divided, after the execution of the two wills, according to the above, to the real heirs. To clarify the above, we mention the following example:

Example/

A person died, leaving a father, a mother, two daughters, a son and a daughter of a deceased son during his father's life, and a person bequeathed to him (30,000), and the total estate is estimated at (1300,000). Here the estate has two types of wills, namely, the obligatory will and the optional will. When distributing this estate, the above-mentioned steps must be followed, which are as follows

1- The amount of the optional will is extracted from the total of the estate temporarily, as:

($300,000 total of the estate)-($30,000) (the amount of the optional will which is less than

one third of the estate = ($270,000 remaining from the estate)

2- The remainder of the estate shall be divided among all the heirs, including the origin deceased:

Two daughter:son , deceased son	mother	father
$p\frac{4}{6}s$	$\frac{1}{6}$	$\frac{1}{6}$

And due to the rest is not divided. It is (4/6) over (6). It is the children's share, so the issue is corrected and becomes (6 x 3 = 18), so the father takes one-sixth (3) as well as the mother (3), and the rest is 12 divided among the sons.... for each daughter (2) and (4) the share of the living son and (4) a share dead son

After correcting the issue, divide the remainder of the estate after extracting the voluntary will by the number of shares to indicate the value of one share, and then multiply by the number of each heir's share:

$270,000 ÷ 18 = $15,000 per share

$15,000 x 4 = $60,000 The son's assumed life share, which is less than a third

$60,000 The share of the deceased son + $30,000 The value of the optional will = $90,000 The sum of the two obligatory and optional wills which is less than one third of the estate.

3- Since the sum of the two wills is less than one third of the estate, they are executed as they are, and the remainder of the estate is distributed among the real heirs as follows:

$300,000 total estate – $90,000 sum of two wills = $210,000 remainder of the estate.

daughter	**daughter**	**son**	**mother**	**father**
$\frac{1}{6}$	$\frac{1}{6}$	$\frac{2}{6}$	$\frac{1}{6}$	$\frac{1}{6}$
35,000 $	35,000 $	70,000 $	35,000 $	35,000 $

Conclusion

After we dealt with the subject with study and research, we will try to finish our study on the subject of the obligatory will in Islamic jurisprudence and Iraqi law, as we initially clarified the concept of the will in general, and clarified the concept of the will and the extent of its legality in jurisprudence and law, as there was one direction that allowed it, which is the doctrine of virtual, But the majority of scholars as It became clear to us: that the original in the will is delegate and desirability, and we touched on its legal and law organization, so it was necessary to show the most prominent findings and suggestions we reached.

First, the most important results we have obtained:

1- After clarifying the opinion of the doctrine of virtual, and the opinion of the majority of jurists on the legality of the obligatory will, it became clear to us that the evidence of doctrine of virtual is insufficiency about the necessity of this will in the right of the one who inherits, as it became clear from the opinion of the majority of jurists, that the mechanism of the will on which the virtual doctrine relied on the legality of the obligatory will, has abrogation of its obligation and its desirability remains, and that the rule of the original will is the delegate and desirability, other mandated rulings may overwhelm, so it changes the secondary ruling.

2 - Some man-made laws made the obligatory will take precedence over the rest of the other wills, even if between them there is an obligatory religious will, and this is in violation of Islamic law, by giving precedence to legal duty over religious duty

3- The grandson is not entitled to the obligatory will if he is an heir, even with a small penalty, or if the grandfather or grandmother makes a bequest or give the grandson to the extent of this will,

This is what is stipulated in Egyptian law and some other Arab laws, and this is what we did not find in Iraqi law

4- The Iraqi law did not clearly detail the beneficiaries of the obligatory will, so it did not show us that this will is limited to the first class of grandsons or does it include the lower classes, unlike what the Egyptian law indicated.

5- The Iraqi law did not explicitly indicate that the distribution of the amount of the obligatory will is according to the rule (for a male, the same as the luck of two females), unlike its Egyptian counterpart, which was clear in that

6- The Egyptian or Iraqi law did not indicate the method of extracting the obligatory will from the estate, only mentioning some of the controls that should be observed when extracting this will, and the third method is the best method that most Arab laws followed.

The Iraqi judiciary has followed the first method in extracting the amount of the obligatory will, although legal texts and commentators of that law refer to the third method.

7- The adoption of the will has legal and social effects: it is the creation of a new system that bequeaths the near and far from the dead at the same time, and this is contrary to the systems and rules of inheritance.

As for the social effects: the work of this will may result in creating a kind of grudge and hatred among the heirs, and the situation may develop into fighting over the inheritance.

Second: Recomendations:

Based on the foregoing results, it is possible to mention a number of recomendations that we present to the legislators in the hope that they will prove useful:

1- The necessity of legislating a special law for the will that deals with the provisions related to all the wills, like the rest of the other laws, due to its special status and its departure from the controls of both inheritance and the obligatory will

2- The necessity of emphasizing that this will be made in the life of the testator, and not to represent him in the event of non-willing, that the grandfather or grandmother make the bequest to those who are entitled to it during his life and register it with the competent authorities so that it becomes legally and legally binding after his death, and with this simple procedure he absolves him as well as avoids any problems may get between heirs.

3- Reconsidering the provisions of the obligatory will, as it is in accordance with the rules and regulations of Islamic Sharia, that this will be confined to specific and limited cases, taking into account the wealth of the bequeather, the abundance of the inheritance, and the poverty or extent of the need of the recipient.

4- Launching an awareness campaign in the community in order to draw the attention of the grandparents to the necessity of taking into consideration those grandsons who lost their assets in their lives or taking into account the parents who are not the heirs from their sons, as well as recommending the relatives about the ties of kinship and solidarity among them in ways that secure a decent life for their poor and needy.

Margins:

1- rticle 74 of the Iraqi Personal Status Law.

2- Al-Kubaisi, Ahmed, Personal Status in Fiqh, Jurists and Law, Volume 2

3- Surat Al-Baqarah, Verse: (132).

4- Mathkoor Mohammad Salam, Wills in Islamic Jurisprudence, previous source 260, Al-Dunya fi - Abdul Majeed Abdul Hamid, Provisions of Inheritance, Legacy and Will in Islamic Sharia, I, Libya, Jamahiriya House for Publishing, Distribution and Advertising, 1993, p. 283

5- Al-Zamli Mustafa Ibrahim, Draft Personal Status Law, Provisions of Inheritance and Will, Baghdad, Iraq, printed at the expense of the Monitoring Ministry of Higher Education and Scientific Research, 1988, p. 8.

6- Ibn Manzur, Muhammad bin Makram, Lisan al-Arab, volume fifteen, letter Waw, 3rd edition, previous source, 154.

7- Al-Hanbali, Moaqif Al-Din Hussein Abdullah, Ahmed Hassan Hamad bin Tarama Al-Mughni, Volume 6, previous source, pg. 414. Abu Zahra, Implementing the provisions of inheritance, Cairo, Egypt, Arab Thought House, 1963, p. 230.Qassem, Youssef, Rights related to the inheritance in Islamic jurisprudence, previous source, pg. 437.

8- Al-Sheikhly, Shamil Rashid, The Obligatory Will, research published in Al-Fath magazine, Baghdad, Iraq, a quarterly legal journal issued

by the Bar Association, Issues One, Two, Three, and Four, 1981, p. 252.
9- Al-Mardi, Ahmed Muhammad, the provisions of Legacies and inheritances, Amman, Jordan, Dar Al-Masira, Amman, 2009, pg. 28.
10- Surah An-Nisa, Verse 58.
11- Muhammad Ahmed Library, Provisions of Wills in Islamic Jurisprudence and Egyptian Law, 1st Edition, Cairo, Egypt, Dar Al-Nahda Al-Arabiya, 1966, p. 291
12- Shalaby, Muhammad Mustafa, Provisions of Wills and Endowments, 4th Edition, Beirut, Lebanon, University Youth Foundation, 1982, p. 239.
13- Al-Zalami, Mustafa Ibrahim, Provisions of Inheritance, Will and the Right of Islamic Transmission from the Law, previous source, p. 237.
14- Mankour, Muhammad Salam, Wills in Islamic Jurisprudence, previous source, p- Qasim Yusuf, Rights Related to Inheritance in Islamic Jurisprudence, previous source, p. 442.
15- Al-Shehli, Rasheed's Apiaries, The Obligatory Will, previous source, p. 261.
16- Muhammad Jawad Mughniyeh, Jurisprudence on the Five Schools, Volume 2, previous source, p. 291.
17- Decision No. (11/951) life, from Zagazig Court, Egypt, M.S. 22/334, Judicial Principles in Personal Status, Ahmed El-Gendy, 2000, previous source, p. 292.
18- Abu Zahra, Muhammad, Draft Wills Law, previous source, p. 192.- Badran, Badran Abu Al-Enein, Provisions of Legacies and Inheritances in Islamic Sharia and Law, previous source, p. 343.- Al-Farahili, Wahba, Wills and Positions in Islamic Jurisprudence, Damascus, Syria, Dar Al-Fikr, 2007, p. 115. Ibrahim, Hilal Yusuf, provisions of inheritance for Muslims and non-Muslims, Egyptians and foreigners, previous source, p. 267.- Al-Sharnbahi, Ramadan Ali Al-Sayed and Saber Ali Hadi Salem Al-Shafi'i, personal status issues related to inheritance, wills and endowment in jurisprudence, law and judiciary, previous source, pg. 446.- Al-Zalami, Mustafa Ibrahim, Explanation of Personal Status Law, Provisions of Inheritance and Rejection, a previous source, p. 75.
19- Abu Zahra, Muhammad, Explanation of the Law of the Will, previous source, pp. 200-202.
20- Abu Zahra, Muhammad, Explanation of the Law of the Will, previous source, p. 202. - Shalaby, Muhammad Mustafa, Provisions of Wills and Endowments, Source of the Previous, p. 296. - Al-Sariti Abdul-Wadud Muhammad, Wills, Endowments and Inheritances in Islamic Law, previous source, p. 157. - Hussein, Ahmed Farraj, Provisions of Wills and Endowments in Islamic Sharia, previous source, p. 202.
21- Abu Zahra, Muhammad, Explanation of the Law of the Only One, previous source, 247. - Hussein, Muhammad Ahmad Shehata, Al-Wajeez fi Inheritances and Wills, previous source, p. 215.
22- Mansour Muhammad Salam, Wills in Islamic Jurisprudence, previous source, p. 269. - Al-Kashki, Abdel Rahim, The Legacy and Related Rights, Cairo, Egypt, Dar Al-Ghadeer 1967, p. 182.
23- Badran, Badran Abu Al-Enein, Provisions of Legacy and Inheritance in Islamic Sharia and Law, previous source, p. 343. - Hussein Ahmed Farraj, Provisions of Wills and Endowments in Islamic Sharia, previous source, p. 206. - Al-Sharnabaji, Ramadan Ali Al-Sayed and Jaber Abdel-Hadi Salem Al-Banna in personal status issues related to inheritance, wills and endowment in jurisprudence, law and judiciary, previous source, pg. 456.