



Comprehensiveness of Islamic Inheritance Law: Orphan Grandchild and His Proposed Share in Inheritance – Shari‘ah Review of Section 4 of the Muslim Family Laws Ordinance 1961 Enacted in Punjab.

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Abstract: The Islamic inheritance system provides the most appropriate method for dividing the estate of a deceased. Every aspect of welfare and well-being has already been considered, and the best solution for heirs has been proposed under that law. In matters of succession, Islam also offers a solution that is acceptable and reasonable for every orphaned grandchild. In the context of the comprehensiveness of the second Ruku of Surah An-Nisā and the final verse of Al-Mā'idah, a resolution is proposed to eliminate the deprivation of orphan-grandchildren. Therefore, this law serves as a guiding light for families in Punjab in particular, and humanity in general. However, falsehood has always conspired against the truth. In a futile attempt to suppress it, Punjab has adopted a law concerning succession that appears to contradict the Qur'an and Sunnah. Furthermore, it complicates adherence to the teachings of the Holy Qur'an. There may be a more appropriate solution to address the deprivation of orphans than assigning inheritance from the grandfather, as this might diminish the rights of other heirs and result in injustice. The following is a critical review of the relevant provision, i.e., section 4 of the Muslim Family Laws Ordinance 1961 concerning succession, along with suggestions on how the law could be aligned with Shariah and the role the state should play in this context.

Keywords: Succession, Inheritance, Grandsons/grandchildren, Section 4, Muslim Family Laws Ordinance 1961.

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Introduction:

Several Muslim countries have attempted to reform this law to allow grandchildren to inherit a specified portion of their grandparents' estate upon their death. These countries include Egypt (in 1943 and 1946), Sudan (in 1945), Syria (in 1953), Tunisia (in 1956 and 1959), Morocco (in 1958), Iraq (in 1959 and 1963), and Pakistan (in 1961).³

Two very different methods for resolving this problem have arisen. The first method, in its most complete form, appears in the Egyptian law of 1946 and is known as the "compulsory wills" system, while the second method is enacted in the Pakistani law of 1961 and is best described as the "right of inheritance" system.⁴

I must state that the Islamic inheritance system is the most effective way to distribute a deceased person's wealth. It considers every aspect of welfare and well-being, providing the most appropriate solution for the heirs. In matters of succession, there is no need to alter the teachings of the Qur'ān and Sunnah, and no one should be permitted to do so. Islam offers a fair and reasonable solution for every orphaned grandchild. If the Qur'ān does not specify the share of an orphaned grandchild among the heirs, then provisions related to wills and welfare are available to address this perceived deprivation. Below, the concept of succession will be explained, including the categories of heirs, the reasons for property distribution after death, the views of jurists from the four schools of thought (Hanafi, Maliki, Shafi'i, Hanbali), as well as perspectives of Western scholars on Islamic inheritance law. The text also discusses alternative methods to mitigate the deprivation of an orphaned grandson, potential injustices that might occur if the grandson is made a successor or a regular sharer in the inheritance, and finally, presents a summary, suggestions, and recommendations.

Succession:⁵

In the context of the Muslim Family Laws Ordinance (MFLO) 1961 in Pakistan, Section 4 refers to the succession of property and inheritance rights among Muslims in Pakistan.

In this case, the succession mentioned in MFLO 1961 would fall under the category of "Testate Succession" or "Intestate Succession", which deals with the distribution of a deceased person's estate according to Islamic inheritance laws (Farā'id).

Testate succession refers to the distribution of assets according to a valid will, while intestate succession refers to the distribution of assets when there is no valid will, following the rules of Islamic inheritance.

Economic needs are among the important and basic needs of human life, one of the sources of economic resources is the wealth that a person gets from his parents and relatives, and it is called inheritance. Islam has determined the share of inheritance for each person, the people whose share has been determined by the Holy Qur'an are called Aṣḥāb al-Furūd or Aṣḥāb al-Farā'id, and the remaining wealth is divided among the relatives. In addition to the fixed parts, the will for other relatives has also been emphasized.

Classes of heirs:

³FARUKI, KEMAL. "ORPHANED GRANDCHILDREN IN ISLAMIC SUCCESSION LAW: A Comparison of Modern Muslim Solutions." *Islamic Studies* 4, no. 3 (1965): 253–74.

⁴Ibid.

⁵Succession refers to the process of transferring control, ownership, or leadership from one person or group to another. It can apply to various contexts, such as Business, leadership, politics, or intergenerational succession but here we are only discussing succession in property and it is called intergenerational Succession which involves a transition from one state or leadership to another, aiming to ensure continuity, stability, and growth.

‘The law of inheritance examines Islamic inheritance law, whose core principles are outlined by the Qur’ān and the Sunnah, providing a list of legal heirs with each heir’s entitlements clearly specified. The three key elements for applying Islamic inheritance law are: the deceased (muwarrith), the estate (tarikah), and the heir(s) (wāriṭhūn). Ḥanafī jurisprudence classifies heirs into three main groups: Qur’ānic heirs⁶, agnatic heirs, and uterine heirs.⁷

First Class heirs (Aṣḥāb al-Farā’id) are also known as Qur’ānic heirs. These include: Four males — husband⁸, maternal brother, father⁹, and paternal grandfather; and nine females — wife¹⁰, daughter, son's daughter, mother¹¹, paternal grandmother, maternal grandmother, full sister, maternal sister, and paternal sister.

The agnatic heir (‘Aṣabah) is the closest male relative connected to the deceased through another male, such as a consanguine or full brother. This also includes a son, father, paternal grandfather, paternal uncle, and nephew. The agnatic heirs inherit any remaining shares after the Qur’ānic heirs have received their portions.

The uterine heirs (Dhawī al-Arḥām) are the third category of heirs after the Qur’ānic and agnatic heirs. They consist of distant relatives who inherit only if there are no Qur’ānic or agnatic heirs. Their members include the daughter's children, the sister's children, the uterine brother's children, and the mother's siblings, among others.

Excellent arrangement of the Inheritance law by Sharī‘ah:

Gradation has been considered in the commands mentioned in the Holy Qur’ān. The prohibition of alcohol is an example of this.¹² Similarly, the rules of inheritance were revealed gradually and in stages. Overall, these inheritance rules are explained in the initial part of Surah Al-Nisa, where clarity, conciseness, and good narration are clearly evident. The beauty of the words has been carefully arranged and is worth appreciating.

Why wealth is distributed through inheritance:

Are there questions about transferring wealth through inheritance? The simple reason for this is that the property is now left without an owner. While the owner was alive, he had the legal right (within the bounds of the law) to dispose of his property as he wished, whether by selling it or giving it as charity. Now that he is no longer alive, what should be done with this wealth? The Sharī‘ah grants each person the right to bequeath their wealth to someone after their death (called a will) if they choose, but there are two basic conditions:

- i. One can give up to a maximum of one-third.¹³
- ii. Those for whom Allah Himself has assigned a share of the wealth left behind by a person after their death.¹⁴ If it is kept and not distributed to someone, it cannot be claimed by them after his death because doing so would violate the

⁶(<https://academic.oup.com/book>) accessed 31/12/2023

⁷Ibid.

⁸ AL Qur’ān: 4/12

⁹ AL Qur’ān: 4/11

¹⁰ AL Qur’ān: 4/12

¹¹ AL Qur’ān: 4/11

¹² Wine was not initially forbidden outright, but rather it was said that it contained a great sin and some benefits for people (2/219). This was the first stage. After that, the command was revealed in Surah An-Nisa (4/43) that drinking Wine before prayer was prohibited. And in the third stage, Surah Al-Ma'idah (5/90) explained its prohibition and ordered to avoid it completely.

¹³ Muslim bin Hajjaj al Qushairi, (206 - 261 AH) *Sahih Muslim*: Issa Al-Babi, Cairo, 1995, Hadith, 1628.

¹⁴ Ali bin Abi Bakr bin Abd al-Jalil, Abu al-Hasan Burhan al-Din (d. 593 AH) al-Furghani, *Al-Hidaya fi Sharh Badiya al-Mubtadi*, Publisher: Dar Ahyaya al-Tarath al-Arabi - Beirut - Lebanon 4/514

limits set by Allah, which is not permitted in the Sharī'ah. Yes, if he wishes, he can give to anyone he desires in life, as much as he wants. But remember that giving in life is not regarded as inheritance or a will; rather, it is considered a gift. The matter of inheritance and a will only arises when this person dies and leaves behind some wealth.

Now that he has left the wealth and it is without an owner, the law states that this wealth will go to his relatives. As if the reason for inheritance is solely kinship. Then, since many relatives exist, the Sharī'ah allocated specific shares to some relatives through texts (known as As'hab al-Furud) and established the principle of "closer and closer" for the remaining relatives, meaning that the nearest relative would receive a share.

Inheritance rulings govern the distribution of wealth and prevent it from gathering in one place. It should be noted that even during a person's lifetime, Allah has issued such rulings in the Shariah, which restrict the accumulation of wealth. For example, many means of acquiring wealth, especially those involving large sums, were prohibited, such as the ban on interest. Additionally, it became obligatory for him to care for many of his relatives; zakat was made compulsory; rights of others besides relatives were recognised; charity was encouraged; and the state's rights over him were established. Nonetheless, if he accumulates some wealth during his lifetime, it becomes obligatory to distribute it as soon as his eyes are closed.

This is the base of the law of inheritance.

As a result of this law, the distribution of wealth and resources in society is profoundly affected, and it also benefits the deprived sections of society, especially orphans. However, all these are the advantages and wisdom of this law, not the legal basis for the right to inheritance! Note, then, that the legal reason for the right to inheritance is kinship proximity, not dependence.

The question remains as to how to protect the needy and orphans, for which the Sharī'ah has provided detailed rulings. Why aren't these directives enforced? On the other hand, the Sharī'ah has established an entire system of relatives for maintenance and expenses. If the child does not have a father, then who is responsible for his guardianship? If he's not, who will take on that responsibility? If no one is, then to whom will the responsibility be transferred? Even if there is no one, the government should be responsible for his support. In this case, the state will bear the responsibility for his sponsorship.

Opinions of European Scholars about Islamic Law of Inheritance:

The study of Islamic inheritance law has not been confined to Muslim jurists alone; rather, it has attracted considerable attention from European scholars, particularly in the field of comparative legal studies. This scholarly engagement has encouraged Muslim legal thinkers to revisit and analytically compare Islamic law with European legal systems. In this context, the following quotation from Shaykh Nūr al-Dīn 'Itr reflects a Muslim scholarly response to European legal perspectives, especially Roman law.

We included a balanced discussion comparing Qur'ānic law and Roman law regarding Milkiyyat-e-Khilafah (ownership through inheritance). We noted that Roman law may have lasted about thirteen centuries, yet its approach to inheritance cannot be compared to the Sharia of the Qur'ān, unless one compares a flimsy stick to a sharp sword. It is impossible that Muhammad 'Arabi ﷺ invented this on his own; rather, it is from Allah Almighty. European jurists generally agree that the law outlined in the Holy Qur'an is such a legacy that human intelligence has not yet been able to develop a superior law.¹⁵

¹⁵ Dr, Nuruddin Itr, *Uloom Al-Qur'an Al-Kareem*, Sixth Edition, Publisher: Al-Sabah, Damascus, 1996, Chapter 20, Ijaz ul-Qur'an il-Kareem p. 220.

Sir James Norman Dalrymple Anderson¹⁶ writes:

There is no part of Islamic Law more characteristic of both the spirit and letter of the Shari‘ah than the Islamic Law of Inheritance (Mirath). To begin with, this branch of law has a more solid foundation than any other in the explicit commands of the Qur’ān, as the commonly used term for the science of all related issues, “‘Ilm al-faraid” (meaning the knowledge of the shares made obligatory by the Almighty), clearly indicates. Furthermore, no part of the sacred law is regarded with such pride by Muslims, nor has been developed by their jurists with such meticulous detail, accuracy, and religious devotion. There is even a well-known saying attributed to the Prophet that knowledge of the shares assigned to the various heirs under this system is equivalent to half the total of human knowledge!¹⁷

ir William Jones, the famous translator of “Al Sirajiyya”¹⁸, wrote:

“I am strongly disposed to believe that no possible question could occur on the Mohammedan Law of Succession which might not be rapidly and correctly answered.”¹⁹

Lucy Caroll said about revolutionary change in succession law brought in by Islam:

“ISLAM introduced dramatic changes in the pre-Islamic customs regarding succession; these changes were largely to the benefit of female relatives, who generally had no place in the pre-Islamic scheme of inheritance even in the heartland of Islam.”²⁰

The Islamic law of succession, worked out in precision by the classical jurists from few Qur’ānic verses, is regarded as the central core and prime achievement of the Shari‘ah. However, in the changed circumstances of the fifteenth century Hijra, attention has focused on some perceived inequities of the traditional scheme, raising challenging questions of whether and how the traditional law can be reformed.²¹

Allama Iqbal has quoted Von Kremer in his sermons:

“Next to the Romans, there is no other nation, besides the Arabs, which could call its own a system of law so carefully worked out ... and law of inheritance being a supremely original branch of it.”²²

Argument from a narration of Bukhārī regarding the inheritance of grandfather to an orphan and its answer:

Those who believe in the permissibility of giving an inheritance to a grandson cite as evidence the narration of Abdullah Ibn e Mas'ud and Abu Musa Al-Ash‘arī, which is mentioned in Bukhārī as follows;

¹⁶ Sir James Norman Dalrymple Anderson OBE QC FBA (29 September 1908 – 2 December 1994) was a British lawyer, missionary, and Arabist. ([Norman Dalrymple Anderson - Wikipedia](#)) accessed on 15/3/2024

¹⁷ Anderson, J. N. D. “Recent Reforms in the Islamic Law of Inheritance.” *The International and Comparative Law Quarterly*, vol. 14, no. 2, 1965, pp. 349–65. *JSTOR*, <http://www.jstor.org/stable/756960>. Accessed 31 Dec. 2023. P 349, accessed 23 October 2023.

¹⁸ A famous book of ‘al-Farā'id’, which is taught mainly in Hanafi religious institutions in the East and West to learn the Islamic science of inheritance.

¹⁹ Faiz Badruddin Tyabji, *Mohammadan Law the personal law of Muslims* published by Tripathi And Company and the Digital Library Of India - P.825

²⁰ Carroll, L. (1983). The Hanafi Law of Intestate Succession: A Simplified Approach. *Modern Asian Studies*, 17(4), 629–670. <http://www.jstor.org/stable/312238>

²¹ Carroll, L. (1998). Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan. *Islamic Law and Society*, 5(3), 409–447. <http://www.jstor.org/stable/3399266>

²² Muhammad Iqbal (1877-1938), *The Reconstruction of Religious Thought in Islam*, Kitab Bhavan, 2000. ISBN 81-7151-081-7. PP. 168-170

Abu Musa Ash'ari was asked about a daughter, granddaughter and sister, he said: "Half for the daughter, half for the sister, and go to Ibn e Mas'ud, he will also follow my answer." Ibn e Mas'ud was asked and informed about the saying of Abu Musa, so he said: In that case, I will go astray and will not be among the guided people. I will decide about it what the Prophet ﷺ said: The daughter will get half, the granddaughter will get one-sixth, fulfilling two-thirds, and what is left will be given to the sister, so we came to Abu Musa and he was informed about the decree of Ibn e Mas'ud, Abu Musa said: Do not ask me as long as great scholar like Ibn e Mas'ud is among you.²³"

The supporters of the validity argument from this tradition state that it is clear from this tradition that Ibn e Mas'ud issued a fatwa granting the granddaughter a one-sixth share in the presence of the daughter so that the remaining two-thirds would be complete. Therefore, if the presence of the daughter had deprived the granddaughter of her inheritance, Ibn e Mas'ud would not have issued such a ruling.

To counter this argument, the majority of scholars say that it is worth noting in this incident that Abu Musa Ash'ari and Ibn e Mas'ud did not declare the granddaughter as the successor of her late father, and the share that Ibn e Mas'ud gave is something else.

The scholars of the Ummah disagreed on many other sub-issues. Certain expressions will be mentioned here to clarify the consensus among the four Imams on this matter. Undoubtedly, Ibn e Mas'ud's view was known to all these Imams, but none of them believed that in the presence of the son, the grandson would be entitled to a share of the inheritance. It appears that the four Imams of jurisprudence agree on this single point.

Ibn e Hazm al-Andalusi, who does not believe in taqleed and asserts absolute ijtihad, also holds an opinion aligned with the majority view on this issue.

"مَسْأَلَةٌ: وَلَا يَرِثُ بَنُو الْإِبْنِ مَعَ الْإِبْنِ الذَّكَرِ شَيْئًا"²⁴

And in the presence of the son, the grandson will not inherit anything.

Opinions of Islamic Jurists regarding grandson's inheritance:

Imam Bukhārī, has established a chapter about the inheritance of this orphan grandson:

"باب: ميراث ابن الابن إذا لم يكن ابنٌ"

"Inheritance of a grandchild if there is no son".

And Imam Bukhārī has quoted the fatwa of Zayd bin Thabit:

That (the deceased's) grandsons are the successors of his sons, as long as there is no male child above them. Their sons are like their sons, and their daughters are like their daughters. They will inherit as their brothers do, and they will also become Hajib, just as their brothers do. The grandson will not inherit in the presence of the son.²⁵

Shams Al-Aima Muhammad bin Ahmad al-Sarakhsi al-Hanafī writes:

"وَأَوْلَادُ الْإِبْنِ يَفُومُونَ مَقَامَ أَوْلَادِ الصُّلْبِ عِنْدَ عَدَمِ أَوْلَادِ الصُّلْبِ"²⁶

And the children of the son are the successors of the filial children only if there are no filial children.

A prominent researcher from the recent past Dr. Wahba bin Mustafa al-Zuhaili writes:

²³ Muhammad bin Ismail al- Bukhārī, *Sahih al-Bukhārī*, (Dar Ibn Kathir, Dar al-Yamama) - Damascus, Edition: 5th, 1414 AH - 1993 AD Hadith 6355, V.6, P. 2477

²⁴ Abu Muhammad Ali bin Ahmad bin Saeed bin Hazm Al-Andalusi [Al-Zahiri], *Al-Mahalli Bal-Athar*, Dar-ul-Fikr - Beirut, 8/289

²⁵ Muhammad bin Ismail al-Bukhārī, *Sahih al-Bukhārī*, Vol. 6, p. 2577

²⁶ Muhammad bin Ahmad bin Abi Sahl Shams al-Aimma al-Sarkhsi (d. 483 AH), *Al-Mabusut*, published by: Matbaa Al-Sa'ada – Egypt, number of parts: 31 (Dar al-Marfa'a), vol. 29, p. 141

"وابن الابن يحجب بالابن"²⁷

"The son's son (grandson) will be disinherited in the presence of the son."
Maliki Jurist Allama Qarafi writes in al-Zakhirah:

"ولد الابن مع عدم الأبناء للصلب كميراث ولد الصلب"²⁸

In case of absence of filial sons, the order of grandson's inheritance is the same as the filial son's inheritance.

In Al-Mu'ta Imam Malik mentioned:

And the rank of the male offspring (grandsons) of the children, as long as there is no boy above them, is the same as that of the children; their males are like their males, and their females are like their females. They will also be heirs just as others are. There will be heirs, and they will be heirs in the same way. And grandchildren, if there is a male among the descendants of the deceased, then there is no inheritance for any of the grandchildren.

²⁹

Considering all this discussion, it is accurate to state that this issue is a consensus among Ahl-e-Sunnat, with no dissenting discussion or opinion from any side.

In case of disinheritance, possible circumstances of grandson:

A grandson who has not been declared entitled to his grandfather's inheritance may have different accounts:

The grandson whose father has died is poor, and his deceased father did not leave enough wealth to support him. In such cases, the uncle and grandfather will be responsible for his maintenance. If the grandson is prosperous, with his father leaving substantial wealth and property, but the grandfather is bankrupt, will the uncles be entitled to a share of the brother's inheritance in the presence of the son? Would it not be said that only the son is eligible to inherit the father's property, and in the son's presence, the brothers will not receive a share? Sometimes, it may also happen that the grandfather died leaving no property but significant debts, which the uncle will be obliged to pay. It is also possible that the uncle himself is less wealthy and poorer than the grandson. Therefore, it is not always necessary for an orphan to be bankrupt; however, in some cases, he will necessarily be bankrupt, indigent, or insolvent. This situation of neglect can occur not only with the grandson but also with a sister, brother, or uncle. Consequently, there is no valid reason to consider only the grandson as the sole recipient of these concerns oppression.

Now let's also examine the law in Pakistan to determine whether the lawmaker's practiced justice or cruelty by establishing this so-called right for the orphan grandson.

Poverty or need does not prove the right to inheritance.

An important principle related to inheritance is that, when understood, it prevents confusion on this matter. This principle states that one's neediness or poverty is not the reason for the right to inherit. If being in need or poor were the basis for this right, then after a person's death, it would become necessary to identify who has the most urgent need to share in their inheritance. Consequently, legal rules would be required to determine this requirement.

²⁷ Wahba bin Mustafa Al-Zuhaili, *Al fiqh ul Islami wa-adillatuh*, Publisher: Dar Al-Fikr - Syria - Damascus Edition: Fourth, Number of parts: 10, vol. 10, p. 7812.

²⁸ Abu Al-Abbas Shihab Al-Din Ahmad bin Idris bin Abdul Rahman Al-Maliki, Al-Qarafi (d. 684 AH) *Al-Thakhira by Al-Qarafi*, Publisher: Dar Al-Gharb Al-Islami – Beirut, 1st Edition: 1994 AD Number of parts: 14, vol. 13, p. 46

²⁹ Malik bin Anas, *Al-Muwatta*, Publisher: Zayed bin Sultan Al Nahyan Foundation - Abu Dhabi - UAE, 1st Edition: 1425 AH - 2004 AD, Part 3, p. 719

Explanation of the so-called fairness in giving an inheritance to a grandson through two examples

1. Waqas had two sons: Ahmad and Ibrahim. Ahmad was about thirty years old and earning a living, while Ibrahim was severely disabled and unable to earn anything for himself, about twenty-five years old. Ahmad earned millions through his business, and his marriage was also arranged quickly, after which Allah Almighty blessed him with a son named Ali. Ibrahim, on the other hand, was handicapped and could not marry. Ahmad was still young when he died suddenly along with his wife in a car accident, but his son Ali miraculously survived. His father Waqas inherited one-sixth (about 17 percent), and the remaining 83 percent went to his son Ali.

Waqas was devastated by the loss of his son, and three days later, he also died suddenly from cardiac arrest. At the time of Waqas's death, according to Islamic law, he had only one heir: his disabled son Ibrahim. However, under Pakistani law, he has two heirs — his orphaned grandson Ali and his disabled son Ibrahim — and Waqas's estate will be divided equally between them. This means that the share Ahmad would have received if he were alive would go to his son Ali, even though Ahmad had died before his father. Additionally, Ali will also receive half of the seventeen percent that Waqas inherited from Ahmad. Conversely, according to Islamic law, Waqas's disabled and helpless son Ibrahim was entitled to receive all of Waqas's inheritance, including the seventeen percent transferred from Ahmad, but half of it was taken from him! Is this what they call justice? No! It is darkness; it is cruelty.

2. Consider another example: Zahid had two sons, Bakr and Amr. Bakr had a son, Ali; Amr had two sons, Hasan and Waleed. Zahid's two sons died together in an accident. Zahid also could not bear this shock and he died as well. Zahid now has three grandsons: Ali, Hasan, and Waleed. According to Islamic law, Zahid's share should be divided equally among the three, each getting one-third. However, under Pakistani law, Ali is treated as the acting authority of Bakr, while Hasan and Waleed are considered deputies of Amr. Consequently, according to this law, Ali receives half of the share, while the other half is divided equally between Hasan and Waleed. In simple terms, one grandson from the deceased's side takes 50 percent of the estate, and the remaining two grandchildren share 25 percent each. Is that justice!

If one considers as the jurists of ancient times did, there could be hundreds of other examples where the current Pakistani law is causing severe cruelty.

Is changing inheritance system of Islam a solution?

Islam is a complete code of life. It has many interconnected areas, and its merits or flaws can only be assessed when it functions properly across the entire Islamic system. The law of inheritance is part of this system, just as other laws govern different aspects of life—such as the economy, society, morals, government, and education. Along with the law of inheritance, there are also laws concerning wills and expenses; all these laws must be applied and work together in collective life. It can be inferred that, if a fully integrated Islamic system and an ideal society had been established on strong foundations, it would have been difficult for orphans to face problems in such a well-trained society, because the community would have been responsible for their welfare. This might be why the history of opposition, hatred, and criticism on this issue began when all links of the Islamic system were broken, leaving only the incomplete law of inheritance to mourn in the absence of the other components, and thus, it itself appeared mournful.³⁰

³⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 105-122.

How to remove the deprivation of an orphan grandchild: In the light of the Holy Qur'an:

1. The principle of a will for an orphan:

There are basically two types of positions of the jurists regarding the will;

1. According to the majority of jurists from Hanafi, Maliki, and Shafi'i schools, and based on a tradition, the religion of Hanabila holds that bequeathing a part of the property less than one-third is not obligatory but recommended, unless there is no right to his property. If there is something to be fulfilled, such as Zakat, fasting, or Hajj, then the will or bequest becomes wajib. This is the view of Imam Sha'bi, Nakha'i, Thori, Auza'i, Ibn Munzir, and Abu Thaor. Ibn Abd al-Barr cited the scholars' consensus on its preference and described those who believe in obligation as "Shādh," (whose opposition will not be counted.)
2. The second position is the persuasive obligation, whose sayings have been described in three cases;
 - I. It is obligatory for every owner of wealth to make a will. This saying has been narrated from Zuhri that "Allah has declared the will to be a right (obligation) whether the wealth is less or not." And Ibn e Mujliz was asked: is it necessary to make a will? He answered; yes! If he has left any good, i.e. a lot of wealth.³¹
 - II. It is obligatory for parents and close relatives who do not inherit to make a will. This is the opinion of Masrooq, Dahhak, Qatadah, Taus, Hasan, Iyas, Ibn e Jarir, Abdullah bin Abi-Aufaa, and Talha bin Mutarrif. According to a hadith, Ibn e Abbas also shares this view because, in another hadith narrated from him, it states that the will is revoked. Additionally, a hadith indicates that the order regarding those who become heirs is abrogated, and the order remains only for those who do not become heirs. This tradition is narrated from Imam Ahmad, and Imam Shafi'i also holds a similar view. This is a second opinion.³²

Willing is absolutely obligatory, both religiously and judicially. This is the opinion of Ibn e Hazm, who asserts that will is obligatory but does not believe it is solely a religious obligation, unlike those who hold the first and second views. Rather, Ibn e Hazm is convinced of its obligation even from a judicial perspective.³³

In summary, according to Islamic jurisprudence, a will is generally recommended when no one has a right to the property. However, it is different from other rules of Shari'ah; for example, if someone has a right to the property, then a will becomes obligatory. This includes wills to repay trusts and debts, and for obligatory acts of good deeds, where its command remains commendable. If any permissible work is done on the property, then a will would be declared obligatory, such as a will for a wealthy stranger or a will for relatives or a will for a non-Muslim.

While the meaning and effect of the three conflicting sayings is that the will is obligatory

The purpose of mentioning different jurisprudential opinions here is not to prioritise between them, but rather to recognise that all jurisprudential opinions are valid and can be relied upon individually. We view them as a precious jurisprudential treasure that we can utilise in a timely manner, selecting opinions that are more capable of addressing the challenges faced

³¹ Muhammad Fawad Estiti, *Al Wasiyyat ul Wajiba Contemporary Research*, No.22, P 212.

³² Ibid. P 213.

³³ Ibid.: P.213

in new times, places, and situations.³⁴

2. Responsibilities of family:

A minor whose father has died is called an orphan. And sponsoring him is a good deed of great status in Islam. It is narrated from Sahl bin S'ad; The Prophet ﷺ said:

“The guardian of an orphan will be like this with me in Paradise and he pointed with his index and middle finger and kept a little distance between them.”³⁵

Among human rights, the first is the right of parents, followed by other relatives, and then strangers. Among strangers, the helpless orphan is the first in need, then other poor individuals.³⁶

A person complained to the Messenger of Allah ﷺ about the hardness (wretchedness) of his heart, and he said: Do you wish for your heart to become soft? He replied yes! He said, if an orphan comes to you, place your hand on his head and feed him from your food; your heart will soften, and he will fulfill your needs.³⁷

“The Prophet ﷺ said, "Whoever provides food and drink to an orphan, Allah will admit him to Paradise, unless he commits a sin that cannot be forgiven.”³⁸

In the Holy Qur'an, it is not difficult to estimate how much Allah has threatened the relatives in the matter of the orphans from the following verses:

*“Indeed, those who consume the wealth of orphans in oppression, they only fill their stomachs with fire; and soon they will enter a blazing fire.”*³⁹

Consuming the property of an orphan is said to be like filling one's belly with fire, and he is promised a burning fire. No such statement is made in the Qur'an or Hadith regarding his proposed inheritance by the grandfather because the orphan is not entitled to this property. The grandfather keeps it because that property belongs to closer relatives of the grandfather than the grandson.

*“If relatives, orphans and the destitute are present when the distribution of inheritance takes place, give them from it, and speak to them with courtesy. Let those who would have faced concerns if they had left behind their weak children have fear; so they should fear Allah and speak the truthful word.”*⁴⁰

In verse 8, he mentioned that before distributing the inheritance, relatives and needy people should be given some of the wealth and spoken kindly to. It may also happen that sometimes a son dies leaving orphans, and afterwards his father dies; then those orphans become grandchildren and are present due to an uncle, who is another son of the deceased. If these grandchildren are denied the grandfather's legacy, the grandfather should ensure they are entitled to the wealth through a will. If the grandfather fails to do this, then the heirs should follow the mentioned order and allocate some of their share to them. Muslims are often very lax in following this order; in fact, this order is often not observed at all among Muslims.

The next verse indicates that the guardians of orphans are being urged to fear Allah concerning them and to raise them with the understanding that if our children become orphans and someone else cares for them, then they desire a particular kind of upbringing. The same kind of upbringing they want others to provide. Say kind words to them; for example, reassure

³⁴ Ibid.: P.213

³⁵ Muhammad bin Isma'il, *Sahih Bukhārī*: Hadith 5304

³⁶ Muhammad Qasim, *Sarat al-Jinan*, Maktab tul Madina, Karachi, Al-Baqarah 2/177

³⁷ Abu Abdullah Muhammad bin Yazid Al-Qazwini, (d. 273 AH), *Sunan Ibn Majah*, Publisher: Dar Ihya Al-Kutub Al-Arabiya - Faisal Isa Al-Babi Al-Halabi, Hadith 3680, Vol. 2, P, 1213.

³⁸ Abu Isa Muhammad bin Isa, Al-Tirmidhi, (d. 279 AH), *Sunan Al-Tirmidhi*, Publisher: Mustafa Al-Babi Al-Halabi Company - Egypt, Second Edition, 1395 AH - 1975 AD, Hadith. 1917, Vol. 4, p. 320.

³⁹ Al Qur'an: 4/10

⁴⁰ Al Qur'an: 4/8-9

them by saying, 'don't worry, we are like your father, we will not let you worry.'

*“Give the orphans their wealth and do not take impure (unlawful) wealth in place of pure (lawful) wealth, and do not consume their wealth by combing it with yours. Indeed, this is a severe offence.”*⁴¹

This verse orders the giving of property to orphans. If the grandfather dies, his property does not automatically become the orphan's. Otherwise, it would have been mentioned in the Holy Qur'ān regarding his property, share, and the order to give it to him. It was forbidden to consume the orphan's property alongside one's own, and doing so was considered a grave sin. Therefore, how could depriving the orphaned grandchild of his grandfather's inheritance be deemed a sin, or the right to forfeit his property? While they are synonymous, this is not described in the Qur'an. Naturally, the orphan does not have the right to this wealth, and the lack of any mention of it further confirms this. Otherwise, Muslims would have been prevented from losing this right.

*“Assess the competence of orphans until they reach the age of marriage, so if you see intelligence in them, then deliver their wealth to them; and do not consume it wastefully and with haste fearing that they will grow up.”*⁴²

*“Be good to your parents, your relatives, orphans, the destitute”*⁴³

It is worth noting here that Allah Almighty has commanded to treat the orphan well. If depriving him of his inheritance in the presence of his son would be unjust to him, then surely his portion has been prescribed in the Holy Qur'an. It was found that not giving the orphan a share of the grandfather's inheritance is not an injustice; rather, it is a violation of the rights of the closest relatives and an act of injustice.

*“And do no approach the wealth of orphans except in the best manner, until he reaches maturity.”*⁴⁴

The wealth received through inheritance becomes the property of a person. Just consider that it is forbidden to eat the wealth of an orphan, let alone go to him if his share in the inheritance is prohibited in some cases. If there is an excess in his estate, it is definitely commanded in the Qur'an that the grandson should receive a share of the inheritance. It will be necessary to reduce the shares of other deserving family members.

Muhammad Qasim has written under this Ayah:

“And do no approach the wealth of orphans” In this verse, a major sin is prohibited and an important thing is commanded. The major sin is betraying the property of an orphan and the most important thing is to fulfill a promise. It is forbidden to usurp the total or some property of an orphan, betray it, delay in giving it for no reason. And increase it. From this, it is known that the guardian of an orphan can trade etc. with the property of the orphan, by which his property increases, that it is included in Ahsan, and similarly, it is permissible to keep his rupees in the name of the orphan in the bank etc. without interest. This is the type of safety.⁴⁵

*“You must remain established upon justice in dealing with the rights of orphans.”*⁴⁶

It is illegal and haram to do injustice to an orphan. Is it possible that the one who is commanded to be fair to the orphan in the Qur'an commits injustice by depriving him of his inheritance? Absolutely not! This cannot happen at all. Sharī'ah is the greatest protector of the orphan's rights; if there were any injustice in not declaring his share, then his share would have been declared.

*“Or the feeding on a day of hunger. To an orphan (who is) the next of kin.”*⁴⁷

⁴¹ Al Qur'ān:4/2

⁴² Al Qur'ān: 4/6

⁴³ Al Qur'ān: 4/36

⁴⁴ Al Qur'ān: 6/152

⁴⁵ Muhammad Qasim, *Sirat ul Jinan*: 6/152

⁴⁶ Al Qur'ān: 4/127

⁴⁷ Al Qur'ān: 90/14-15

There is no benefactor of an orphan greater than Allah Almighty. The Qur'an carefully instructs to feed the orphan and does not include him among the heirs. The grandson indeed has no share in the inheritance, but those who speak of giving him an inheritance may wish to be benefactors of orphans more than the Qur'ān.

*“And out of his love, they feed the needy, the orphan and the prisoner.”*⁴⁸

That is, when the beloved servants of Allah feed the orphans, the poor, and the prisoners, they do this solely to seek Allah's pleasure. The significance of feeding the poor and orphans can be appreciated from these verses. Therefore, Allah Almighty states:

“Do you see the one who belies the religion? Then it is him who pushes away the orphan.

*And does not encourage (others) to feed the needy.”*⁴⁹

From this verse, it is understood that pushing or scolding an orphan is the act of a person who denies the religion. The question then arises as to why Allah Almighty did not command those who follow the religion to give inheritance to the orphaned grandson. The only possible answer is that granting inheritance to an orphaned grandchild is not just for him, but unfair to other relatives. This is why the Sharī'ah has not issued any such command; otherwise, where should the orphan be pushed and where should the inheritance be? Evicted from? There is a significant difference between the two.⁵⁰

The remarkable thing is that the Qur'an considers the rights of the orphan, even to food, and clarifies its importance. Why does it not explain the right of his inheritance? Certainly, there is no injustice with the orphan grandson; otherwise, it should have been addressed in the Qur'an.

On the authority of Abu Huraira, the Messenger said;

“The best house among Muslims is the one in which there is an orphan and he is treated with kindness, and the worst house is that of Muslims in which there is an orphan and he is treated badly.”⁵¹

3. Responsibility of state and Government:

The right granted by the Sharī'ah is the child's legal right and should not be regarded as merely a "moral principle". It is the legal obligation of the relatives upon whom the Sharī'ah has placed the duty of supporting the child. There is a need to assist the child in fulfilling this legal right, rather than giving him a right that is not recognised as his according to the Law.

Then the question is that you remove the child's rights, which the Sharī'ah has not granted to him, from his relatives through legal coercion (Section 4 of the Muslim Family Laws Ordinance). But when it comes to the rights prescribed by the Sharī'ah, you give the lame excuse that his relatives will not support him! If they don't, make them do so. Force them. Punish them. How could you not? Also, note that according to Islamic law, it is not the child's responsibility to go to court for his rights. It is the judge's duty to ensure the protection of the rights of all orphans in his jurisdiction and to carry out this responsibility through those accountable for their care. So if you wish to amend the law, rather than altering the Islamic Sharī'ah, amend the English law and assign this responsibility to the family court judge, or establish specific courts for this purpose.

Maintenance according to Sharī'ah

A permanent law of Islam is maintenance, and it is the duty of the Islamic court to provide for anyone who is dependent on another due to being a minor, bankruptcy, or any other

⁴⁸ Al Qur'ān: 8/76

⁴⁹ Al Qur'ān: 107/1-3

⁵⁰ Muhammad Qasim, *Sirat ul Jinan*: 107/1-3

⁵¹ Muhammad bin Yazid Al-Qazwini, *Ibn e Majah*, Hadith: 3679, Volume 2. P.1213

incapacity of the person responsible. According to this Sharī'ah law of maintenance, if there are orphans and granddaughters until they reach adulthood, their maintenance is the responsibility of their uncles or guardians. If there is no one among the relatives responsible for the person's maintenance, then, if necessary, this duty will be imposed on Bait-ul-Mal. When the Sharī'ah provides us with such a system, and if it is implemented, there will be no difficulty for orphans,⁵²

Requirement of the Law on Will:

In Islamic jurisprudence, the legitimacy of a will is tied to the existence of good in this decree of Allah Ta'ala;

*"It is made obligatory for you that when death approaches any one of you, (and) if one leaves wealth, so he should make a will for parents and close relatives in accordance with that which is acceptable in the custom (of Islamic law); this is necessary upon the righteous."*⁵³

This verse makes the will dependent on the fact that the deceased left some "Khair", which is a considerable amount of wealth. There is, however, a difference of opinion regarding its amount. According to Ibn Qudama, the ruling is that the wealth which benefits the heirs will be regarded as good. It remains beneficial even after the death because the Prophet ﷺ said:

"It is better for you to leave your heirs and relatives rich than for them to spread their hands before the people."⁵⁴

The effort to establish the right for the orphan grandson was not limited to Pakistan; his passion was also taken away by the Arabs. Consequently, in the 1940s, special legislation was first enacted in Egypt, and later in many other Arab countries, requiring the grandfather to bequeath up to one-third of his estate to the orphan grandson. The law also specified that even if the grandfather did not explicitly make this will, the law would presume he had done so, and therefore, the grandson would be entitled to up to one-third of the grandfather's share.

Rejections to be considered:

There are also many serious objections to this law, but we mention only three:

One question is, why are you only concerned about orphaned grandchildren? Couldn't it be that Waqas's orphaned grandchildren received a lot from his father, but Waqas's brother died in poverty and his children were in greater need? Then why aren't you worried about orphaned nephews? Similarly, the orphaned sons of sisters should also be a concern, and so on.

The second objection is that this law has distorted the basic structure of Sharī'ah by removing the distinction between will and inheritance. The will indicates that Zayd should have the freedom to allocate his wealth to someone after his death, while inheritance means that Waqas does not have that freedom, and after his death, his wealth is divided according to Sharī'ah. Sharī'ah offers a harmonious balance of freedom and restriction, permitting up to one-third of the estate to be freely disposed of, while two-thirds are reserved for inheritance. You have also taken away that one-third of freedom!

It should be noted that some jurists, especially Ibn Hazm al-Zahri, believed that a will was obligatory in favour of relatives who did not have a share in the inheritance. However, they were more understanding than the legislative bodies of Egypt and other Arab countries, which considered the will of the bequeather and stated that it was his wish to do so, whether

⁵² Monzer Kahf, "The Islamic Welfare State and Its Role in the Economy," in *Islamic Perspectives on Sustainable Development*, ed. Munawar Iqbal (New York: Palgrave Macmillan, 2005), p. 49

⁵³ Al Qur'ān: 2/180

⁵⁴ Muhammad bin Isma'il, *Sahih Bukhārī*: Hadith: 2591

for the nephew, someone else, or another relative. Nonetheless, he must ensure that at the time of making the will, he does not inherit himself and that the amount of the will does not exceed one-third.

Yes, do not exceed one-third. That is, Ibn Hazm believed that if he made a will, even if it was less than one-third, then the obligation was fulfilled. According to these laws, it is mandatory to make a will up to one-third! In this way, he has transformed the will into an inheritance.

It is here that the third objection becomes clearer: due to this law, it sometimes happens that the share of the orphan grandson exceeds the actual inheritance of the deceased! Zayd, for example, had four sons, one of whom died during his lifetime and left an orphaned grandson. According to this law, the grandson must receive one-third (as a will), and the remaining two-thirds should be divided among the three remaining sons. That is, the orphan grandson gets 33 percent, and each son gets 22 percent!

The responsibility of the government to support the orphans:

In the Islamic system of government, it is the duty of the state to provide basic needs such as housing, food, and clothing for its subjects. It is necessary for him to assign responsibilities to helpless orphans. Among the duties of the Qazi was to oversee the affairs of the orphans in his area.

Summary:

In summary, there are several ways within the Shari'ah to prevent the potential deprivation of an orphaned grandson, as discussed above. The teachings of the Qur'an and Sunnah ensure that in the case of an orphan, the possibility of the grandson being deprived should be considered, and not only should his needs be met, but also necessary measures should be taken to support him. However, declaring him entitled to inheritance is equivalent to adding to the Shari'ah, which is incorrect. Great jurists have explained this issue unanimously; none of them has declared the grandson as the heir when the son is present, and all have denied it.

Suggestions:

This law should be amended as it is against Shari'ah for the following reasons:

- i. Depriving the sons of their right to inherit and reducing their share while the grandson will get a full share of his deceased father's inheritance.
- ii. Instead of giving him a share in the inheritance, the will could be made mandatory for the grandfather by the state to make a bequest to his grandchildren while he is still alive.
- iii. There are different accounts of the grandson. After the death of the father, the remaining children of his grandfather are entitled to his inheritance. Sometimes, it may happen that the deceased leaves behind enough wealth to support his orphans and widow, or the situation may be the opposite if he has not left wealth for his children. The grandfather may have abundant wealth, as is generally the case in our times, so in this situation, the grandfather should make a will for his grandchildren. Although the right of inheritance of the grandsons has ended from the inheritance, the grandfather can still make a will for it. If the grandfather does not do this, can the government oblige him to do so? According to the law of Will or Bequest in several Arab countries, it could be implemented in Pakistan as well, through the state as Wasiyyat-e-Wajiba.
- iv. In the public interest, a government may opt to enact non-mandatory laws where the potential benefits of implementation significantly surpass the considerable losses

caused by their absence.

- v. The government could consider establishing a law regarding conditional inheritance for orphaned grandchildren. During legislation, this should be conditional on their economic status. If the grandson is wealthy despite being an orphan, and the uncle is among the poor while the grandfather also inherits some wealth, then including grandsons among the beneficiaries by law would likely reduce the share of uncles, which was already smaller.
- vi. Scholars should teach people the principle that when a son dies, a will must be made for the grandson and arrangements should be made for his support.