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APPRAISAL OF BEQUEST OF COMPANY SHARES UNDER ISLAMIC LAW

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Abstract

This paper appraises the bequest of company shares under Islamic law Shari'a. It examines the permissibility of bequeathing shares, considering them as a form of fungible property *mithli* or a combination of tangible and intangible assets. The study explores the conditions and restrictions governing such bequests, including the limitations on the bequeathable portion of the estate (typically one-third), and the rights of legal heirs. It further analyzes the challenges posed by legal requirements structures surrounding and shareholding arrangements, such as fractional shares, bonus shares, and the complexities of valuing shares in diverse markets. The paper investigates various scholarly opinions on the matter, drawing upon classical Islamic jurisprudence and contemporary *fatwas* to offer a comprehensive analysis of the legal framework surrounding the bequest of company shares. Ultimately, this research aims to provide clarity and guidance on this increasingly relevant issue within the context of Islamic finance and estate planning, offering practical recommendations for both testators and heirs.

Keywords: Appraisal, Company Shares, Islamic Law

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1.1 Introduction

The concept of bequest (*wassiyyia)* like other Sharia concept is derived either from the Quran, *sunnah,*[1] *ijma,*[2] or *qiyas.*[3] Although *qiyas* being one of the secondary sources, on closer reading, It is found that *qiyas* is not regarded as an element which supports the institution of bequest at all.[4] The principle of *qiyas* does not allow or recognize a dead person to remain in possession of his estate or to exercise any power upon it. Thus, at his death he loses the right to convey anything. This could have been the result of an Islamic principle which states that in the case of death all the deceased's estate or rights are transferred automatically to his heirs. However, by looking into the three other sources we find that the constitution of bequest has been created from these three other sources.

In the Q*uran.* It is prescribed when death approaches any of you if he leaves any goods that he makes a bequest."[5] In the *sunnah* comes the *hadith*[6] from the Prophet (S.A.W) saying" What right has a Muslim having something which may be bequeathed to sleep for two nights unless his bequest is written."[7]

[1] The actions, pronouncements, silent approval and the habits of the Prophet Muhammad SAW during his life time.
[2] An Arabic word which means the consensus of opinion, Abdulhafaiz, B., 'Student's Dictionary, English-Arabic Bilingual Arabic – English', (1st Ed, Dur Al-Kutub Al-ilmaiyia, Beirut, Lebanon), p 69.
[3] An Arabic word which means analogical deduction, (n 2), p 89.
[4] Abdulrahim, M.A., "*Muhammadan Law of Inheritance'*, (1st Ed, The Pakistan Educational Press, Lahore, Pakistan: 1998) p.98
[5] Quran 2:180- 19, AL-Mubarakpuri, S.S.," Tafsir Ibn Kathir", (1st Ed, Vol.2, Darussalam Publishers & Distributors, Riyadh, Saudi Arabia: 200), p.380-390
[6] The saying and the advices of Prophet Muhammad SAW
[7] Siddioi, A.H., "*Bukhari & Muslim al-Mufabras*", Arabic-English, translated by Muhammad Muhsin Khan
(vol.7, Dar al-Arabia, Beirut, Lebanon: 2007), p.229

1.2 Concept of *Wasiyyah*

Wassiyyah means Bequest in Arabic[8] and it comes from its Arabic root *wasa* which means he conveyed. In other words *wassiyyah* means a gift of property by its owners to another person contingent on the giver's death.[9] The legal Quranic injunctions in respect of bequest or will was revealed in *surah al-Baqarah*[10] where it says that it is the responsibility of the pious and Allah fearing persons to leave *wasiyyah* behind, but this verse was revealed when no law was yet fixed in the matter of inheritance.[11] Later in *surah al-Nisa*[12] a complete guidance was given to Muslims concerning inheritance and fixed portions for each heir.

In the medieval period before Islam or the *jahiliyyah,*[13] the Arabs disposed of their property as they liked as no law concerning bequest or inheritance existed to guide them.[14] They could make bequest in favour of any one, depriving their own parents, children and wives. At times the bequest was made in favour of rich and influential members of the clan.[15]

The prophetic (SAW) *hadith*, reported on the authority of *Sa'd bin Abi Waqqas* says:

"I was taken very ill during the year of the conquest of Mecca and felt that I was about to die. The Prophet (SAW) visited me and I asked: "O Messenger of Allah I own a good deal of property and I have no heir except my daughter. May I make a will leaving all the property for religious and charitable property?" He (the Prophet) replied: "No," I again asked may I do so in respect of two third of my property? He replied No.' I asked: 'may I do so with half of it?" He replied: "No."

[8] Baydoun, A.A., Student's Dictionary Arabic-English Biligual English-Arabic, (1st Ed, Dar Al-Kutub, Beirut 2001),p.393
[9] Abdulhamid, H.S., "*Hidayah*", (vol.4, Dur al-Mukhtar. Cairo: 2008), p.397 & 466
[10] Quran, 2: 180-182, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.2) (n 5), p.382-390
[11] Doi. A.R., Shariah The Islamic Law, (Iksan Islamic Publishers, Ibadan, Nigeria: 1990), p.8
[12] Quran, 4: 12, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.3) (n 6), p.280-290
[13] The medieval period of time called by scholars of Sharia
[14] Doi. A.R., Shariah The Islamic Law, (n 12), p.10
[15] Ibid

I again asked: "May I do with one third of it?" The Prophet replied: "Make a will disposing off one third in that manner because one third is quite enough of the wealth that you possess. Verily if you die and leave your heirs rich is better than leaving them poor and begging. Verily the money that you spend for the pleasure of Allah will be rewarded, even a morsel that you lifted up to your wife's mouth.''[16]

The Islamic law in respect of inheritance and bequest is further clarified that bequest (*Wasiyyah*) can be made only for one third of the entire Property and no more. No one can make a bequest in respect of any legal Qur'anic heir and in other words, those relatives whose portions are fixed in the Quran cannot be increased or decreased through bequests nor can one deprive the legal heir through any bequest.[17]

In spite of the clear guidance in respect of shares of inheritance in the Quran and the *Sunnah, Wasiyyah* still remains an operative injunction up to the maximum of one-third of one's property but should be done with strict sense of justice and equity.[18] This provision can be used for those who are helpless but are not Quranic recipients of shares like one's own grandchildren from his children that died before him.[19]

Similarly there may be some really needy persons outside the family circle whom one wishes to help through bequests or wants to spend some money on public welfare which he is afraid his wealthy heirs, will not willingly give away after his death if he did not make adequate provision through his bequests.[20]

[16] Muhammad, M.K., "*Sahih Al-Bukhari Arabic-English*", ch.55, Hadith 2, (Dar al-fikar, Cairo: 1982), p.1234
[17] Al-Bardisi, M.K., *Al-Mirath wa-al-Wasiyyah fi al-Islam*, (Dar Al-Nadhir, Cairo, Egypt: 2008), p. 34
[18] Doi, A.R., (n 12), p.8
[19] Ibid
[20] Ibid

In the verses on inheritance, it is made clear that the shares will be distributed only after the debt left behind by the deceased is paid and the bequest is carried out. There is a consensus of opinion of Islamic scholars that although bequest is mentioned before the debt, the debt should first be paid and then the bequest will follow, then the distribution of the shares to the heirs. The point that has been emphasized in sur*ah al-Nisa*[21] He should not make bequests in order to deprive the Qur'anic sharers of their legitimate shares after his death.

The temptation to do so becomes greater in respect the collaterals (*Kallalah*) when the deceased has no children or parents and the property is to be given to the distant relatives. He might think that rather than the property going to collaterals, it is better that he gives it away through bequests or through the pretext of debt. This will be against the spirit of the law of *Mirath*.[22]

A Muslim who owns property is given permission to bequeath his property for a charitable object or to anyone except a legal heir. This is called *wasiyyah, t*he making of a *wassiyyah* (will) is specially recommended. The Holy Qur'an speaks of the making of a will as a duty incumbent upon a Muslim when he leaves sufficient property for his heirs[23].

By law for any person entering into any legal relationship or anything which is meant to carry some form of legality such as writing a *wassiyyah* must have capacity to do so, for instance if a person is to be prosecuted or sued for a breach of contract or tort he must have capacity.[24] Capacity under sharia means age and

[21] Quran 3: 12, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.2) (n 6), p.370-380
[22] Doi, A.R., (n 12), p 21
[23] Quran 2: 180, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.2) (n 6), p.380-390
[24] Padfied, C.F., *Law Made Simple*, (6th Ed Bungay, The Chaucer Press, Suffolk, U.K: 1986), p.78

mental status of the person or it can be defined as the legal competence, ability, qualification, power or responsibility.[25]

Any legal matter especial like will making must have a format that can be followed in order to be executed.[26] If a *wassiyyah* is faulty or ambiguous it can be annulled, cancelled, recalled or rendered inoperative a *wassiyyah.*[27] A *wassiyyah* can be revoked by the testator before his death.

The essential elements of *wassiyah* under Sharia includes, capacity, format, prove validity, revocation.[28]

1.3 Essential Elements of Bequest

Under the Islamic law the disposition of bequest (*wassiyyah)* depnds on certain elements upon which the bequest (*wassiyyah)* is established. Each of these elements is connected with certain conditions that validate the efficiency of the bequest (*wassiyyah).*

There are four element of bequest *(wassiyyah)* which are agreed upon by the Maliki, Shafi'i and Hanbali, jurists. They are the testator (*al-musi*), the beneficiary *(al-musa lahu),* the subject matter of the bequest *wassiyyah (al-musa bihi)* and the method it is carried out furmula i.e., offer and acceptance *(sighah al aqd).*[29]

1.3.1 The Formula of Bequest

Contrary to the majority of jurists, Hanafi jurists viewed that there is only one pillar of bequest *wassiyyah,* that is *al-ijab wa al-Qubul* (offer and acceptance). Their opinion was formed on the basis that all the other three elements such as the testator and the legatee and the subject matter are in-built within *al-Ijab wa al-Qubul* (offer and acceptance).

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[25] Ibid

[26] Sagay, I.E., *Nigerian Law of Succession*, (1st, Ed, Malthouse Press Ltd., Lagos: 2006), p.79

[27] Ibid

[28] Ali, S.A., "Muhammadan Law, (7th Ed, vol. II, Kitab Bhavan, NewDelhi: 1999), p.281-283

[29] Muhammad B J,'Al-wassiyyah (Bequest) according to the four Sunni Schools: a Concise Analysis'(February 2018)23 (2) (11) IOSR-JHSS 50-55

[30]The formula of bequest *wassiyyah* consists of offer and acceptance. The offer must be clear, an unambiguous words that indicate transfer of ownership following the transferor's death.[31] Bequest *wassiyyah* can also be formed through writing according to majority of the Muslim jurist.[32] Hanafis have opined that where the offer of bequest *wassiyah* is rejected by the offeree, the property bounces back to the offeror.[33] However, a *wassiyyah* is said to have been completed with the acceptance of the beneficiary or legatee after the death of the testator. In other words, a *wassiyyah* can only be effective after the death of the testator. As long as he is still alive, the property so bequeathed to him and he has the right to dispose or revoke the *wassiyyah.*

According to Hanafi jurists, a bequest is formed when it is duly constructed by clear and unequivocal offer and acceptance. Therefore, a bequest entails the condition of offer and acceptance in which the offer must be made by a capable testator while the acceptance is validated only after the death of the testator. The jurist in this school opined strictly that the bequest execution involves right of ownership only after the death of the testator. Therefore, the issue of offer and acceptance or rejection be enforced only after the death of the testator and they maintain that acceptance might either be verbal or by way of gesticulation (*Isharah*). [34]

The Maliki jurists viewed that issue of offer and acceptance must be clear and explicit in such a way that it specifies the term offer and that the acceptance occurs after the death of the testator. As the Maliki jurists the Shafi'is jurists also viewed that the language of the offer and acceptance must be an explicit utterance that specifies the bequest either loudly or in written form or using epithet (*kinayah*)

[30] ibid
[31] Al-Fatawa al-Hindiyah, 6:90; Kashshaf al-Qina', 4:344; Al-Shirbini, Mughni al-Muhtaj, 2:52.
[32] Ibn Nujaim, al-Ashbah wal-Naza'ir, 339; Al-Sharh al-Saghir, 4:601; Al-Buhuti, Kashshaf al-Qina', 4:337.
[33] Al-Zaila'I, Tabyin al-Haqā'iq, 6:184.
[34] ibid

such as "he is entitled to certain portion in my estate". The acceptance language can be explicit also by saying "I have accepted it", but the validation of such acceptance occurs only after the death of the testator. Likewise, the Hanbali jurists agreed that the language of offer and acceptance must be explicit and shall be accepted only after the death of the testator. In conclusion, a bequest can be made in a written form or orally. However, it can be made in the presence of two male witnesses who must be Muslim, just, sane, adult and persons who are precluded from being legatees or heirs of the testator.[35]

1.3.2 *Al- Musi* (the Testator)

The second essential element of bequest *wasiyyah* is at *musi* the testator who must have the capacity to enter into a gratuitous contract. This capacity is predicated on being sane, adult, free, consent and choice.[36]

Every adult Muslim with reasoning ability has the legal capacity to make a will or called *wasiyyah* under the sharia.[37] An adult for this purpose is someone who has reached puberty.[38] Evidence of puberty is menstruation in women and night pollution in men.[39] In the absence of evidence puberty is presumed at the completion of age of fifteen years, *Bukar Falata vs. Yaa Doma.*[40] In this case the Court held that: " Majority under sharia is determined by physical indications by declaration of the youth in question, or failing this by reaching the age of fifteen lunar years." This is the position of the Maliki jurists on how to determine the period of majority of a particular person.

[35] Ibid
[36] Al-Mausu'ah al-Fiqhiyah, 43:238; Al-Fiqh al-Islami wa Adillatuhu,
[37] Rahim, A., *The Principles of Islamic Jurisprudence*, (3rd, Ed, Bhavan Kitab, New Delhi: 2006), p.206
[38] Ibid
[39] Yiadoma v Bukar Fulata (Suit No. NEM/56A/69)(24(1970)NSNLR at, p.10)
[40] Ibid

The Maliki and Hanbali schools consider the will of a discerning (*mumayiz*) child as valid. The age of discernment for a child is seven complete years. The testator must have the legal capacity to dispose of whatever he bequests in his will and he must be the owner of it.[41]

Therefore in order for the testator's action to be validated he must be said being free be an *Aqil*[42] or be in a mental state which enables him to appreciate the nature of the bequest and the responsibilities it entails. This puts his mental state in the forefront of the qualifications required to validate the act of making a testament since the lack of mental faculty is the most vulnerable point allowing any vitiation.[43]

The four Muslim jurists agreed that the bequest executor must be matured sane, just, and trustworthy capable of execution and alive at the time of disposing the bequest. Most of the Muslim jurists had a divergent view as to whether non-Muslim and slaves can be appointed as executor, the Maliki, Shafi'i and Hanbali jurists viewed that an executor must be a Muslim. Whereas the Hanafi jurists viewed that it does not matter whether he is a Muslim or not.[44]

What makes the mental state such an important issue is the fact that coming of age is not necessarily indicative of mental maturity. The law allows the validation of the bequest of a child who is defined as *Aqil* or sane. Since the attainment of absolutely suitable mental faculty cannot be precisely defined there was a great need to discuss it in relation to age or physical signs to see at what stage a testator's bequest should be considered valid.[45]

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[41] Ibid
[42] An Arabic word for a person who has capacity or mentally stable
[43] Al-Bardisi., (n 18), p.89
[44] Ahmad, H., "*Analogical Reasoning in Islamic Jurisprudence*" (A Study of the Juridical Principle of Qiyas) (3rd Ed, Adam Publishers Distributors' New Delhi: 2008}, p. 355
[45] Hallaq, M.S.B.H., "Fiqh According to the Quran and Sunnah" (1st Ed, vol.II, Darussalam, Riyadh, SAUDI: 2008}, P. 331-424

The prime purpose of Islamic law introducing the restrictions is to help the testator to conclude a valid will which will not defy the spirit of the sharia and thus be invalid.[46] Thus, bequest which is directed towards matters forbidden in Sharia, e.g. to those who are employed for deep mourning, to houses of amusement, bingo clubs and casinos or to dance halls, etc. thereby encouraging people to waste their money, will be null and void.[47] This is because the Islamic law, in its drive to purify people and protect them from any sort of exploitation, considers such things to contravene its objectives.[48]

A similar view was apparently held by some Hanbalis, one of whom was Al-Bahuti,[49] who validated a bequest made to an heir's son even though the testator meant thereby to give indirect profit to his heir. He stated that 'the responsibility of the testator's motive will be left to his own conscience (God).[50] Unlike the Hanafis, who ignore motive completely, Al-Bahuti in his statement takes the middle course between the Hanafis' and his contemporarily influential colleagues, Ibn Taimiya[51] and Ibn al-Qayim,[52] who clearly recognized the significance of motive in the case, instead of giving it its full force in law, he accepts the testator's motive is suspect. The second opinion in this respect was led by Ibn Taimiya and Ibn al-Qayim. The latter especially stood firm on condemnation and invalidation of evilly motivated bequests.[53]

[46] Milford, H., "*Islamic Law of Wills*", (1st Ed, Oxford University Press, Cowley, England: 1993), P.231

[47] Badawi A.A., "The Concise Presentation of the Fiqh of the Sunnah and the Noble Book", Translated by J.D.M. Zarabozo, (2nd Ed, International Islamic Publishing House, Riyadh, Saudi:2007), p.86

[48] Ibid

[49] Ibid

[50] Ibid

[51] Ibn Taimiya, A.A., "*Al-Mubarrar fi al-Fiqh*", (Maktabat al-Sunna al-Mohammadiya, Cairo: 2005), p.34

[52] Ibn al-Qayaim, S.D.A., "*Tuhfat al-Mawdud*, (1st Ed,Damascus: 1391H/1971AD), p.123

[53] Ibn Taimiya-Sunnah, Online.com, https://www.sunnahonline.com accessed on 23/1/2018

1.3.3 *Al-Musa Iahu* (the Beneficiary of the bequest)

The third essential element is the *al-musa lahu* (the beneficiary of the bequest). Such a person must be in existence at the time of the bequest,[54] he must have the capacity to own,[55] and where a bequest is made in favour of a unborn, he must be born alive for the bequest to be valid.[56] Other conditions include, the beneficiary must be identified, must not be an heir of the person making the bequest.[57]

The legatee is another function of the main elements of bequest. It is known beyond doubt that without the legatee as a recipient, we cannot imagine a bequest as being effective. We find it therefore necessary to consider the question as to whom the bequest should be offered, in what state he must be and what qualifications he must have.[58]

1.3.4 The *al-Musa Bihi* (the subject matter)

The fourth essential element is *al-musa bihi* (the subject matter of *wassiyyah*) which must be a recognized property under Islamic law (i.e. *mal mutaqawwim*) or usufructs.[59]

1.4 Types of Bequests (*Wassiyyah*)

The English word Will, means in Arabic, wassiyyah meaning bequest. Therefore, a will or bequest can be classified as follows: General and specific bequest, Conditional and Contingent Bequest, Usufructury Bequest and the Obligatory bequest.

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[54] Opcit 4:581 582
[55] Opcit, 43:239.
[56] Opcit 4:423.
[57] Ibid.
[58] Al-Hasri, A., "*Al-Wasit fi-Nazariyat Al-Aqd*", (Sharikat al-Tab'wa al-Nashr al-Ahliyia, Baghdad: 2007), p.66
[59] Al-Kāsānī, Badā'i' al-Sanā'i', 7:352-356; Al-DArdir, al-Sharh al-Kabir, 4:423; Al-Shirazi, al-Muhadhdab, 1:452; Ibn Qudamah, al-Mughni, 6:151.

1.4.1 General and Specific Bequest

A general bequest is one in which the gift of property is not so specifically distinguished because it may be a pecuniary legacy or a gift of property generally described. Also it consists of a share in the entirety of the testator's property or a share in a particular genus of his property i.e 'one-third of my estate' it exists at the time of his death. The beneficiary of a general bequest is entitled to the stated fraction of the property as it exists at the time of the testator's death.[60]

While a specific bequest is one in which the gift of a particular item of property is distinguished from other property of the same kind i.e'. 'My red Toyota car'. Also, it consists of a share in a particular item of property or a species of property i.e. 'a quarter of Rams' It may refer to the testator's property at the time of the bequest and the beneficiary is entitled to the stated fraction of the property as it exists at the time of the bequest.[61]

1.4.2 Conditional and Contingent Bequest

A conditional will is a bequest coupled with a condition which seeks to regulate the manner in which the property bequeathed is enjoyed or the general conduct and activities of the beneficiaries. Where this is so it will be enforced against the beneficiaries if the conditions are valid; but where they are not the normal doctrine of severance will apply i.e. the condition will be ignored and the bequest will remain valid.[62]

This type of bequest which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void.[63] For example Ahmed bequeathed his house to Bilal on condition that Bilal does not sell or let it and that on Bilal's death it will revert to Ahmed's heirs the conditions are void

[60] Bambale, Y.Y., Acquisition and Transfer of Property in Islamic Law, (Malthouse Press Ltd, Lagos, Nigeria: 2007), p 66-67.
[61] Coulson, N.J., Succession in Muslim Family, (Sweet & Maxwell, Edinburgh: 2004), p 218-219
[62] Ibid
[63] Mulla, D.F., *Principles of Mohammedan Law*, 18th Ed, (Kitab Bhavan, Calcutta: 2005), p 144

and the legatee takes the house as absolute owner. Bilal may use it or alienate it as he sees fit and on his death it will pass to his heirs or as he otherwise instructs.

While a contingent bequest is one which is suspended upon a condition and is not to become operative unless and until a specified event takes place or a specified condition is fulfilled. As a general rule a promise to give in future is not generally binding but it does not apply to *wassiyyah* which by its nature is a postponed transfer of ownership which may be revoked by the testator at any time prior to his death. Hence the general rule is that contingent *wassiyyah* are valid.[64]

1.4.3 Tangible and intangible Bequest

A usufruct bequest (*manfa'ah*) is a bequest whereby the legatee has the right to use and enjoy the fruits or profits of an estate or some other thing which he does not own (e.g. the rent of flats, milk of the dairy herd, fruits of an orchard). Property on which a usufructury bequest is made should be in existence at the time of death of the testator. The one third rule is applicable to usufructury bequests,[65] according to the Maliki and Hanafi Schools if the usufructruy bequest is in favour of a specific legatee then the usufructury right is not inheritable should the legatee die before the expiration of the term limited for the bequest. The subject of the bequest reverts immediately to the heirs of the testator.[66] Also according to the Maliki schools of fiqh the usufructury right is inheritable by the legatee's heirs until the term of the bequest expires. However according to the Hanafi, Shafi'i and Hanbali schools. if a usufructury bequest is made in favour of a specific legatee the legatee must be in existence at the time of death of the propositus.[67]

1.4.4 The Obligatory and Charitable Bequest

The juristic foundation for the obligatory bequest is to be found in the Quran.[68] The majority view is that this verse was completely abrogated *(Nasakha*) by the

[64] Ibid
[65] Mulla, D.F., (n 64), p150
[66] Mulla, D.F., (n 64), p159
[67] ibid
[68] ibid.

revelation of the inheritance verses.[69] The minority view is that the Quranic verse[70] was only partially changed. Meaning those who fear Allah by adhering to what He has prescribed and refrain from doing what is prohibited. This verse included Allah's Command to bequest to one's parents and next of kin, the matter which was changed before the revelation of the verse of inheritance which was changed by the verse of ordainments.[71] The prescribed ratios of inheritance became an obligation from Allah that must be fulfilled by those concern. Therefore it is narrated in the *hadith*, 'verily Allah has prescribed the proper right for those to inherit so no more bequeath is prescribed for the inheritor'.[72] Although a bequest for an heir was changed but a bequest for relatives who do not inherit was not changed. This was the view held by Imam Shafi'i. The evidence for this position is that the language used in the Quranic verse[73] is prescriptive and the inheritance verses[74] do not explicitly abrogate the Quranic verse.[75] In fact the inheritance verses contain four unqualified references to bequests.

1.5 Revocation of Bequest

A testator may revoke his bequest at any time, even during death sickness, either expressly or by implication. A bequest being a voluntary deposition and non-operative before the testator's death caused jurists to agree, without exception, to its being of an unbinding nature and therefore subject to revocation, amendment or even replacement. However, the right of revocation is left entirely to the free will of the testator.[76]

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[69] ibid
[70] ibid
[71] Khalil, A.G.M., *Tafsir Al-Jalalayn*, (Vol 1, Dar-Al-Manarah, El-Mansura- Egypt: 2010), p.98
[72] Al-Trirmidhi: Imam of Hadith and Fiqh, www.the-faith.com accessed on 12/1.2018
[73] ibid
[74] Quran, 4:11-12, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.3) (n 6), p.370-380
[75] Quran, 2:180, 19, AL-Mubarakpuri, S.S., (trans, 1st Ed, Vol.1) (n 6), p.387-397
[76] Ullah, M.I.T., *The Muslim Law of Inheritance*, (1st, Ed, S. Sultan Law Publishers, Allahabad, Pakistan: 2009), p.77

The action of revocation will not be regarded as a breach of promise since the will is merely a proposed act the revocation of which incurs no harm whatsoever nor will it cause any loss to anyone. Thus a proposed act as such where acceptance has not occurred can easily be withdrawn by the testator at any time before death. A commitment in the form of a bequest is only held to be legally contracted when the testator persistently affirms his intention up to his death.[77]

The important principle ruling revocation is seen in the inclination of the jurists to express their consensus of opinion by giving the wish of the testator the maximum juristic consideration and by approval of the express desire of the said testator to revoke a former bequest.[78]

As to the formats of repeal there are no recognized and rigid forms of revocation available. But the jurists evidently are of the opinion that a testator should be allowed to show his desire to prevent a bequest's fulfilment by any means possible. However, the manner in which revocation can be made is limited to express revocation and implied revocation.[79]

1.5.1 Failure of Bequest

Benefit of the legatee, in person, is a substantial objective of *al-Wasiya*. His survival, therefore, is vital if the bequest is to be operative at all. The legatee who predeceases his testator becomes by definition unworthy to succeed to the bequest because he cannot meet the required condition of a valid bequest.[80]

[77] Ibid
[78] Ahmad, H., "*Analogical Reasoning in Islamic Jurisprudence*" (A Study of the Juridical Principle of Qiyas) (3rd Ed, Adam Publishers, Distributor's New Delhi:2008},p.355
[79] Ibid
[80] Al-Hasri, A., (n 69), p. 123

The death of the beneficiary, as such, obstructs the movement of an estate into his possession. Hence, the portion bequeathed if still unrevoked by the testator will fail because the person supposed to benefit is found incapable of possession.[81]

However Islamic law demands the actual or at least the presumptive existence of the legatee a moment after the death of the testator. Thus there is no question of Islamic law permitting representation of the legatee's heirs in this matter as the bequest in such a case become immediately null and void.[82]

1.6 Bequest of Shares under Islamic Law

As state earlier a bequest (*Wasiyyah*) or will is defined as a transfer of any property or money that come into operation after the testators' death. The testator is called *Musi* and the legatee or devisee is called *Musa lahu*, and the executor is called *Wasi. Sahih*.[83]

Testamentary bequest refers to "will" as a bequest. Testamentary gift of one third from one's estate to the poor needy, charity etc., and the remaining two third of the estate is to be distributed among Islamic legal heirs per Muslims succession law.[84]

The concept of company (*Shirkah*), [85] as a form of business outfit is well recognized under Islamic Law. Such business outfits could be established principally to pull capital with a view to profit. The first Muslim company, the Sirket-I Hayriye Marine Transportation Company, akin to modern day company limited by shares was established in Turkey in 1851.[86],

[81] Ibid
[82] Fazee, A. A., "*Outlines of Muhammadan Law*" (3rd Ed, Oxford University Press, Cowley, England: 2008), p.231
[83] Muslim. book 13: Bequest (Wills) (Kitab al Wasaya)
[84] Mellows, A.R., "The Law of Succession, (Butterworths, London: 2000), p. 214
[85] An Arabic word meaning company or partnership. Abdulhafaiz, B., (n 2) p. 78
[86] Timur, K., "The Absence of the Corporation in Islamic Law: The American Journal of Comparative Law, Vol. 53, No. 4, (Fall 2005), pp 785-834: American Society of Comparative Law Stable URL :http://www.jstor.org/stable/30038724

1.6.1 Models of Shares Transfer under the Nigerian Law

Any person who has capacity to be a member of a company also has, as a general rule, the capacity to transfer his shares and in a number of cases the transfer even by infants have been valid.[87] A member may transfer by an attorney but the power should be authenticated and be left with the company together with the instrument of transfer.[88] A shareholder is not a trustee for the other shareholders in respect of his shares and except perhaps for his qualification shares, he can deal with his shares as any other shareholder.[89]

The shares or other interests of a member in a company are personal property transferable subject to the articles.[90] There is a distinction between a transfer of shares and a transmission of shares. A transfer is by the act of the member, while a transmission occurs by operation of law on the death or the bankruptcy of a member.[91] Before shares are transferred, the required procedure is that there must be a valid agreement of transfer either by gift or contract.[92]

1.6.2 Form and Method of Shares Transfer

The form of transfer of shares is regulated by section 155 in the Company and Allied Matters Act. 2020,[93] for example a provision in the act[94] provided that the transfer of a company's shares shall be by instrument of transfer and except as expressly provided in the articles, transfer of shares shall be without restriction. The instrument of transfer must be executed by or on behalf of the transferor and

[87] Goosh's Case (1872) 8Ch. App. 266
[88] Palmer. A.S., *Palmers Company Law*, (2nd Ed, London, England; Blackstone Books Ltd. 1978), p. 612
[89] Orojo., "Company Law and Practice in Nigeria" (3rd Ed, Mbeyi & Associate, Lagos, Nigeria: 1992) p .123
[90] Section 115 of Company and Allied Matters Act 2020
[91] Ferris George & Sons Ltd. V. Khoury (1965) 1ALL N.L.R. 91
[92] Harvel Investment Ltd. V. Royal Trust Company of Canada (C.I) Ltd. (1986) A.C. 207;[1985] 3 W.L.R. 276; 128 S.J. 522; [1985] 2 ALL E.R. 966
[93] Section 151 of Company and Allied Matters Act 2020
[94] Ibid

transferee and transferor is deemed to remain a holder of the shares until the name of the transferee is entered in the register of members in respect of the share.[95]

The right to transfer shares may be restricted by the articles or by statue. The articles of a private company must restrict the transfer of its shares.[96] The transferor is deemed to remain a holder of the shares until the name of the transferee is entered in the register of members in respect of shares.[97]

Subject to any restriction of the regulations as are applicable any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.[98]

A provision in the Act[99] however provides that notwithstanding anything in the articles it shall not be lawful for the company to register a transfer of shares in the company unless a proper instrument of transfer has been delivered to the company.[100] Thus the articles cannot provide for example that a widow shall be registered as owner of shares where no transfer has been completed.[101]

As required by a section in the Company and Allied Matters Act. 1990,[102] the common form of transfer is to be executed by both the transferee and the transferor but execution here does not mean that the instrument must be by deed sealed and delivered[103] and where execution in writing only is sufficient, the fact it is under seal does not render it ineffectual.[104]

[95] Ibid
[96] Ibid.
[97] ibid
[98] ibid
[99] ibid
[100] Orojo, (n 90), p 168
[101] Re Greene (1949) Ch.33.
[102] Section 151 (2) of Company and Allied Matters Act 2020
[103] Re Tahiti Cotton Co. Re. ex,p. Sargent1974 L.R. 17 Eq. 273; 43L.J CH.425 22 W.R. 815
[104] Orojo, (n 90) p. 186

1.6.3 Procedure on Share Transfer

Depending on whether the vendor is selling all the shares comprised in the share certificate or any part of the shares, if he is selling all the shares in his certificate he delivers to the purchaser an instrument of transfer and duly executed together with the share certificate.[105] The purchaser then executes the transfer and sends it together with the shares certificate to the company for registration although application for registration could be made by the transferor as well.[106]

However, where the vendor sells part of his shares or all his shares to more than one purchaser he executes the instrument of transfer but instead of handing it over to the purchase he sends it to the company together with his share certificate and the company endorses on the instrument the words 'Certificate Lodged.' The endorsed instrument is then given to the purchase in exchange for the price. The purchaser executes and sends it to the company for registration.[107]

Transfer of shares shall be affected by delivery of a proper instrument of transfer to the company and subsequent registration of the transferee in the register of members.[108]

1.6.4 Transmission of Shares

The vesting of shares in the personal representatives on the death of a shareholder is known as transmission of shares. On the death of a member, the survivor where the deceased was a joint holder or the personal representative of the deceased where he was a sole holder shall be the only person recognized by the company as having any title to his interest in the shares.[109] The means to claim title to the

[105] Ogbuanya N.C.S., 'The Islamic Inheritance Law (*fariad*) The manifestation of comprehensive inheritance management in Islam paper presented at National Convention of Faraid & Hibah 2008, organized by Islamic Development Malaysia, at the multipurpose hall of the Federal Territory Mosque, Kala Lumpur on 7th August (2008), p.66
[106] Palmer. A.S. (n 89) p.291
[107] Section 157 of Company and Allied Matters Act 2020
[108] ibid
[109] ibid

interest in shares is the production of probate of the will or letters of the administration of the estate.[110]

The interests of a beneficiary under a will are equitable only until the shares are transferred to him and he has been registered as a member. The interest may be protected by filing a notice and affidavit of interest.[111]

If the name of any person is entered in or omitted from the register of members of the company or default is made or unnecessary delay takes place in entering on the register, if any person aggrieved may apply to court for a rectification of the register.[112]

1.6.5 The Legality of Owning Shares under Islamic Law in a Public Limited Company

Is been argued by some scholars that owning or buying shares in companies is prohibited according to the Islamic law as long as the person is not aware of what they are trading in it,[113]

i. Their action is haram, even though they were ignorant of the divine law (*hukm shar'i)* at the time of their subscription into these companies?

ii. If some scholars, who did not understand the reality of the share stock company, and gave them a fatwa (of permission) with regard to them, are these stocks and shares which are owned by them halal properties, even though they were earned by a void transaction under Islamic law?

iii. If they are haram, by a void transaction under Islamic law?

[110] Tika Tore Press Ltd. vs. Abina (1973) 1 ALL N.L.R. (Part II) 244; (1973) N.M.L.R, 220; Section 148 Company Allied Matters Act 2020
[111] Section 156 of Company and Allied Matters Act 2020
[112] Section 90 of Company and Allied Matters Act 2020
[113] Taqiuddin, N., *'The Economic System of Islam'* (trans) (Dar Al-Manar, Cairo, Egypt:2000) p. 162-163.

iv. If they are haram, and accordingly not owned by them?

v. And are they allowed to sell, gift or bequeath these shares to other people or not?

The answer to these questions is that ignorance of the divine law *(al- hukm shari*) is not an excuse, because it is compulsory upon every Muslim to learn about that which he needs in his life of the divine laws (*Ahkam al-Shari*)' so that he can carry out all his actions according to the divine law. If that law is one of those laws which are usually can carry out all his actions according to the divine law. If that law is one of those laws which are usually unknown for such persons, then he is not blamed for that action and it would be a valid action for him, even though it is invalid under the Islamic law.

This is because "The Messenger (SAW) heard Mu'awiya ibn al-Hakam praying for someone who sneezed while he was in prayer. After they finished the prayer, the Messenger of Allah (SAW) taught him that speaking during the prayer would nullify it, and praying for the one who sneezes nullifies the prayer, but he (Messenger of Allah (SAW) did not order him to perform the prayer again." This is the meaning of what was narrated by Muslim and *An-Nisai' from Ata'a ibn Yasar*.[114] This is because the rule (not talking during the prayer) is usually unknown to a person and so the Messenger of Allah (SAW) excused him and considered his prayer valid. The prohibition of the share stock companies in view of Islamic law is one of the rules whose like is unknown to many Muslims and so their ignorance can be excused. The action of those who took partnership in them is considered valid, though the companies are invalid, like the prayer of *Mu'awiya ibn al-Hakam* which is considered valid though he did something in it that invalidates it, as he did not know that talking during prayer invalidates it.[115] The

[114] Al-Ruhaibani, M.S.,"*Matalib Uli al-Nuba fi Sharh Gbayat al-Muntaba*", (1st Ed, Dar al-Kutub, Cairo, Egypt:1380H/1967AD) p. 236
[115] ibid

fatwa given by the scholars also takes the rule of ignorance with respect to the one who seeks the opinion. However, the scholar who gives the opinion is not excused because he did not exhaust his effort to understand the reality of the share stock companies before he gave an opinion about them.[116]

With regard to the ownership of the shares by the shareholders, it is a valid ownership and these shares are halal properties so long as Islamic law judged that their action was valid. It is not invalid as they are excused for being ignorant of its invalidity.[117] Selling these shares to Muslims, however, is not allowed, because under Islamic law they are invalid currency notes and the validity of their ownership is incidental, based upon ignorance (of the *hukm*) that was excused. When the divine law about it becomes based upon ignorance (of the *hukm*) that was excused.[118] When the divine law about it becomes known, then it becomes a haram property that is not allowed to be sold, bought, gift or bequest them nor can one delegate other to sell it for him.

The way to dispose of these shares which were owned due to the ignorance of the divine law is to dissolve the company or transform it into an Islamic company.[119]

Alternately one can find a non-Muslim who considers the shares of the share stock company allowed and delegate him to sell the shares on his behalf and then receive the subsequent proceeds.

It was reported from Suwaid ibn Ghafalat "that Bilal said to 'Umar bin Al-Khattab: *"Your administrators ('ummal) take wine and kharaj. "He* said, *as "Do not take these things) from them, take wine and pigs as kharaj."* He said, *"Don take it (these things) from them, but delegate them to sell them and take their*

[116] ibid
[117] Shalabi, M.M., "*Al-WWaqf wa al-Wasiya bin al-Fiqh wa al-Qanun*, (1st Ed, Mitbat'at Dar al-Ta'lif, Cairo, Egypt;1376H1957AD), p. 256
[118] Al-Ruhaibani, M.S., (n 115), p. 250
[119] Muslim. book 13: Bequest (Wills) (Kitab al Wasaya)

price" narrated by Abu 'Ubayd in Al-Amwal. No one denied this action from 'Umar, though it would have been denied if it disagreed with Islamic law, so it became Ijma.[120]

Alcohol and pigs are of the properties of the dhimmis and cannot be properties for Muslims. When they wanted to give them to Muslims in exchange for Muslims. *jizya*, 'Umar ordered Muslims not to accept it, but to delegate them to sell them and take the proceedings. Since shares are of the Capitalists properties are haram and cannot be of the properties of Muslims, when passed to Muslims hands, it is not valid for Muslims to take them. Instead they have to delegate to them their sale. Just like the right of Muslims in *jizya* and *khara*j them. Instead they have to delegate to them their sale.

Just like the right of Muslims in *jizya* and *kharaj* has been confirmed in wine and pigs, and 'Umar allowed them to let the dhimmis sell them on their behalf, it is also the right of Muslims in these shares that they are allowed to delegate the dhimmis to sell (the shares) for them."

1.6.6 No Restriction on Bequest Under Nigerian law

In Nigeria as stated above, the law regulating incorporation, acquisition, transfer, bequest of company shares is principally contained in the Company and Allied Matters Act 2020, Investment and Securities Act 2007, Banks and other Financial Institution Act 2020. Although Shares are choses in action, they can nevertheless be assigned, sold, held in trust, transferred by the owner through bequest, gifts as well as transmitted through inheritance. Such a share could be portion of a business in a partnership or other business relationship or company shares,

Generally, under the Nigerian law, there are no restriction in making a testamentary gift or bequest, you can make part of your will except for tax

[120] Sunnan Ibn Majah 2715, Book 22, Hadith 20

consequences, and testamentary bequest restricted to some extend due to forced heirship equipment which is applicable in a number of countries.[121] The other notable difference in the Nigeria law from the Islamic law is that any one including legal heirs can be recipient of testamentary bequest in general. But under the Islamic Law, the heirs cannot recipient testamentary bequest based on Hadith that states: "Allah (*Subhanahu Wa Ta alla*) has given each person who has tights his rights and there is no bequest for an heir."[122] This means one cannot bequest to his spouse, children, parents, and grandparents: those are said to be the Islamic heirs (a*l-Warith*).[123]

Under Islamic law one can bequeath up to one third of his estate if he wishes as a part of his Islamic Will (*wasiyyah)* or Trust (*Wqaf)* to any relative or non-relatives who are not his Islamic heirs, the needy, Muslim registered charitable organizations, Associations, Mosques, the Muslim Community and the World Community at large, etc[124] The Maliki jurist view would apply in case of bequest of shares whether company or otherwise yet, the general principle underpinning this transaction is regulated principally by *inter alia*.[125]

Therefore, ownership of shares, stocks by a Muslim is permissible since it is part of *tijara*[126] such ownership must however be aligned with the Islamic concepts of Halal and haram. In other words, a bequest of shares of a company whose objects are not in consonance with Islamic Law may be declared invalid under Islamic Law but same may be valid under the CAMA

[121] Sagay,I., "*Nigeria Law of Succession*", (Malthouse Press Ltd, Lagos: 2006), p. 123
[122] Sunnan Ibn Majah 2714, Book 22, Hadith 20
[123] ibid
[124] Muslim. book 13: Bequest (Wills) (Kitab al Wassiyah)
[125] Company Allied Matters Act 2020, Abdulhafaiz, B., (n 2) p. 78
[126] An Arabic word means business or trading

1.7 Conclusion

In conclusion it can be said that bequest (*wasiyyah) i*s optional both on part of the testator as well as the beneficiary. The testator may not make the bequest (*wasiyyah*) of the shares as he pleases while the beneficiary is free either to accept it or reject it. Every will or bequest *(wasiyyah)* made by a person during his life time is valid and becomes executable after his death only. Therefore, the bequest (*wassyiah)* of shares made from one own's estate should not exceed one third of it allowed by Islamic law, also must not be made to an heir and it must take place or executed only after the death of the donor. However, if these shares are made as a gift by the donor while he is sound and well they must be in the possession of the beneficiary that is the donee while the donor is alive otherwise it reverts back to the estate of the donor if it was not in the possession of the beneficiary when the donor is alive. From the foregoing, one can make a bequest of shares in a company can be made as long as it doesn't contradict with the Islamic rules and regulations. The paper recommends when bequeathing, wealthy people should endeavour to abide by the dictates of Islamic law so as to prevent unnecessary litigations as well as conflict between heirs. This is because the objective of Islamic law in all its legislations is to ensure fairness; and any attempt to violate its provision only creates a state of unfairness and intractable conflict that may linger for years. Wealthy people should also not forget themselves their own interest in bequeathing for noble and religious causes that will benefit them even after their death while their heirs share the remaining properties. There is also a need for clear legal guidelines for Courts in dealing with Islamic law when it relates to statutory provisions like CAMA as such will ensure smooth litigation that will not lead to waste of time.