Biannual Research Journal
AL-IDAH
Published by
SHAYKH ZAYED ISLAMIC CENTRE
UNIVERSITY OF PESHAWAR
PESHAWAR PAKISTAN
ISSN (Print) : 2075-0307
ISSN (Online) : 2664-3375
OPEN ACCESS
www.al-idah.pk
Vol:42 ISSUE:1 Jan-June 2024

Inter-relationship between the Principles of Inheritance, Wills and Gifts

Issue: *https://www.al-idah.pk/index.php/al-idah/issue/view/40*
URL: *https://www.al-idah.pk/index.php/al-idah/article/view/902*
Article DOI: *https://doi.org/10.37556/al-idah.042.01.0902*

Author (s) :
Sadia Tabassum
Assistant Professor, Department of Law, Faculty of Shariah and Law
International Islamic University Islamabad, Email: sadia.tabassum@iiu.edu.pk

How to Cite **:** *Sadia Tabassum 2024. Interplay between the Principles of Inheritance, Wills and Gifts. Al-Idah . 42, -1 (Jun. 2024), 1 - 9.*

Publisher **:** *Shaykh Zayed Islamic Centre, University of Peshawar, Al-Idah – Vol: 42 Issue: 1 / Jan – June 2024/ P. 1 - 9.*

Article History:

Received on:	***13 – March - 2024***
Accepted on:	***17 – May - 2024***
Published on:	***25– June - 2024***

Abstract & Indexing
Islamic Research Index · Australian Islamic Library · Crossref · DOAJ Directory of Open Access Journals · International Scientific Indexing · Index Copernicus International

Abstract:
It is common observation that in family courts, more often than not, the cases about inheritance involve disputes related to wills and gifts. It is, therefore, necessary for lawyers and judges to have a thorough understanding of the interplay of the principles of inheritance, wills and gifts. This paper aims to explain some of these fundamental principles and the way they interact with each other.
***Keywords**: Interplay, Principles of Inheritance, Wills, Gifts*

Basic Theme of the Islamic Law of Inheritance:

Islamic law accords its adherents the right to own property along with all its necessary corollaries. For instance, a person can dispose of his property at will during his lifetime; he can give it in charity, gift it, sell it and bequeath it.[1] However, there are certain restrictions on each of these rights. Thus, for instance, bequest cannot be made for heirs, as their shares in inheritance have been predetermined by the Almighty in the Qur'an.[2] Similarly, bequest for non-heirs is invalid if it exceeds one-third of the total estate, unless allowed by heirs.[3]

As far as liabilities, or debts, are concerned, one of the fundamental principles of the Shari'ah relates to individual liability. Hence, debts do not devolve upon the heirs of the deceased. However, debtors have a prior right to the estate of the deceased that his heirs have to it. A recurrent theme of the Qur'anic verses about inheritance is that payment of debts precedes distribution of property among heirs:

"…after any bequest he made or debt [he incurred]."[4]

Hence, the jurists hold that debts and bequests[5] will be enforced before distribution of the estate among heirs. Importantly, debts are divided into two kinds: debts which the deceased owed to God and debts which he owed to human beings.[6] Debts of God are supposed to be paid by the person during his lifetime because they fall in the category of rituals which require personal performance.[7]

However, a person may make bequest for payment of such debts and in that case they can be paid within the limits of one-third of his estate.[8] Significantly, if a person during an illness apprehends death (mortal illness) acknowledges debt for another person, such acknowledgement of debt is also treated as bequest and is enforced to the extent of one-third of the property.[9] The same is the rule for gifts made during mortal illness.

In a nutshell,

- Debts of God can be paid out of the estate of the propositus up to the extent of one-third of the estate, provided the propositus has made a bequest for their payment.
- Debts of human beings can consume the whole estate.
- Acknowledgement of debts and gifts during mortal illness attract the rules of bequest. Thus, they cannot be enforced in favor of heirs, or beyond one-third of the estate for non-heirs, unless all heirs give their consent.
- None of the debts can devolve upon the heirs though they, or some of them, may volunteer their payment as an act of charity for saving the propositus/the deceased from consequences hereafter.

This scheme of the things clearly show that, while during his lifetime a person may dispose of his property at will, after he dies the rights of the heirs become sacrosanct. It is for this reason that during mortal illness, several restrictions are imposed on a person's right to dispose of his property. This inalienability of the rights of heirs is further elaborated in the next section where it is shown that these rights are deemed "rights of God" in the larger scheme of the Shari'ah.

The Law of Inheritance as the "Right of God:

The concept of the right of God signifies the immutable sphere of the Shari'ah. At times, the concept is also used for "God-given" rights to individuals because they are also "inalienable".[10] Imam Abu Bakr Muhamamd b. Abi Sahl al-Sarakhsi (d. 483 AH/1097 CE), one of the most distinguished jurists of all times, mentions eight categories of the right of God including the *hudud* punishments.[11] It may be recalled that the jurists define the *hadd* punishment as: "fixed punishment [the enforcement of] which is obligatory as a right of God."[12] Significantly, the Qur'an after prescribing the rules and principles about the law of inheritance calls them *hudud Allah* (limits prescribed by Allah):

> "These are the limits [imposed by] Allah. Whoso obeys Allah and His messenger, He will make him enter Gardens underneath which rivers flow, where such will dwell forever. That will be the great success. And whoso disobeys Allah and His messenger and transgresses His limits, He will make him enter Fire, where such will dwell forever; his will be a shameful doom."[13]

Thus, the part of the Shari'ah designated as the right of God including the law of inheritance is followed by Muslims as a matter of "ritual obedience." Imam Abu Yusuf Ya'qub b. Ibrahim al-Anasri (d. 183 AH/799 CE), the disciple and successor of Imam Abu Hanifah (d. 150 AH/767 CE) who founded the Hanafi School, is given the credit for formulating the following maxim:

> "A Muslim is bound by the laws of Islam wherever he may be."

While the Muslim jurists have different theories about application of the Shari'ah in foreign territories, they largely agree that this particular maxim is true of the immutable part of the Shari'ah, designated as the 'right of God'(Huquq Allah).[14] From this perspective, the following excerpt from the judgment of the Supreme Court of Pakistan in *Farishta* is very important:

> [S]uch religious or Divine law of Muslims by which they believe to be governed as a matter of their religious faith. It is a law which a Muslim carries with him wherever he goes as according to him, Islam is not merely a religion but Din - imparting the sense of obedience to Allah's commandments and embraces a man's life from cradle to the grave. It is a whole way of life, and from that point of view, Islam, as such, is a pure personal law of every Muslim.[15]

The Whole Property as Monolith:

It is from this perspective that Imam Sarakhsi gives the following two significant maxims:

> "A Muslim is bound by the laws of Islam even if he is in a foreign territory."[16]
>
> "A Muslim is subject to the laws of Muslim territory wherever he may be."[17]

A necessary corollary of these principles is that the whole property of a Muslim shall be considered monolith for the purpose of the law of inheritance and will. This principle is rooted in the texts of the Qur'anic verses and Prophetic traditions which prescribe shares in inheritance for various heirs from "what the deceased has left".[18] The phrase used in such verses *ma-taraka* is general, which – as elaborated in discussions of principles of interpretation (*qawa'id usuliyyah*) – conveys the meaning of generality definitively[19] and thus includes all the property of the deceased wherever it may be.

Muhammad Amin Ibn 'Abidin al-Shami (d. 1252 AH/1836 CE), the famous Hanafi jurist whose *Radd al-Muhtar* has been one of the major sources for courts in the sub-continent explains that the rule about non-application of the law of inheritance on property in foreign territory is not applicable to the property of Muslims. He cites earlier precedents of the jurists declaring that if a Muslim trader or prisoner dies in foreign territory and leaves property there, it shall be inherited by his heirs in Muslim territory.[20]

Will As Exception:

Muslim jurists generally hold that before revelation of the verses about inheritance, will was made obligatory on Muslims as per the following verse of the Qur'an:

> "It is prescribed for you, when one of you approaches death, if he leaves wealth, that he bequeath unto parents and near relatives in kindness. [This is] a duty for all those who ward off [evil]."[21]

However later when the verses about inheritance were revealed,[22] the Prophet (peace be on him) declared:

> "Lo! Allah has given everyone his due right. Hence, no bequest for any heir."[23]

Thenceforth, bequest in favor of an heir became prohibited. Even for non-heirs, the Prophet (peace be on him) put the restriction of one-third of the total property. Thus, the Companion Sa'd (Allah be pleased with him) narrates:

> The Prophet came to visit me when I was in Makkah. I said: "O Messenger of Allah, shall I bequeath all my money?" He said: "No." I said: "One-half?" He said: "No." I said: "One-third?" He said: "[You can bequeath] one-third, and one-third is a lot. If you leave your heirs independent of means, it is better than if you leave them poor and holding out their hands to people."[24]

These verses and traditions create an immutable right for heirs of the deceased which being the right of God, cannot be altered through will. Therefore, the jurists hold that will made in favor of an heir, or made in favor of a non-heir but in excess of one-third, is invalid unless and to the extent explicitly permitted by the heirs. However, an heir can totally or partially relinquish her/his right only and her/his decision does not bind other heirs. Thus, Imam 'Ali b. Abi Bakr al-Marghinani (d. 593 AH/1197 CE), author of the famous Hanafi manual *al-Hidayah* which has been the major source of Muslim Personal Law in the sub-continent, says:

> The prohibition [of will in favor of an heir or in excess of one-third] is because of the right of the heirs. Hence, it will be valid if they allow it. And if some of them allow it and others do not, it will be valid only against the one allowing it in respect of his share because he has

> authority over his share only; and it will be invalid for the right of the one who rejected it.[25]

He further declares that the permission shall be valid only if it is made after the death of the propositus.[26] Thus, even if an heir grants permission at the time of the bequest, it has no legal effect.[27] Moreover, those granting permission must have legal capacity for it, i.e., they must be major and sane at the time of granting permission.[28]

For the purpose of the operation of these rules, it is important to consider if a person was an heir at the time of the death of the propositus. If at that time he is not entitled to inherit, the bequest will be valid. On the other hand, if at the time of the bequest he was not entitled to inherit but he became entitled at the time of the death of the propositus, the bequest shall not be enforced, unless permitted by other heirs.[29]

Gift in Mortal Illness[30]:

Because the God-given rights of the heirs are sacrosanct and inalienable, the jurists also hold that a transaction made by a person after they apprehend death is considered to be suspicious and if they violate or restrict to the rights of the heirs they are invalid. Thus, if a person divorces his wife and then dies while she is observing the waiting period, the divorce is held invalid because he intended to nullify a God-given right of hers.[31] On the same principle, gifts made in mortal illness are assigned the status of bequests.[32] Thus, a gift made to an heir is invalid, unless permitted by the other heirs.[33] Similarly, a gift made to a non-heir is valid only up to the extent of one-third of the total property of the deceased.[34]

Like bequest, for the purpose of gifts in mortal illness also it is important to consider whether or not the donee is entitled to inherit at the time of the death of the propositus. Thus, if a gift is made in mortal illness in favor of a person who at the time of the death of the donor is entitled to inherit him, the gift shall be invalid.[35]

What about acknowledgement of debt during mortal illness for an heir? If at the time of the acknowledgement of debt, he was entitled to inherit, the acknowledgement shall be deemed a gift in mortal illness attracting the rules of bequest and thus shall be considered invalid.[36]

As for what constitutes mortal illness, it has been succinctly explained in the ALA Opinion. Suffice it is to say that the four-point criterion mentioned in *Sardar Begum v Iqbal Ahmad*, 1986 CLC 1151, is based on the principles of the Shari'ah as expounded by the Hanafi jurists. It is also well established that it is not essential that the person should have died in one year after having contacted the said illness and that what actually matters is apprehension of death. Professor Imran Ahsan Khan Nyazee (b. 1945), an authority on Islamic law and jurisprudence, gives the summary of the rules about death-illness in the following words:

> *Marad al-mawt* called death illness or terminal illness, is in reality "a state of mind" more than it is a real illness. It is a condition in which the mind of a sick person is dominated by the fact that he will die because of his illness. It is of no consequence whether the person actually dies from this illness or from something else. The basis for giving it importance is that in such a state the person may undertake rash or irrational actions that may affect the rights of

> persons who have a future interest in his property. In this state of mind, the person is also likely to come under the influence of one or more persons who are very close to him at that time, either physically or emotionally.[37]

Finally, as the rights of the heirs are sacrosanct and inalienable, in case of a dispute between the heirs about the validity of a transaction of the propositus affecting the right of his heir after his death, the burden of proving the validity of such a transaction lies on the one who claims that the propositus was healthy and was not suffering from mortal illness when he made this transaction. Thus, Zayn al-Din b. Ibrahim Ibn Nujaym (d. 970 AH/1563 CE), a leading Hanafi jurist who wrote a detailed compendium on the general principles and maxims of the Shari'ah, first mentions the principle that "a thing is attributed to its nearest time," and then mentions among the examples of this principle:

> If a person acknowledges debt for an heir and then dies:
> If the one for whom the debt is acknowledged asserts that he acknowledged the debt when he was healthy, but the other heirs say that he was suffering from mortal illness at that time, the statement of the heirs shall be accepted and the burden of proof lies on the one who claims validity of the acknowledgement of debt; however, if instead of presenting proof, he seeks denial on oath by the other heirs, he may do so.[38]

Hence, in case of a dispute among the heirs about the validity of the gifts and acknowledgements, the first presumption is that they were made in mortal illness and hence invalid and the burden of proving their validity lies on the one who claims that they were made when the propositus was healthy.

Shari'ah Principles on Gifts

After elaborating the fundamental rules and principles of the Shari'ah about inheritance and wills, it is high time now to discuss some relevant rules and principles about gifts so as to have a complete picture of the legal regime applicable to the present case.

Gift and Charity:

Gift initially is deemed an act of charity, though it may end up as exchange.[39] Because one cannot be compelled to do charity, the donor cannot be compelled to transfer possession of the property to the donee and he can retract from gift before transferring possession. Moreover, even after transferring possession, he can retract from it so long as it remains an act of charity, i.e., so long as the donee does not give the donor something in return of, and as consideration of, the gift.[40]

Exception from this latter rule is in the case of a gift to spouse or to those relatives who are in the prohibited degree.[41] Gift in these cases is deemed part of the general virtue of taking care of relatives, which attracts reward from God. Thus, it is presumed that the donor gifted the property to his spouse or other near-relative for pleasing God and that such reward becomes its counter-value.[42]

Gift and Sale:

As a result of gift, ownership immediately transfers to the donee, in much the same way as it immediately transfers to the buyer after a contract of sale. The Shari'ah does not treat a promise to gift as gift, as it does not deem an agreement to sell as sale.[43] Gift, like sale, is a contract that is incomplete without acceptance

from the other party and this acceptance must be made in the session of the contract, i.e., when the offer was made.[44]

What distinguishes gift from sale is that sale completes with acceptance, but gift remains incomplete till possession is transferred to the donee. Thus, gift comes into existence by mere offer while sale comes into existence by offer and acceptance,[45] but ownership is not established unless the transfer of possession completes. Imam Sarakhsi is explicit on this point:

> Ownership is not established by mere contract unless possession is transferred.[46]

Imam Marghinani, the author of *Hidayah*, summarizes the principle by declaring that gift becomes valid by offer, acceptance and possession.[47]

Possession after Gift:

The jurists rely on two important precedents of the two successors of the Prophet, peace be on him, for declaring that transfer of possession is essential for completion of gift.

Thus, Abu Bakr (God be pleased with him) on his death-bed told ‘Aishah (God be pleased with her) that he had gifted her some property of which she did not get possession and that it would be, therefore, treated as the property of all heirs.[48] Similarly, ‘Umar (God be pleased with him) issued a declaration to the effect that if the donor before his death did not transfer possession to the donee, the gift would be deemed nullified and the property would go to all heirs.[49] The following principle emerges from these precedents:

> Before possession is transferred to the donee, the gifted property remains in the ownership of the donor.[50]

Conditions for the Validity of Possession:

The jurists mention the following essential conditions for the validity of possession:

1. That possession is transferred by the explicit or implied permission of the donor.[51] In case of implied permission, donor has to be present at the time of the transfer of possession.[52]
2. That the gifted property is not mixed with, or does not contain, some other property which has not been gifted.[53] Significantly, for this purpose, the law considers the time of taking possession and not the time of the concluding the contract.[54]
3. That the one taking possession had the legal capacity for taking possession, i.e., he had reached the age of discretion.[55]

References

1. See for details: Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence* (Islamabad: Advanced Legal Studies Institute, 2012), 219-222.
2. See below for more details.
3. Details are given below.
4. Qur’an, 4:11-12. In these verses, this phrase occurs four times.

5. That is to say, in favor of non-heirs and that too up to the extent of one-third of the estate.
6. Shahbaz Ahmad Cheema, *Islamic Law of Inheritance: Practices in Pakistan* (Islmabad: Shariah Academy, 2017), 34-35.
7. Ibid.
8. Ibid.
9. See below.
10. Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1994), 115-116. See for more details: Imran Ahsan Khan Nyazee, "Islamic Law and Human Rights", *Islamabad Law Review*, 1:1-2 (2003), 13-63.
11. Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Usul al-Sarakhsi* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1993), 2:289.
12. 'Ala' al-Din, Abu Bakr b. Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, eds. 'Ali al-Mu'awwad and 'Adil 'Abd al-Mawjud (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), 9:177.
13. Qur'an, 4:13-14. Translation of the Qur'anic verses have been taken from Muhammad Marmaduke Pikthall. However, slight modifications have been made on the basis of my personal understanding of the text.
14. See for details: Muhammad Mushtaq Ahmad, "The Notions of Dar al-Harb and Dar al-Islam in Islamic Jurisprudence with Special Reference to the Hanafi School," *Islamic Studies* 47:1 (2008), 5-37.
15. PLD 1981 SC 120, at 122.
16. Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *al-Mabsut* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), 8:116.
17. Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Sharh al-Siyar al-Kabir* (Bierut: Dar al-Kutub al-'Ilmiyyah, 1997), 5: 375. This may be compare with the principle of 'active nationality.' See for details: Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routlege, 1997), 110-111.
18. See, for instance, Qur'an, 4:11-12 and 176.
19. *Usul al-Sarakhsi*, 1:132-140.
20. Muhammad Amin. B. Abidin al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar* (Beirut: Dar al-Fikr, 1992), 6:768.
21. Qur'an, 2:180.
22. Abu 'l-Hasan Ali b. Ahmad al-Wahidi, *Asbab Nuzul al-Qur'an* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1991), 148-150.
23. *Sunan Abi Dawud*, Book of Bequests, Chapter on What Has Come about Bequest for Heir.
24. *Sunan al-Nasa'i*, Book of Bequests, Chapter on Bequeathing One-third.

25 Ali b. Abi Bakr al-Marghiniani, *al-Hidayah fi Sharh Bidayat al-Mubtadi* (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.), 4:513.

26. Ibid., 4:514.
27. Ibid.
28. Ibid.
29. Ibid.
30. Rules and principles about gift will be explained in detail below. In this section, I am only focusing on gifts in mortal illness because they attract the rules of bequest.
31. Ibid., 2:151.
32. Ibid., 4:514.
33. Ibid.
34. Ibid.

35. Ibid.
36.. Ibid.
37. Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Islamabad: Shariah Academy, 2019), 281.
38. Zyan al-Din b. Ibrahim Ibn Nujaym, *al-Ashbah wa 'l-Naza'ir 'ala Madhhab Abi Hanifah al-Nu'man* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1999), 55.
39. In other words, in the beginning it is a unilateral declaration, but in the end it may become a bilateral agreement when the donee reciprocates the gift. Hence, it shares some features of *'ariyah* (commodate-loan) which can be terminated at will, as well as some features of exchange or sale. See Section 4.2 below.
40. Kasani, 8:105 and 116-117.
41. Ibid, 131-134.
42. Ibid.
43. Ibid., 87.
44. Ibid., 84-85.
45. Ibid.
46. Sarakhsi, *al-Mabsut*, 12:47.
47. Marghinani, *al-HIdayah*, 3:222.
48. Kasani, *Bada'i' al-Sana'i'*, 8:98.
49. Ibid., 8:99.
50. Ibid.
51. Ibid. 106-107.
52. Ibid., 107.
53. Ibid., 108-109. The jurists generally discuss the example of the gift of a house without luggage in that house. They hold that the possession will be valid only when the luggage is removed and the gifted house is left to the donee who enters there like an owner.
54. Ibid., 109.
55. Ibid.