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Rules Concerning the Heritage

The Heritage

The heritage (al-tarikah) comprises the following things:

1. That which the deceased owned before his death in the form of:

a) tangible property,

b) debts,

c) any pecuniary right, e.g. the right consequent to *tahjir* (demarcation of ownerless vacant land with an intention of cultivating it), where he intends to cultivate ownerless vacant land and demarcates it by constructing a wall or something of the kind, thus acquiring a right to cultivate it in preference to others; or an option (*haqq al-khayar*) in a contract of sale; or the right of pre-emption; or the right of retaliation (*qisas*) for murder or injury, where he is a guardian of the victim (e.g. if a person kills his son and then dies before retaliation, causing the right of *qisas* to change into a pecuniary right payable from the murderer's estate, exactly like a debt).

2. That which the decedent comes to own at his death, e.g. compensation for unintentional homicide (*al-qatl al-khata'*), where the heirs opt for compensation instead of *qisas*. The rule applicable to this compensation is the one applicable to all other properties, and all those entitled to inherit, including husband and wife, will inherit from it.[1]

3. That which the decedent comes to own after his death, e.g. an animal caught in a net that he had placed in his life, and similarly where he is a debtor and his creditor relinquishes the debt after his death or someone volunteers to pay it for him. Also, if an offender mutilates his body after his death and amputates his hand or leg, compensation will be taken from him. All these will be included in the heritage.[2]

Deductions from the Heritage

Different types of deductions are made from the heritage. Some of them are deducted from only a third of the heritage, and discussion regarding them has preceded in the chapter on wills. Some deductions are made from the whole heritage, and they too are of different types. Hence, if the heritage suffices, they will be completely met, and what remains of it after these deductions and the execution of the will, will be for the heirs. All the schools concur on this.

If the *tarikah* falls short of meeting these deductions, the more important among them will be given precedence over those of lesser importance. If anything remains after the preferred deductions are made, the next in order will follow; otherwise only the deductions of higher preference will be covered. The schools differ regarding the order of preference of these deductions.

The Imamiyyah state: The first deduction before any other thing, is to meet the *wajib* funeral expenses, such as expenses of ablution (*al-ghusl*), shrouding, carrying the body and digging the grave, if required, irrespective of whether the decedent has made a will to this effect or not. Therefore, funeral expenses, according to them, are prior to debts, irrespective of the debts being related to the fulfilment of religious duties (*haqq Allah*) or to creditors (*haqq al-nas*). They bring proof from the tradition narrated by al-Sakuni from al-'Imam Ja'far al-Sadiq ('a):

أَوَّلُ شَيْءٍ يُبْدَأُ بِهِ مِنْ المَالِ الكفن، ثُمَّ الدَّينُ، ثُمَّ الوَصِيَّةُ، ثُمَّ المِيرَاثُ

The first thing which is deducted from the decedent's estate is the shroud (*funeral expenses*), *then debt, then the will, and then the inheritance.*

The Ima miyyah fuqaha' differ among themselves regarding the case where a creditor has a right over the estate itself, such as where the decedent dies after mortgaging his property with a pledgee, the property being all that he owned. Here, a group of fuqaha' give the funeral expenses preference over the right of the pledgee, because of the general nature of the traditions which include the above-mentioned tradition of al-Sakuni in which no difference has been made between pledged and unpledged properties.

Other fuqaha' give precedence to the right of the pledgee because the owner of the pledged property is forbidden by the Shari'ah to exercise his rights of ownership, and that which is forbidden by the Shari'ah is like that which is forbidden by reason.[3]

After meeting the funeral expenses, the repayment of debts will start, irrespective of their being *haqq Allah* or *haqq al-nas*, such as unpaid *khums* and *zakat*, pecuniary atonements (*kaffarat*), the returning of the *mazalim*,[4] the unperformed obligatory Hajj, and other similar religious and non-religious liabilities. All these debts are in a single category.

Therefore, if all of them cannot be completely met from the estate, they will be covered pro rata like the liabilities of an insolvent person,[5] allowing no exception to this except *khums* and *zakat*, provided these relate to the actual items of t heir incidence present, in which case the two will be preferred over other debts. But if these two are due (without the items of incidence being present), they will be treated as all other debts.

The four Sunni schools, along with the Imamiyyah, concur that funeral expenses are preferred over the debts payable from the estate before death. The four schools then differ among themselves in giving precedence to funeral expenses over debts relating to the heritage, such as an article which the owner pledged before his death. The Hanafi, the Shafi'I and the Maliki schools say: Those claims which are related to specific parts of the heritage will be given precedence over funeral expenses (*hashiyat al-Bajuri 'ala Sharh Ibn Qasim,* vol. 1, *fasl al-mayyit,* and Abu Zuhra's *al-Mirath 'inda al-Ja'fariyyah,* p. 40, 1955).

The Hanbalis observe: Funeral expenses will be preferred over all other claims and debts including a pledge, penal damages, etc. (*al-Tanqih fi fiqh al-Hanabilah*, p. 71, al-Matba'at al-Salafiyyah).

In short, according to all the schools, the funeral expenses have precedence over debts unrelated to specific items of the heritage, and the Hanafi, the Shafi'I and the Maliki schools give priority to debts related to specific items of the heritage over funeral expenses, while the Hanbali school gives priority to funeral expenses in this case. Some Imami legists favour the view of the three schools, and others concur with the Hanbalis.

Heirs and the Decedent's Heritage

The schools concur that the heritage devolves on the heirs immediately after the death if there is no debt or will involved. They also concur that the remainder of the heritage exceeding debts and bequests stands transferred to the heirs. The schools differ whether that part of the heritage covered by debts and bequests will be considered transferred to the heirs or not.

The Hanafis state: The part which equals the value of debt will not be included in the property of the heirs. Consequently, if the complete estate is covered by debt, the heirs will not own anything from it. But they have a right to free the estate from the creditors by paying them their claim on the estate. If the estate is not totally covered by debt, the heirs will own the remainder.

The Shafi'is and the majority of Hanbali legists say: The heirs will come to own the indebted part of the estate, irrespective of whether the debt covers the whole estate or only a part of it. However, the debt will relate to the whole estate and the estate will be liable for it. (Abu Zuhrah, *al-Mirath 'inda al-Ja'fariyyah*).

The Imamiyyah differ among themselves on the issue; the majority of them hold the opinion that the

estate will be transferred to the heirs whether totally covered by debts or not. The debts will be linked to it in one of the various ways, like a claim of pledge, or like the claim of damages resulting from the crime of a slave, or linked directly in a way not resembling any of these two ways. In any case, a debt will not hinder the actual act of inheritance, although it hinders the right of disposal in regard to that which is covered by the debt. This opinion is close to the Shafi'i view. (*al-Jawahir and al-Masalik, bab al-mirath*)

The result of the difference of opinion appears in the increase in the estate which takes place between the time of death and the time of repayment of the debt. According to the opinion of the Shafi'is, the Hanbalis and most of the Imami legists, the increase belongs to the heirs and they will dispose it without any hindrance from the creditors and others. But according to the Hanafi view, the increase will be subject to the estate, being linked to the debts payable from it.

1. The author of al-Jawahir says: The preponderant (mashhur) opinion among the Imamiyyah legists is that those related through the mother do not inherit the compensation for involuntary homicide. As to the right to qisas it is inherited by all those who inherit the heritage excepting the husband and the wife, who, however, will inherit the compensation in lieu of qisas.
2. Al-Shaykh Ahmad Kashif al-Ghita, Safinat al-najat, bab al-wasaya.
3. This is the proof (dalil) mentioned by al-Sayyid al-Hakim in al-Mustamsak, bab kafan al-mayyit. Al-Shaykh Muhammad Abu Zuhrah, in al-Mirath 'inda al-Ja'fariyyah, writes: It is obvious in this situation that the right of the creditors relates to the property itself and supersedes all other rights to that property. Through this observation, the Shaykh attributes to the Imamiyyah a consensus concerning the preference of the right of the pledger over funeral expenses, while there is a difference of opinion among them on this issue, and neither of the two differing opinions is preponderant to justify the attribution of consensus.
4. There is a difference between the mazalim and usurped (maghasib) properties. The mazalim are those in which haram and halal wealth has been mixed and the owner is unable to discern due to his ignorance, while the maghasib properties have a known owner. The mazalim also differ from those properties whose owners are not known (majhul al-malik), because in the latter the ignorance is concerning the property itself and its being mixed with other property is not necessary. The rule for the mazalim is to give them away as charity (sadaqah) on behalf of its (real) owner when there is no hope of finding him.
5. Al-Sayyid al-Hakim in Mustamsak al-'Urwah, vol. VII, mas'alah 83, says: This--i.e. pro rata distribution--is customary among us, and this is what is required by the principle of not preferring something without a cause for such preference (tarjih bila murajjih) as well as the tradition of the Prophet (s): "The debt due to God is better entitled to repayment," is understood not to imply a difference (between the debts due to God and the debts due to people); rather it solely explains that it is wajib to fulfil haqq Allah and that neglecting it is not permissible.

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