



THE LEGAL AND JURISPRUDENTIAL FOUNDATION OF THE STATE'S RIGHT TO INHERITANCE-AN ANALYTICAL STUDY IN IRAQI LAW, COMPARATIVE LAW, AND IN LIGHT OF ISLAMIC SHARIA AND CONTEMPORARY SCHOLARS' OPINIONS

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Article history:	Abstract:
Received: 20 th October 2024 Accepted: 11 th November 2024	This research presents an analytical study on the State's entitlement to inheritance, encompassing not only financial matters but also, in certain circumstances, the deceased's body. It offers a scholarly exploration of the issue through the lens of Iraqi and Egyptian laws, alongside the perspectives of Islamic jurists, particularly contemporary opinions. The study aims to thoroughly examine the details of this topic, propose jurisprudential solutions to modern challenges influenced by religious beliefs on financial transactions, and identify the most precise views and trends while diagnosing legislative gaps.
Keywords:	

INTRODUCTION

First: Research Topic

There is no doubt that Islamic Sharia stands out for its precedence over other legal systems in regulating the issue of inheritance succession, whether the heir is the state or any other entity. Inheritance, as defined by Sharia, is the transfer of the deceased's estate to the heir by legal decree, requiring no acceptance from the heir, as it inherently avoids any harm that could result from such succession⁽¹⁾.

One of the most remarkable aspects of Islamic Sharia is its establishment of a unique framework for inheritance beyond the conventional causes of succession⁽²⁾, such as marriage or kinship. When no heirs are present, there exists an entity entitled to the deceased's estate, inheriting it without any familial or marital connection to the deceased. What is acquired in this manner is not regarded as inheritance but as entitlement, which materializes in the transfer of the estate to the public treasury (Bayt al-Mal).

This topic is particularly significant because Islamic Sharia has thoroughly addressed and regulated its principles. Moreover, personal status laws derived from Sharia have incorporated its rulings into modern legislation. While the State's right to inheritance is primarily associated with financial matters, such as inheriting assets, it also extends to non-financial matters, most notably the State's authority to manage the deceased's body.

Second: Objectives of the Research

The study of the topic "The State's Right to Inheritance" seeks to achieve several key objectives, including:

Establishing a scientific foundation that addresses the state's right to inherit from the deceased, encompassing all its aspects, given the scarcity of sources and research directly and independently addressing this topic.

Defining the concept of "disability" as it pertains to legal issues, focusing on the legal dimension to clarify which type of disability raises challenges in formal legal acts.

Exploring the implications of the topic from both Islamic jurisprudential and legislative perspectives, shedding light on this complex issue.

¹) Dr. Ahmed Al-Kubaisi, Personal Status in Jurisprudence, Law, and Judiciary, Vol. 2, Al-Irshad Press, Baghdad, 1972, p. 87.

²) Lawyer Hadi Aziz and Judge Abbas Al-Saadi, Al-Mabsout in Calculating the Inheritance Issue, Baghdad, 2002, p. 16.

Proposing legislative measures aimed at clarifying the financial aspects of the State's right to the deceased's estate, as well as the non-financial aspects, such as the management of the deceased's body.

Ensuring that these legislative measures reflect the true realities that the study aims to address. This requires legislative intervention to harmonize related laws with the opinions of Islamic jurists from various schools of thought, especially contemporary scholars. Additionally, the research emphasizes the need for in-depth social studies, not merely comparative legal studies, to capture the broader societal implications of this issue.

Third: Reasons for Choosing the Research

A combination of reasons motivated the selection of this topic as the focus of our study. Among the most significant are:

The lack of specialized studies on this topic, particularly regarding the positions of prominent Islamic jurists, with an emphasis on the views of contemporary scholars.

The scarcity of legal studies addressing this topic. Despite not being a novel issue, it has not received the necessary attention within relevant laws. Many legislations have overlooked it, and those that addressed it failed to provide it the level of attention and depth it deserves.

The partial treatment of the topic in various legislations, which requires analytical or critical examination. These laws often include interpretations or gaps that deserve further scrutiny concerning the scientific aspects of the topic under discussion.

Fourth: Research Hypothesis

The research seeks to uncover the foundations that underpin the legislative and legal framework for the State's right to inherit from the deceased. It also aims to highlight the differences in jurisprudential perspectives and identify gaps within the relevant legislative texts.

Fifth: Research Questions

Every research project revolves around a specific issue that the researcher seeks to resolve. The core problem in "The Legal and Jurisprudential Foundation of the State's Right to Inheritance" can be addressed through the following questions:

What is the stance of legislation on the topic?

The problem becomes more detailed when identifying the many gaps in the legislative treatment of this issue by the Iraqi legislator. Does the Iraqi legal framework adequately balance the State's rights with those of the deceased's relatives?

Are the views of Islamic jurists, particularly contemporary scholars, aligned with the current context?

Furthermore, has Islamic jurisprudence provided a more comprehensive understanding of the issue compared to secular legislation?

Does an institution equivalent to Bayt al-Mal (the treasury of Muslims) exist today, and can it be subjected to the corresponding Islamic legal rulings?

Sixth: Research Methodology and Scope

In this study, the researcher addressed the topic by employing two key methodologies:

Inductive Comparative Methodology:

This approach was applied horizontally, allowing for comparisons between legal and jurisprudential systems whenever possible, using the available laws, regulations, and instructions relevant to the topic.

Foundational Analysis Methodology:

This method involved presenting information and facts, then comparing and analyzing them systematically. The objective was to derive conclusions that contribute positively to the research topic, ensuring a deeper understanding of the subject. The combination of these methodologies enabled a comprehensive examination of the subject, providing insights that bridge legal and jurisprudential perspectives.

Seventh: Research Structure

The researcher primarily focused on Iraqi and Egyptian legislation, while also referencing the legislative positions of other Arab countries (such as Kuwait, Palestine, Syria, Qatar, Algeria, and Lebanon) whenever possible. Adopting an academic approach, the study was divided into the following main sections:

Chapter One: The State's Right to Inherit Financial Matters

Section One: The jurisprudential foundation of the State's financial right to inheritance.

Section Two: The legal foundation of the State's financial right to inheritance.

Chapter Two: The State's Right to Inherit Non-Financial Matters

Section One: The jurisprudential foundation of the State's right concerning the deceased's body.

Section Two: The legal foundation of the State's right concerning the deceased's body.

This structured approach enabled a thorough exploration of both financial and non-financial aspects of the state's right to inheritance. It provides a balance between theoretical underpinnings and practical legislative considerations, ensuring the topic is addressed comprehensively.

To ensure a comprehensive understanding of all aspects of the topic, it was deemed appropriate to precede the two main chapters with a preface. This preface aims to review and clarify some fundamental concepts related to the topic before delving into its specific rulings and detailed discussions.

First Chapter: This chapter addresses the jurisprudential and legal foundations of the State's right to inherit financial matters, divided into three sections as follows:

First Section: The jurisprudential foundation of the State's financial right to inheritance.

Second Section: The legal foundation of the State's financial right to inheritance.

Second Chapter: This chapter focuses on the jurisprudential and legal foundations of the State's right to inherit non-financial matters, specifically the State's authority over the deceased's body. It is divided as follows:

First Section: The jurisprudential foundation of the State's right concerning the deceased's body.

Second Section: The legal foundation of the State's right concerning the deceased's body.

Conclusion

Introduction

It is essential to clarify some fundamental principles and general concepts related to the topic before addressing the jurisprudential and legal foundations of the State's right to inheritance.

At the outset, Muslims established the system of the Caliphate, an administrative institution with a political nature, serving as the central authority of the state. This institution, developed by the Arabs, aimed to manage their affairs and address the challenges they faced while organizing their nascent state⁽¹⁾.

As the Islamic state expanded its territories, becoming vast and prosperous, the need arose for an institution to manage its abundant and dormant wealth. This led to the establishment of what was called Bayt al-Mal (the Treasury) or Bayt Mal Allah (the Treasury of Allah). In the early Islamic era, this term referred to the physical place where the public funds of the Islamic state, particularly movable assets, were preserved⁽²⁾.

Bayt al-Mal (the Treasury) is considered one of the rightful beneficiaries of inheritance. It receives the wealth of a deceased person who has no heirs and places it under the stewardship of an authority responsible for its lawful disbursement. If none of the eligible inheritors are present, the estate is transferred to Bayt al-Mal as unclaimed property, becoming a collective asset for all Muslims and used for legitimate expenditures as prescribed by Islamic law⁽³⁾.

This transfer does not occur through the traditional concept of inheritance, as all Muslims are considered brothers ("Indeed, the believers are brothers" – Quran, 49:10). The funds are allocated to Bayt al-Mal not through inheritance rules but as collective wealth for the benefit of the Muslim community. Evidence for this is found in the practice where, if a Muslim has no heirs, their wealth is given to Bayt al-Mal, despite there being no inheritance rights for one Muslim over another. Furthermore, allocations from this wealth are distributed equally among men and women without discrimination, unlike the rules of inheritance, where such distinctions exist.

The funds of Bayt al-Mal are not disbursed except in accordance with specific and strict rules and principles designed to prevent the loss or misuse of wealth. In many ways, Bayt al-Mal resembles modern-day ministries of finance or central banks in contemporary states.

Bayt al-Mal has various sources of revenue, the most significant of which include:

Zakat and charitable contributions.

Jizya (a tax levied on non-Muslim citizens of the Islamic state).

Kharaj (a land tax).

Spoils of war (ghanima).

Khums (a one-fifth tax on specific revenues).

The share of zakat for specific groups.

Wealth confiscated from apostates.

Assets left behind by protected non-Muslims (dhimmis).

Gifts, confiscations, fines, taxes, and other levies.

Inheritance (mawarith) is also considered a source of Bayt al-Mal in its modern equivalent as the state treasury.

¹) (1) Dr. Khasha' Al-Mu'adidi, Studies in the History of Arab Civilization, printed at the expense of the University of Baghdad, 1979, p. 64.

²) The treasury is defined as the house of the Muslims' money; it is a financial system that Islam established during the era of the Noble Prophet and the Rightly-Guided Caliphs. It is more clearly: (the institution that supervises the money that comes in and goes out of it for various expenditures; to be under the hand of the Caliph or governor, who places it in what God has commanded it to be placed in a way that improves the affairs of the nation in peace and war.

³) Muhammad Zaid Al-Abyani Bek, Explanation of the Sharia Rulings on Personal Status, Vol. 3, Al-Nahda Library, Baghdad, p. 26.

Inheritance, in general, refers to the wealth left behind by a deceased individual, referred to as the estate (tarika). Linguistically, the term tarika comes from the root word to leave behind) and denotes what a person leaves after their death. It is synonymous with the concept of inheritance.

In jurisprudential terminology, some Muslim jurists—particularly from the Maliki, Shafi'i, and Hanbali schools—define the tarika as everything a person leaves behind after death, encompassing both tangible wealth and financial rights. This applies regardless of whether the heirs are direct inheritors or others, and whether the deceased was in debt or not. They base this understanding on the Prophetic saying:

"Whoever leaves wealth or a right, it is for their heirs; and whoever leaves dependents or debt, it is for me to settle."

In jurisprudential terminology, some Muslim scholars, including those from the Maliki, Shafi'i, and Hanbali schools of thought, have defined the tarika (inheritance or estate) as encompassing all that a person leaves behind after death, including both tangible assets and financial rights. This definition applies regardless of whether the rightful recipient is an heir or a non-heir and irrespective of whether the deceased was in debt or not.

This understanding is supported by the saying of the Prophet Muhammad (peace be upon him):

"Whoever leaves wealth or rights, they belong to their heirs; and whoever leaves dependents or debts, they are my responsibility."

This hadith underscores the inclusiveness of the inheritance concept in Islamic jurisprudence, reflecting its meticulous consideration of both financial rights and obligations of the deceased.

Another group of scholars, such as those of the Zahiri school, have defined the tarika (inheritance estate) as everything the deceased leaves behind in terms of assets and financial rights, provided these are entirely free from any claims or rights of others. Based on this definition, items subject to the rights of others are not considered part of the inheritance estate.

For example, mortgaged assets or items purchased by the deceased during their lifetime but not yet delivered or paid for are excluded from the estate. This exclusion is due to the third-party rights involved, such as those of the mortgagee or the seller, which were established during the deceased's lifetime.

This perspective emphasizes the necessity of distinguishing between assets that belong wholly to the deceased and those encumbered by others' claims, ensuring that such obligations are settled before the distribution of the estate among the heirs.

As for the devolution of inheritance to Bayt al-Mal (the State), whether the inheritance pertains to the deceased's assets or body, Bayt al-Mal is not considered an heir in the strict sense. Instead, it takes possession of the estate in cases where no heirs exist. This devolution is based on the principle that the deceased's estate has no rightful heir. Some scholars even view such an estate as lost property (ḍawā' i'), labeling it as vacant rather than inherited wealth.

Consequently, unclaimed estates revert to Bayt al-Mal. However, Bayt al-Mal is not classified as an heir under Islamic law, which strictly defines the categories of heirs and does not permit deviations from these stipulations. The deceased's estate is subject to three types of rights:

Rights prioritized over the heirs' claims: These include debts owed by the deceased and funeral expenses.

Rights of the heirs: These are distributed according to the shares stipulated by Islamic law.

Rights of non-heirs: This category is the focus of this discussion and pertains to the estate that reverts to entities other than the heirs (whether they are holders of fixed shares or close relatives). In such cases, the estate is not inherited but is instead transferred to Bayt al-Mal.

The mechanism for Bayt al-Mal to acquire the estate is not through inheritance but through a distinct legal process. This process aligns with the principles of company liquidation and the procedures of the relevant court, which in this case is the Personal Status Court. These procedures ensure the proper allocation of unclaimed estates to Bayt al-Mal, reinforcing its role as the custodian of unclaimed assets within the framework of Islamic law.

There is no doubt that the same rights related to the estate, which must be fulfilled before any action is taken concerning the inheritance—such as the costs of washing, shrouding, and burying the deceased (the decedent)—also apply in cases where the state is entitled to the estate.

This means that before the estate reverts to the state or Bayt al-Mal, these preliminary obligations are fulfilled first. These include ensuring that the deceased is prepared for burial with dignity, all necessary expenses for the funeral are covered, and any debts or obligations owed by the deceased are settled. Only after these essential rights are addressed can the remaining estate be transferred to the state, ensuring compliance with both Islamic principles and legal norms.

Chapter One: The Legal Basis for the State's Right to Inherit Financial Assets

This chapter addresses the legal foundations that establish the State's entitlement to inherit the deceased's estate. The state is categorized under the group of non-heir beneficiaries. It is commonly known that there are two categories of individuals or entities entitled to the deceased's estate:

First Category:

This includes heirs who are entitled to inherit due to kinship or marital ties, referred to as "relation by blood or cause" under Islamic law.

Second Category:

This consists of non-heir beneficiaries, including individuals or entities with claims to the deceased's estate without any blood or marital ties. These beneficiaries may be entitled to a portion of the estate or its entirety. They include:

A person acknowledged by the deceased as kin.

A person or entity bequeathed the entire estate by the deceased.

The State Treasury (Bayt al-Mal).

This research focuses on the third entity, the State Treasury (Bayt al-Mal), which may claim the estate in the absence of legitimate heirs. The legal basis for the State's entitlement to the deceased's estate can be found in specific laws and legal principles. Moreover, the State's inheritance rights can extend to the wealth of Muslims as well as that of individuals who have renounced Islam.

Chapter Structure

This chapter is divided into two sections:

Section One: The Legal Basis for the State's Right to the Deceased's Estate.

This section examines the legal principles and statutes that underpin the State's entitlement to inherit from the deceased, particularly in the absence of heirs.

Section Two: Procedural Mechanisms Governing the State's Entitlement to the Estate.

This section explores the laws and legal frameworks that regulate the process through which the state claims an estate, including judicial procedures and administrative protocols.

By examining these aspects, this chapter provides a comprehensive understanding of the State's legal right to inherit financial assets under modern legal systems.

First Section: The Legal Basis for the State's Right to Inherit Financial Assets

The legal basis for the state's right to inheritance is determined based on the status of the deceased, whether they were a Muslim at the time of their death or had renounced Islam. Accordingly, this section is divided into two subsections:

First Subsection: Discussing the state's right to inherit the estate of the deceased if they died as a Muslim.

Second Subsection: Explaining the state's right to inherit the estate of the deceased if they died as an apostate from Islam.

First Subsection

The Case of the Deceased Being a Muslim

The perspectives of Muslim jurists vary significantly regarding the legal basis for the entitlement of the Bayt al-Mal (the public treasury) to inherit the estate of a deceased individual who has no heirs. Not only is there a lack of consensus among jurists about the principle of transferring an heirless estate to the Bayt al-Mal, but they also differ in characterizing the basis of this entitlement. Specifically, does the Bayt al-Mal inherit the estate as a rightful heir, or does it receive it as an entity entitled to unclaimed or ownerless property?

Accordingly, the opinions of jurists are divided into three main viewpoints as follows:

First Viewpoint:

Represented by jurists of the Maliki and Shafi'i schools, this perspective holds that if an estate has no rightful heirs, it passes to the Bayt al-Mal as an inheritor. This view is based on the principle that "the Bayt al-Mal inherits from those who have no heirs," given that the Bayt al-Mal fulfills the interests of Muslims. Thus, it serves as evidence of its entitlement to inherit the estate.

This viewpoint is supported by the Prophet Muhammad's (peace be upon him) saying:

"Whoever leaves wealth, it belongs to their heirs, and I am the heir of those who have no heirs"¹.

Based on this interpretation, the Prophet inherits from those who have no heirs in his capacity as the custodian of Muslims' welfare, which provides the basis for the Bayt al-Mal's entitlement to the estate as an heir².

Furthermore, the Maliki and Shafi'i jurists argue that if a deceased individual has no heirs, any bequest exceeding one-third of the estate is invalid. The validity of such a bequest is contingent on the consent of the heirs, and in this scenario, the Bayt al-Mal serves as the heir. Since the Bayt al-Mal represents the collective rights of all Muslims, no single entity can approve the bequest, rendering it void. This view has been firmly adopted by the majority of Shafi'i scholars and jurists from the Hijaz region³.

¹) Imam Muhammad bin Ali Al-Shawkani, Nail Al-Awtar min Asrar Muntaha Al-Akhbar, Vol. 6, 1st ed., edited by Muhammad Subhi bin Hassan Hallaq, Dar Ibn Al-Jawzi, Cairo, p. 63. Also see the position of the Shafi'i jurists in Nihayat Al-Muhtaj 11/6 and also Al-Muhadhdhab 32/2. And from the Maliki jurists see that great commentary with Al-Dasuqi's commentary 16/4. And from the Zahiri jurists see Al-Muhalla by Ibn Hazm Al-Zahiri 348/8.

²) Dr. Muhammad Youssef Hafni, previous source, p. 474.

³ Sheikh Muhammad Abdul Rahim Al-Kashki, The Estate and Related Rights, Dar Al-Ghadeer Printing, Baghdad, 1967, p. 166.)

However, later Shafi'i and Maliki jurists added that if the Bayt al-Mal is disorganized or nonfunctional, the estate should be allocated to the relatives of the deceased (dhu al-arham). This preference for relatives over the Bayt al-Mal is substantiated by the Qur'anic verse:

"And those of blood relationship are more entitled [to inheritance] in the decree of Allah" (Qur'an 8:75).¹(

Similarly, another verse states:

"For men is a share of what the parents and close relatives leave..." (Qur'an 4:7).²(

Additionally, the Prophet Muhammad (peace be upon him) said:

"The maternal uncle is the heir of one who has no heirs."

The disagreement primarily arises in cases where the claims of the Bayt al-Mal conflict with those of distant relatives (dhu al-arham). However, in the absence of such relatives, there is no dispute that the estate should go to the Bayt al-Mal if it is properly managed. If not, the estate should be directed to public interests.

Some scholars interpret the Prophet's saying, "The maternal uncle is the heir of one who has no heirs," in several ways. It may imply negation, meaning that no one else is entitled to the estate. Alternatively, it could refer to the maternal uncle as a legal inheritor or, in some cases, be understood metaphorically to refer to the ruler, who is sometimes called "the maternal uncle."³

Second Viewpoint

The Case Against Bayt al-Mal as an Heir

The second perspective, represented by jurists from the Hanafi and Hanbali schools, rejects the notion of Bayt al-Mal as an inheritor. Instead, they view the transfer of unclaimed estates to Bayt al-Mal as a means of managing "lost" or "ownerless" wealth, intended for the collective benefit of Muslims.

Key Arguments of the Hanafi and Hanbali Schools

Not an Inheritance: These jurists argue that if the estate transfer to Bayt al-Mal were inheritance, it would follow the principles of inheritance law. However, such estates are not subject to these rules.

Universal Allocation: Bayt al-Mal receives estates from both Muslims and non-Muslims without distinction, underscoring that the transfer is not based on inheritance but rather on the principle of serving the broader Muslim community.

Ownerless Property: The estate is regarded as ownerless wealth ("mal da'i") and is allocated to Bayt al-Mal to be utilized for public interests.

Rebuttal to the First Viewpoint

Criticism of the Prophetic Tradition: They question the reliability of the hadith, "I am the heir of those who have no heirs." Even if accepted as authentic, its intended meaning is interpreted differently. Rather than suggesting inheritance, the hadith signifies the Prophet's role as the custodian of Muslim affairs.

Distinction Between Heir and Custodian: The transfer to Bayt al-Mal is seen as a practical measure for public welfare rather than a legal inheritance.

Preference for Dhu al-Arham (Distant Relatives)

Hanafi and Hanbali jurists, like their Maliki and Shafi'i counterparts, advocate for allocating the estate to distant relatives (dhu al-arham) if they exist, based on the Qur'anic verse:

"And those bound by ties of blood are closer to one another in the Book of Allah..." (Qur'an 8:75).

If no such relatives exist, the estate then reverts to Bayt al-Mal. However, they emphasize that this transfer occurs only when Bayt al-Mal functions effectively as a legitimate institution for managing Muslim wealth.

Modern Perspective

Some contemporary scholars condition the transfer of estates to Bayt al-Mal on its proper organization and governance. In the absence of a functioning Bayt al-Mal, they recommend channeling such estates directly into public welfare projects.

Additional Considerations

Link to Public Interests: These jurists highlight that unclaimed estates contribute to public welfare through Bayt al-Mal as an extension of the principle of fairness, often cited as "the burden accompanies the benefit" ("al-ghurm bil-ghunm").

Support for Burial Costs: Given that Bayt al-Mal covers the funeral expenses of individuals without resources, it is considered equitable for such estates to revert to it.

This viewpoint underscores the administrative role of Bayt al-Mal as a manager of communal assets rather than as an heir in the legal sense.)⁴(

Third Viewpoint

Imami Jurists' Perspective

¹) Verse 75 of Surat Al-Anfal

²) Surah An-Nisa, verse 7

³) Narrated by Ahmad, Abu Dawood, Ibn Majah, and Al-Tirmidhi, and he authenticated it. Published on the website of Sheikh Al-Islam Ibn Al-Qayyim <https://www.ibnalqayem.net/>)

⁴) Quoted from Dr. Ahmed Farag Hassan and Dr. Mohamed Kamal El-Din Imam, The System of Inheritance, Wills and Endowments in Islamic Jurisprudence, Al-Halabi Legal Publications, Beirut, 2002, p. 330.

Imami jurists hold that estates without rightful claimants revert to the authority of the Imam. In the absence of the Imam, these estates are to be allocated to causes deemed appropriate by a just and qualified jurist ("mujtahid 'adil").¹(Summary of Juristic Opinions

While the aforementioned perspectives differ in their legal and theological reasoning regarding the entitlement of Bayt al-Mal to unclaimed estates, they converge on the principle that such estates ultimately fall under the jurisdiction of Bayt al-Mal. This entity is regarded as a legal and financial body representing the public treasury and entrusted with managing societal interests.

The varying opinions reflect different doctrinal emphases, yet they collectively underscore Bayt al-Mal's role as a custodian for wealth without a rightful owner, ensuring it serves the broader welfare of the community.

Second Subsection

The Legal Basis for the State's Right to the Estate of an Apostate

Islam upholds the principle of freedom of belief, prohibiting compulsion in religion, as affirmed in the Quran:

"And say, 'The truth is from your Lord, so whoever wills—let him believe; and whoever wills—let him disbelieve.'" (Surah Al-Kahf: 29)

However, Islam also holds apostates accountable, as apostasy is viewed as a deliberate rejection of truth after attaining conviction. Islam ensures individuals have ample opportunity to verify and solidify their belief before committing to the faith, leaving no justification for apostasy thereafter.

Definition of Apostasy)²(

Linguistically, apostasy refers to reverting or renouncing. Legally, it denotes a person abandoning Islam after embracing it. The conditions for valid apostasy include sound mind, adulthood, and voluntary choice. Apostasy must be established by the testimony of two just men before a judge, and the apostate must be offered the chance to repent and remove any doubts or misconceptions.

Legal Opinions on Apostate Estates

Muslim jurists have debated the disposition of an apostate's property after their apostasy. The primary issue is whether their estate reverts to their Muslim heirs, is transferred to the state treasury (Bayt al-Mal), or is inherited by adherents of their newly adopted religion. Three main schools of thought have emerged:

First Viewpoint

This perspective holds that the apostate's property becomes state property, as the apostate is considered akin to an enemy combatant due to their rejection of Islam. Consequently, their property, regardless of whether it was acquired before or after apostasy, is treated as fay' (spoils) and reverts to Bayt al-Mal.

Arguments Supporting This View:

Prophetic Traditions:

"A Muslim does not inherit from a disbeliever, nor does a disbeliever inherit from a Muslim."³(

"People of two different religions do not inherit from one another."⁴(

These narrations are cited by Shafi'i jurists, who apply them universally to all cases of apostasy, whether involving a generic apostate or a heretic.)⁵(

Position of the Malikis and Hanbalis:

According to the Maliki school, the apostate's property is transferred to Bayt al-Mal as spoils unless the apostate was a heretic (zindiq), in which case the property is inherited by their Muslim heirs.

If an apostate seeks to disinherit their heirs by declaring apostasy while terminally ill, their property is deemed an inheritance for their heirs.)⁶(

¹) The happy martyr Zayn al-Din bin Ali bin Ahmed bin Taqi al-Amili (the second martyr), Al-Rawdah al-Bahiyyah, an explanation of Al-Lum'ah al-Dimashqiyyah, Vol. 8, Dar Ihya al-Turath al-Arabi, Arab History Foundation, 1992, p. 143.

²) The word apostate in language means apostasy, which means returning, and in Islamic law it means severing Islam with the intention or word of disbelief or an action, whether he said it in mockery, stubbornness, or belief, and thus he leaves Islam, whether the one who left entered another religion or followed an atheist who has no religion, such as someone who embraced communism, for example, and its forms are apostasy by doubt, denial, emotions, words, actions, mockery, and disbelief by determination, hesitation, and abandonment. Muhammad Abu al-Layl, Apostasy, its punishment and controls in Islamic jurisprudence, published on the international information network on the website Arabic/http il// said. Org

³) Sahih Al-Bukhari, previous source, Vol. 8, p. 11

⁴) Abu al-Fadl Ahmad bin Ali bin Muhammad bin Ahmad bin Hajar al-Asqalani, Al-Jirmi's Summary of the Graduation of the Hadiths of the Great Al-Rafi'i, Vol. 3, 1st ed., Dar Al-Kutub Al-Ilmiyyah, Beirut, 1989, p. 190.

⁵) Muhammad bin Idris Al-Shafi'i, Al-Umm, Vol. 7, Dar Al-Ma'rifah, 1990, p. 384

⁶) Abu Al-Hassan Ali bin Muhammad bin Habib Al-Mawardi Al-Basri, The Great Comprehensive Book on the Jurisprudence of the Schools of Imam Al-Shafi'i, Vol. 8, 1999, p. 145.

Imam Ahmad holds a similar view, affirming that the property of an apostate generally reverts to the state treasury, reflecting the principle that the apostate's status aligns with that of an enemy combatant.)¹(

This analysis captures the central reasoning of the first viewpoint regarding the disposition of an apostate's estate, illustrating its foundation in Islamic jurisprudence and reliance on Prophetic traditions.

Second Viewpoint

This perspective holds that the estate of an apostate should be inherited by their non-Muslim relatives, rather than reverting to the state treasury. However, if the apostate has no heirs within their new faith, the estate then becomes fay' (spoils) for the benefit of the Muslim community.)²(

Arguments Supporting This View

Prophetic Traditions:

Proponents of this view rely on the generality of the Prophetic saying:

"A Muslim does not inherit from a disbeliever, nor does a disbeliever inherit from a Muslim."

Since the apostate is considered a disbeliever, the inheritance would logically go to their non-Muslim relatives, not to Muslim heirs or the state treasury.

Legal Reasoning:

The apostate is categorized as a non-Muslim; thus, their estate follows the inheritance laws applicable to disbelievers.

In cases where no non-Muslim heirs exist, the estate is transferred to Bayt al-Mal for the collective benefit of the Muslim community.

This viewpoint, notably supported by scholars from the Zahiri (literalist) school of thought, emphasizes that inheritance should align with the religious status of the deceased, thereby granting priority to their heirs of the same faith.

Conclusion

The second viewpoint offers an alternative perspective that aligns the disposition of the apostate's estate with their chosen faith. While differing from the first viewpoint, it retains a connection to foundational Islamic principles by ensuring the estate benefits either their non-Muslim heirs or the broader Muslim community in the absence of such heirs.)³(

Third Viewpoint

Supporters of the third viewpoint assert that the entire estate of the apostate should be inherited by their Muslim relatives. This is because two primary qualifications—Islam and kinship—are simultaneously present in the Muslim heirs. According to this view, no distinction is made between the wealth acquired by the apostate during their time as a Muslim and that obtained after their apostasy.)⁴(

Foundations of the View

Islam and Kinship as Dual Qualifications:

Proponents argue that inheritance prioritizes both religious alignment and familial ties. Since Muslim relatives meet these dual criteria, they are entitled to inherit the apostate's estate, regardless of when or how the assets were accrued.

Hanafi School of Thought:

This position is primarily attributed to Muhammad al-Shaybani and Abu Yusuf, prominent disciples of Imam Abu Hanifa.

They held that the principle of kinship (as a legal basis for inheritance) remains unaffected by the apostasy of the deceased, as long as the heirs maintain their Islamic faith.

Key Differentiators:

Unlike the first viewpoint, this position rejects the idea that the estate should revert to Bayt al-Mal.

In contrast to the second viewpoint, it does not acknowledge non-Muslim heirs as entitled to the estate, emphasizing the precedence of Muslim heirs.

CONCLUSION:

The third viewpoint emphasizes the preservation of familial rights within the Islamic framework, ensuring that the estate remains within the Muslim lineage. By attributing inheritance solely to Muslim relatives, this perspective reflects the central role of both religion and kinship in Islamic inheritance law.

Fourth Viewpoint

Scholars of the Imamiyyah school provide a detailed perspective on the issue, distinguishing between two types of apostates: the natural apostate and the apostate by adoption.

This differentiation is based on the individual's circumstances before and after embracing Islam.)⁵(

¹) www.jameatale;an.org

²) Imam Malik bin Anas Al-Asbahi, Al-Mudawwana Al-Kubra, Vol. 8, Dar Sadir, Beirut, no year of publication, p. 583.

³) Ibn Hazm Al-Zahiri, Al-Mahalli, Vol. 9, Dar Al-Afaq Al-Jadida, Beirut, p. 304

⁴) Sheikh Muhammad bin Youssef Atfeesh, Explanation of the Book of the Nile and the Healing of the Sick, Vol. 8, Dar Al-Fath, Beirut, p. 541.

⁵) Martyr Sayyid Muhammad al-Sadr (Q.S.), Manhaj al-Salihin, Vol. 4, Najaf al-Ashraf, 2011, Question 961, p. 242, and also His Eminence Sayyid Ali al-Husayni al-Sistani, may his shadow endure, Manhaj al-Salihin, Vol. 3, Question No. 958, p. 188.

1. The Natural Apostate :

Definition:

A person who was born to Muslim parents (or at least one Muslim parent), raised as a Muslim, and later renounced Islam.

Inheritance Ruling:

According to the Imamiyyah, the estate of a natural apostate reverts directly to Bayt al-Mal (the treasury of the Islamic state).

The apostate's heirs, whether Muslim or non-Muslim, are not entitled to inherit their estate, as their apostasy severs their entitlement entirely.

2. The Apostate by Adoption :

Definition:

An individual whose parents were non-Muslim at the time of their conception and who later embraced Islam, either before or after reaching maturity. Upon adulthood, they renounce Islam and return to their previous religion or adopt another faith.

Inheritance Ruling:

The estate of an apostate by adoption may be inherited by their legal Muslim heirs, provided the heirs meet the requisite conditions of Islamic inheritance law.

If no eligible heirs exist, the estate then reverts to Bayt al-Mal.

Key Principles Underpinning This Distinction:

Faith Status at Birth:

Apostasy is viewed more severely when it occurs after being born and raised as a Muslim (natural apostate), as it represents a complete rejection of one's inherent faith.

Eligibility for Inheritance:

For the apostate by adoption, a prior non-Muslim status at birth and subsequent conversion to Islam allows for some leniency in inheritance rulings.

Role of Bayt al-Mal:

In both cases, Bayt al-Mal serves as the ultimate beneficiary in the absence of qualified heirs.

CONCLUSION:

The Imamiyyah school's nuanced differentiation reflects a careful balance between the spiritual and legal dimensions of inheritance in cases of apostasy. By considering the individual's background and circumstances, this approach ensures that rulings align with broader principles of justice and equity in Islamic jurisprudence.

If the apostate is either naturally apostate or apostate by adoption, the prevailing opinion within the Imamiyyah jurisprudence holds that the rightful inheritor of their estate is the Imam (or the just Islamic authority representing the Muslim community). This view also establishes that non-Muslims cannot inherit from an apostate, as they are excluded from the estate based on their faith status.

However, a differing perspective among some scholars suggests that the apostate by adoption should be treated similarly to an original disbeliever.

Under this view, inheritance may follow the same rules as for non-Muslims, potentially allowing their estate to devolve to heirs from the same faith as the apostate.

This divergence illustrates the complexity in addressing cases of apostasy within Islamic jurisprudence, where interpretations vary depending on theological, historical, and legal considerations.

The fifth approach in this matter is represented by a significant group of scholars and jurists, including Imam Ali (peace be upon him), Abu Bakr Al-Siddiq, Abdullah Ibn Masoud, Zaid Ibn Thabit (may Allah be pleased with them), Al-Hasan Al-Basri, Saeed Ibn Al-Musayyib, Ibrahim Al-Nakha'i, Jabir Ibn Zaid, Hammad Ibn Abi Sulayman, Al-Sha'bi, Al-Hakam, Al-Layth Ibn Sa'd, Abu Yusuf, Muhammad Ibn Al-Hasan, Zufar, Ibn Shubrumah, Al-Thawri, Al-Awza'i, Sharik, Ishaq Ibn Rahwayh, and the majority of Imamiyyah scholars.

They argue for the permissibility of inheriting from an apostate's estate by their living Muslim relatives at the time of the apostate's execution or natural death, regardless of whether the apostate is a man or a woman.

Evidence Supporting This Opinion:

Qur'anic Evidence: They cite verses such as Surah An-Nisa (4:176):

"And if a man dies and has no children but has a sister, she will receive half of what he leaves."

The proponents argue that the apostate is considered "perished" (hālik) due to committing a crime that rendered their life forfeit (by execution for apostasy). Thus, their estate is treated as if they have passed away and is subject to inheritance.

Consensus and Precedent:

They cite Imam Ali (peace be upon him), who executed Al-Mustawrid Al-Ajali for apostasy and distributed his estate among his Muslim heirs. This action is seen as a precedent and implicit ijma' (consensus) supporting this ruling.

We find that some researchers lean toward favoring the first approach (that the apostate's estate should revert to the state as part of the spoils of war or public treasury funds) for the following reasons:

The Apostate is Classified as a Disbeliever:

This ruling is based on the Quranic verse:

"And whoever of you reverts from their religion and dies as a disbeliever—for those, their deeds have become worthless in this world and the Hereafter, and they will be companions of the Fire; they will abide therein eternally" (Surah Al-Baqarah 2:217).

Consequently, a Muslim cannot inherit from a disbeliever, as established by the Hadith of the Prophet (peace be upon him):

"A Muslim does not inherit from a disbeliever, nor does a disbeliever inherit from a Muslim."

Therefore, the apostate's wealth, whether acquired during their time as a Muslim or after their apostasy, is not inherited by Muslim relatives but instead reverts to the state.

Difficulty in Differentiating Wealth Acquired Before and After Apostasy:

Distinguishing between the assets acquired during the apostate's period of Islam and those obtained after their apostasy poses significant practical challenges. Such complications could lead to disputes, inconsistencies, and administrative inefficiencies in managing the estate.

Allocating the entire estate to the state avoids these challenges and ensures that the funds are used in alignment with public and Islamic interests.

By these arguments, this approach is seen as a practical and jurisprudentially sound solution, aligning with Islamic principles and the broader goals of justice and societal welfare.

Section Two

The Legal Basis for the State's Right to Inheritance in Financial Matters

In the realm of statutory laws addressing the issue of the inheritance reverting to the state (Bayt al-Mal), Article 88, Paragraph 4, of the Personal Status Law No. 188 of 1959 (as amended) stipulates:

"The eligible inheritors of the estate are the following categories:

4. Bayt al-Mal (the State Treasury)."

Thus, the state is deemed the heir for individuals who have no eligible heirs)¹. Within this framework, the local administration of each governorate represents the state in managing and acquiring such estates. For example, in the case of Baghdad, the authority entitled to inherit is the Baghdad Municipality.

This entitlement is further reinforced by the provisions of the Local Administration Law No. 16 of 1945. Specifically, Article 64, Paragraph 7, of the aforementioned law asserts that:

"The state is the inheritor of individuals who have no heirs."

This legal framework establishes a clear mechanism for the State's role as the ultimate heir, ensuring that unclaimed estates are directed towards public interests through local administrative bodies.

Critique of the Iraqi Legislator's Stance in Personal Status Law

One of the notable criticisms of the approach taken by the Iraqi legislator in the Personal Status Law is the absence of an explicit legal provision addressing the issue of inheritance for apostates (murtadd) and the subsequent reversion of their estate to the state.

In the absence of a clear legislative framework for this matter, reliance must be placed on Paragraph (2) of Article (1) of the Personal Status Law, which stipulates:

"If no applicable legislative text exists, the case shall be adjudicated based on the principles of Islamic Sharia most consistent with the provisions of this law."

This reliance introduces a level of ambiguity, as it leaves the matter to judicial interpretation and the application of Sharia principles. Such an approach may lead to inconsistency in legal rulings, depending on how courts interpret and apply the relevant Sharia doctrines, given the differing views among Islamic jurisprudential schools.

A more robust legislative solution would involve amending the law to include explicit provisions regarding the inheritance rights of apostates and the reversion of their estates, thereby aligning statutory law with established Islamic principles while ensuring clarity and uniformity in legal practice.

Legal Position Regarding the Case of Apostasy in Iraqi and Egyptian Law

Both the Iraqi Personal Status Law and the Egyptian Personal Status Law do not explicitly address the issue of inheritance in cases of apostasy (ridda). Neither law criminalizes apostasy nor explicitly identifies it as a bar to inheritance. This omission could suggest a lack of legislative concern for the issue or reliance on the principle that states:

¹) Lawyer Hadi Aziz Ali and Judge Abbas Ziad Al-Saadi, previous source, p. 410. As for other comparative legislations, we find the Moroccan Family Code No. 3/70 of 2004, which states in paragraph (sixth) of Article 349 of the Code that: (The treasury, if there is no heir, where the authority in charge of state property takes possession of the inheritance, then if there is one heir by presumption, the remainder is returned to him, and if there are multiple heirs by presumption and the presumptions do not take up the estate, the remainder is returned to them according to their lineage in the inheritance). Accordingly, we find that the treasury (the state) is not among the heirs, and the paragraph above considered it to be the holder of the inheritance, so if an heir appears, it must be returned to him.

"No crime or punishment without a clear legal provision" (nullum crimen, nulla poena sine lege).

Consequently, the absence of explicit provisions in both legislations neither criminalizes apostasy nor explicitly prevents inheritance due to apostasy. Furthermore, both laws refrain from enumerating specific bars to inheritance, leaving this matter largely unaddressed.

Researcher's Perspective

Given the ambiguity, the researcher leans toward interpreting the issue through existing legal frameworks:

Article 90 and Article 1/2 of the Iraqi Personal Status Law refer to the application of Islamic legal principles in cases where statutory law remains silent. These provisions implicitly enable the courts to draw on pre-legislation Islamic jurisprudence, which traditionally supports the idea of permitting a Muslim to inherit from an apostate (murtadd), as discussed in earlier sections.

It aligns with broader public interest (maslaha) to favor the inheritance of a Muslim heir over forfeiting the estate to the state or other entities, particularly in situations where Islamic jurisprudence supports this approach.

The Issue of Analogy with Civil Law

The question at hand invites a further inquiry: Could the provisions of Article 1199 of the Iraqi Civil Code be analogically applied to bar inheritance due to apostasy?)¹(

Article 1199 of the Civil Code governs the legal consequences of unlawful actions and compensation but does not directly address inheritance or personal status issues. However, its reference raises the question of whether civil law principles could be used to justify denying inheritance rights in such cases.

Conclusion

The absence of explicit legal provisions addressing apostasy and inheritance suggests that these matters remain open to interpretation based on Islamic jurisprudence and the discretion of courts. The researcher concludes that:

The application of Article 90 and Article 1/2 of the Personal Status Law provides sufficient grounds to prioritize the inheritance of a Muslim heir over other options.

This interpretation is in line with public interest, as it avoids potential disputes and ensures alignment with prevailing Islamic legal principles.

Relying on civil law provisions like Article 1199 to bar inheritance in such cases seems inappropriate, given the distinct nature of civil law and personal status matters.

Thus, there is a clear need for legislative clarification to explicitly address the issue of apostasy and inheritance, ensuring uniformity and certainty in legal rulings

Egyptian Inheritance Law No. 77 of 1943: Estate Distribution and Legal Provisions

Legal Text and Analysis:

The Egyptian Inheritance Law provides a clear mechanism for settling and distributing the estate, outlined as follows:

Covering funeral expenses and the deceased's dependents' costs from death to burial.

Settling the deceased's debts.

Executing the will within the legally permissible one-third of the estate.

Distributing the remainder to the heirs.

If there are no heirs:

The estate may be used to fulfill any additional will that exceeds the one-third limit, provided it has a legal effect.

If no claimants exist, the estate, or what remains of it, reverts to the state treasury.

Compatibility with Islamic Jurisprudence:

This order aligns with Islamic jurisprudence, particularly the opinions of Hanafi and Hanbali scholars, who assert that property without an heir reverts to the public treasury (Bayt al-Mal) as a public financial entity, not as an heir.)²(

¹) Article (90) of Personal Status Law No. (188) of 1959 stipulated that: (Taking into account the above, the distribution of entitlements and shares among heirs by kinship shall be carried out in accordance with the Sharia provisions that were in effect before the enactment of Personal Status Law No. 188 of 1959, as followed in the remaining provisions of inheritance). It considered that the difference in religion is an obstacle to inheritance, and apostasy is not a religion, but rather it is the absence of religion, even if a Muslim converts to another religion such as Christianity, his action does not apply to him or to the Muslim community, and his action is not approved and he is given the choice between returning to Islam or being killed: Dr. Al-Nu'man Munther Al-Shawi, the previous source, p. 70. As for the Jordanian Personal Status Law No. 36 of 2010, Article (284) stipulated that: (If there is no heir for the deceased, his movable and immovable estate shall be returned to the Ministry of Endowments and Islamic Affairs and Holy Places), which is a trend that we find is consistent with the trends found in comparative Arab legislations regarding the devolution of The estate, whether in real estate or movable property, belongs to the state. The texts referred to above of the Syrian Personal Status Law No. 59 of 1953 correspond to the text of Article (262) in paragraph (third) thereof, which states that (if none of these exist, the estate or what remains of it shall revert to the public treasury), which is a very close approach to Article (88) of the aforementioned Iraqi Personal Status Law, where the estate reverts to the public treasury when there are no heirs entitled to the estate.

Fraudulent Intent in Bequests:

If the testator makes a will with the intention of depriving the state of its right to the estate, the situation raises legal and ethical issues, particularly in the following cases:

Legal validity of the will:

As long as the law allows disposition within certain limits (up to one-third of the estate), fraudulent intent alone does not invalidate the disposition.

State's right to protect its interests:

However, the state, represented by the public prosecutor or relevant authorities, may challenge the will in court if:

Clear fraudulent intent on the part of the testator can be demonstrated.

Collusion between the testator and the beneficiary is evident.

The will serves no legitimate purpose other than to deny the state its rightful inheritance.

Foreign Beneficiaries and Real Estate:

Special attention must be given to protecting national interests concerning real estate within Iraq. If a foreign individual bequeaths their property to another foreigner solely to deprive the state of its rightful claim, legislative measures should restrict such practices, especially when the primary motive is circumvention.

Legislative Recommendations:

Explicit Provisions in the Iraqi Personal Status Law:

Introduce provisions that limit wills intended solely to deny the state inheritance rights in the absence of heirs.

Role of Public Prosecution:

Empower the public prosecutor to challenge wills in the interest of law if fraudulent intent or collusion is proven.

Regulation of Foreign Beneficiaries:

Establish legal restrictions on transactions involving foreign beneficiaries concerning estates and properties within the country, ensuring state rights are safeguarded.

Conclusion:

Addressing these legislative gaps is essential to strike a balance between protecting state rights and adhering to the principles of law and justice while respecting individuals' rights to dispose of their estates within lawful boundaries.

From the aforementioned discussion, it becomes clear that the legal basis for the State's financial right to inheritance is enshrined in Paragraph (Fourth) of Article 88 of the Personal Status Law, which explicitly designates Bayt al-Mal (the public treasury) as one of the entities entitled to inherit the estate. This provision forms the foundation of the State's claim, as detailed above.

Section Two: The Religious and Legal Basis for the State's Right Over the Deceased's Non-Financial Matters

Islamic law has established the principle of preserving the sanctity of the deceased's body and the obligation to honor it and avoid any disrespect. This principle reflects the respect for religious, moral, and spiritual values. Islamic law is considered a pioneer in affirming this principle, preceding modern secular laws by centuries. Just as the human being is respected in life, their sanctity remains inviolable in death. This is emphasized in the provisions of Islamic law and supported by legal frameworks alike.)¹

To clearly elucidate the topic, this section is divided into two parts:

Part One: The religious basis for the state's right over the deceased's body.

Part Two: The legal basis for the state's right over the deceased's body.

Part One: The Religious Basis for the State's Right Over the Deceased's Body

In Islam, human beings are endowed with sanctity and dignity, as stated in the Qur'an:

"And We have certainly honored the children of Adam" (Surah Al-Isra, 17:70).

Additionally, the Prophet Muhammad (peace be upon him) emphasized this sanctity by saying:

"Breaking the bone of a believer after death is like breaking it during life."

If the state has any right over the body of a deceased person, it must be exercised within the limits of achieving religious objectives and serving the interests of both the community and the individual. This right must align with the necessity of fulfilling the legitimate needs of the state without compromising the dignity of the deceased or violating their sanctity. As the Qur'an states:

"So fear Allah as much as you are able" (Surah At-Taghabun, 64:16).

A distinction can be made between the rules governing the State's rights over the body of an unidentified deceased person and those of a known deceased person. These will be discussed in the following subsections.

First Subsection: The Deceased with Unknown Relatives

²) Dr. Muhammad Youssef Hafni, previous source, p. 475

¹) Dr. Haider Hussein Al-Shammari, Transfer of real estate ownership by inheritance when the nationality of the heirs is different, Al-Insaniya Journal, College of Education for Human Sciences, University of Babylon, 2014, p. 720.

Islamic jurisprudence ensures that no one is left without guardianship or heirs. For a deceased person with unknown relatives or without specific heirs, Islamic law considers the entire Muslim community to be their relatives and heirs. In such cases, the state authority (sultan) represents the community. This principle stems from the legal maxim:

"The ruler is the guardian of the one who has no guardian."

Additionally, it aligns with the maxim:

"The public treasury (Bayt al-Mal) is the heir of the one who has no heir."

Accordingly, when a deceased person has no heirs or relatives who can provide consent regarding actions related to their body—such as postmortem examinations or organ donations for critical needs—the authority to make such decisions falls to the state authority. This is based on the premise that the ruler serves as the guardian of those without one.

An example of this is a renowned fatwa issued by Dar al-Ifta al-Misriyyah (Fatwa No. 454, Register 74), which permits the removal of the deceased's skin for medical purposes. However, it emphasized that this should be limited to cases where the deceased has no family.

Thus, the State's right to manage the body of a person without relatives derives from the maxim that the ruler is the guardian of the one who has no guardian. However, this authority is subject to specific conditions, such as the action taking place in an Islamic country.

Moreover, an individual may express their wishes before death by making a will to donate their body or specific parts to a public institution for scientific or educational purposes. Such a will is considered valid if the individual meets the necessary conditions, including being of sound mind and legal age.

Conclusion

The State's right to manage the body of the deceased in such cases is based on either the principle that the ruler acts as the guardian of those without one or the deceased's own will, drafted prior to their passing.

Second Subsection: The Deceased with Known Relatives

When the deceased has identifiable relatives, the matter can be categorized into two scenarios:

First Scenario: Deceased in Ordinary Circumstances

Islamic jurisprudence allows the State's ruler or authority to make decisions regarding the deceased's body, provided the consent of the deceased's heirs is obtained. Such actions are permissible when serving public interests, such as medical, research, or educational purposes. Specific guidelines are outlined for different situations:

General Medical and Educational Use

The body can be used for medical or research purposes when it serves the greater public interest, particularly for the living.

The heirs' permission must be sought unless the deceased explicitly consented before death.

Conditions for Anatomical Study or Medical Training

If the body belongs to an identifiable individual, one of the following must apply:

The deceased provided prior consent for their body to be used post-mortem.

The heirs grant permission after the individual's death.

Respect for the sanctity of the deceased's body is paramount, and unnecessary handling or misuse must be avoided.

Gender-Specific Guidelines

For women, their bodies should only be handled or examined by female medical professionals unless none are available, in which case exceptions may be made.

Burial of All Remains

All body parts must be buried respectfully after the completion of the required procedures.

The permissibility of such practices is supported by rulings from Islamic jurisprudence councils and scholarly committees, balancing the sanctity of the deceased with the practical needs of education and public health.

Second Scenario: Deceased Subject to Execution

The body of a person sentenced to death is treated with the same respect and dignity as any other deceased individual. However, the circumstances surrounding the execution might allow for certain exceptions:

Judicial Inquiry or Medical Investigation: If necessary, the body may be examined post-mortem to confirm details related to the execution or its outcomes.

Public Health Needs: Forensic examination to address public health concerns may be allowed.

Scholarly Consensus and Guidelines

The permissibility of using bodies for medical education and research has been a topic of extensive study by contemporary Islamic scholars and jurisprudence councils. This issue is influenced by two fundamental principles:

Sanctity of the Dead in Islamic Law:

Islam strongly emphasizes respecting and honoring the deceased, with multiple Quranic verses and prophetic traditions underscoring this point.

For example, the Prophet Muhammad (peace be upon him) said, "Breaking the bone of a deceased person is like breaking it when alive."

Public Interest and Necessity:

The practical benefits derived from the use of cadavers for medical education and research can outweigh the associated ethical concerns if managed appropriately.

This is reflected in a resolution by the Islamic Fiqh Council in Mecca, which permits autopsies under specific conditions:

Criminal Investigations: To determine the cause of death or circumstances of a crime.

Public Health Measures: To understand diseases and guide treatment or prevention strategies.

Medical Education and Training: To educate students and improve healthcare practices.

Conclusion

Islamic jurisprudence recognizes the importance of preserving the dignity of the deceased while addressing public and scientific needs. Any action involving the deceased's body must adhere to the conditions of necessity, proportionality, and respect, ensuring that the sanctity of the dead is preserved to the greatest extent possible.

It is stated in the book "Scientific Research" by the Council of Senior Scholars in Saudi Arabia (Volume 2, pages 83-84) as follows:

Three Categories of Autopsy

Criminal Investigations:

Autopsies conducted to verify claims in criminal cases.

Epidemic Investigation:

Conducted to understand infectious diseases and develop preventive measures.

Educational Purposes:

Autopsies for scientific learning and teaching purposes.

Council's Decisions

For the First Two Categories (Criminal and Epidemic Investigations):

The council unanimously agreed that autopsies in these cases are permissible. They emphasized that the benefits—such as ensuring justice, security, and protecting society from epidemics—outweigh the harm of violating the sanctity of the deceased. Therefore, the council endorsed the permissibility of autopsies for both categories, regardless of whether the body belongs to a protected (e.g., Muslim) or non-protected individual.

For the Third Category (Educational Purposes):

The council highlighted the following:

Islamic law prioritizes achieving benefits, minimizing harm, and choosing the lesser of two harms to avoid the greater one.

Learning about human anatomy through non-human alternatives (e.g., animals) is insufficient for medical education.

Autopsies have significant benefits for scientific advancement and medical progress.

However, the council also noted the following concerns:

Islamic law emphasizes the dignity of humans, both alive and deceased. The Prophet Muhammad (peace be upon him) said, "Breaking the bone of a deceased person is like breaking it when alive" (Narrated by Ahmad, Abu Dawood, and Ibn Majah).

The necessity of using human cadavers for educational purposes is reduced by the availability of non-protected bodies (e.g., criminals, prisoners of war).

Decision:

The council permits educational autopsies but recommends prioritizing non-protected bodies over those of Muslims or protected individuals.

Additional Rulings

Ibn Baz's Fatwa (Volume 22, Page 349):

If the deceased was protected during their life—whether Muslim or a protected non-Muslim (e.g., under a treaty)—it is impermissible to perform an autopsy, as this violates their dignity.

The Prophet Muhammad (peace be upon him) said, "Breaking the bone of the deceased is like breaking it when alive" (Abu Dawood 2792).

If the deceased was not protected (e.g., a war enemy or apostate), there is no objection to conducting an autopsy for medical purposes.

Conclusion

Islamic jurisprudence balances respect for the deceased with societal and scientific needs. While autopsies are permissible under specific conditions, they must prioritize necessity and avoid unnecessary harm, especially concerning the bodies of Muslims or protected individuals.

Thus, it becomes clear that the basis for the State's right to handle the body of a deceased person with known relatives is contingent upon obtaining the consent of their family, and that such actions must be limited to research and medical purposes.

Regarding the Bodies of Executed Individuals

Islamic jurisprudence offers two main perspectives on the State's right to manage the bodies of individuals sentenced to execution:

First Perspective

Some Islamic scholars argue that the state does not require the consent of the executed individual or their heirs for managing their body.

Reasoning:

Based on rulings from Shafi'i and Hanbali scholars, it is permissible for a desperate person to consume the flesh of someone who is condemned to death or use parts of their body.

As consuming the flesh is permissible in dire situations, using their organs or body parts is also justified without the need for consent.

Second Perspective

Other scholars emphasize the necessity of obtaining consent from the executed individual or their heirs for the state to handle their body.

Supporting Evidence:

The saying of the Prophet Muhammad (peace be upon him): "Indeed, Allah has prescribed excellence in everything. So if you kill, kill well, and if you slaughter, slaughter well" (Sahih Muslim).

They argue that the State's action without consent violates human dignity. The sanctity and respect for a person remain preserved in Islamic law, as evidenced by the obligation to wash and bury the deceased.

Scenario Without Heirs:

If the executed individual has no heirs, the question arises:

Is it permissible to handle their body without explicit consent or instructions left in a will?

Scholars' Interpretation:

Islamic law does not leave anyone without a guardian or heir. If a person has no private heirs, the Muslim community collectively acts as their kin.

Representing the community, the Sultan (or state) becomes the guardian under the principle: "The ruler is the guardian of those who have no guardian."

The treasury (Bayt al-Mal) serves as the heir for those without private heirs.

Thus, in cases where there are no heirs or close relatives to give consent for actions like autopsy or organ donation, the State's authority—represented by the ruler or judiciary—becomes the default guardian.

Conclusion

For executed individuals, if there are no heirs, the principle "The ruler is the guardian of those who have no guardian" applies, providing the state with the authority to handle their body. This principle forms the legal and jurisprudential basis for such actions.

Section Two: Legal Basis for the State's Right to Handle the Deceased's Body

Legislations across different jurisdictions have addressed the State's right to manage the body of the deceased, differentiating between cases of unknown and known relatives, as well as individuals sentenced to execution. To explore the legal positions of comparative laws, this section is divided into the following subsections:

First Subsection: Bodies of the Unknown Deceased

The Iraqi Public Health Law No. 89 of 1981 (as amended) allows the state to manage the body of an unknown deceased person but limits this to therapeutic, scientific, and medical purposes. This applies in cases where no relatives claim the body within:

90 days for deceased Iraqi citizens.

180 days for non-Iraqi deceased individuals, with approval from the embassy of the deceased's country.)¹(

Scholarly Legal Perspectives

Contemporary legal scholars generally agree that in the absence of relatives, the public authorities, as the representatives of the governing body, are entitled to manage the body. They base this on the idea that the state acts as the guardian of those without guardians.

The Concept of Nationalization of the Body

A notable perspective posits that the State's management of such bodies can also be grounded in the "theory of body nationalization" (ta'mim al-body), which views the deceased's body as owned by the state.

Arguments Supporting This View:

Public Ownership:

The deceased's body is not the private property of an individual, their family, or even society.

The state, as the guardian of public interests, should have precedence in managing the body for the collective benefit.

Advancement of Science and Medicine:

Advocates for this view call for laws to align with scientific progress and prioritize the greater humanitarian interest over individual claims.

Public Interest:

Handling such bodies serves critical public needs, including medical research and education, thus benefitting society at large.

Conclusion

The legal foundation for the State's right to manage the bodies of unknown deceased individuals in Iraq and other jurisdictions stems from the principles of public guardianship, the prioritization of societal benefits, and the necessity of aligning legal frameworks with modern scientific and humanitarian advancements.

Second Subsection: Bodies of the Deceased with Known Relatives

When the deceased's family or relatives are known, and they have been informed of the death, the competent authority must obtain the consent of one family member. The hierarchy of authority generally follows this order:

Ascendants: The father or mother.

Spouse: The husband or wife.

Descendants: The son or daughter.

Collateral Relatives: A brother or sister.

Legal Guardian: In the absence of the above.

Comparative Legal Frameworks

In countries such as the United States, United Kingdom, Germany, Netherlands, and Belgium, the law prohibits state intervention in the deceased's body without explicit consent from the relatives. Furthermore:

Consent from all heirs is required for any disposition of the body.

If some heirs consent while others object, no actions may be taken with the deceased's body.)²(

Role of Guardianship in Granting Consent

The question arises: Does guardianship over the deceased influence the right to grant consent for body disposition?

¹) In this direction, we find the text of Article (4) of the Qatari Human Autopsy Law No. (8) of 2003, which states that: (... and the autopsy in this case shall be by decision of the Minister or his delegate after the permission of the Sharia Court and shall be performed by a consultant physician in tissue diseases, and the approval of the deceased's family is not required for its performance). From these texts, the legal basis for the state's right to dispose of the body of a deceased person whose family is unknown becomes clear, which is represented in the purposes of achieving the public interest and considering the state as the guardian after taking into account the formal aspects (for example, obtaining the permission of the Sharia Court or his country's embassy if he is a foreigner and that the operation be performed by the competent medical authority).

²) Prof. Dr. Belhaj Al-Arabi, The Infallibility of the Corpse in Islamic Jurisprudence, 1st ed., 1st edition, Dar Al-Thaqafa for Publishing and Distribution, Amman 2009, p. 202

Autonomy of Consent:

The right to donate or allow the disposition of the body is inherently personal and must come directly from the individual or their heirs.

Guardianship vs. Agency:

Guardianship is not equivalent to agency; a guardian acts in the ward's best interest, not as their agent.

Any act by the guardian, such as consenting to donate body parts, must be motivated by a clear benefit for the ward, not a detriment.

Prohibition of Harm:

Guardians are prohibited from donating parts of the ward's body if it results in pure harm to the ward.

For example, Egyptian law (Article 5) explicitly states that donations must:

Be free from coercion or defects in consent.

Be documented in writing as per the law's executive regulations.

Restrictions on Donation by Minors or the Incompetent:

Donations by children or individuals lacking legal competence are disallowed.

Consent from parents, guardians, or legal representatives is also invalid in such cases.

Exceptions for Specific Medical Benefits:

Donation of regenerative tissues (e.g., blood or bone marrow) may be permissible if medically beneficial for the donor, as certified by two independent, qualified physicians.

Other forms of donation are strictly prohibited due to the harm they cause.

Egyptian Law as a Case Study

Article 5 of Egyptian law outlines the following:

Donations must be based on voluntary and written consent, free from coercion.

Consent from children or those lacking legal competence is invalid, even with parental or guardian approval.

Donations of regenerative tissues (e.g., bone marrow) are permissible under strict conditions, such as familial relationships (e.g., parents, siblings) and written consent from both parents or a legal guardian.

Donors or their representatives may retract consent at any time before the medical procedure begins.

Conclusion

For deceased individuals with known relatives, state intervention in the body requires the explicit consent of the heirs or legal guardians. This legal framework prioritizes individual rights and familial consent, ensuring compliance with both ethical principles and the broader public interest. The distinction between regenerative and non-regenerative tissues further underscores the balance between autonomy and medical necessity.

Presumed Consent Approach in Legislation

A legislative trend has emerged based on the concept of presumed consent, which allows the competent authority to utilize a deceased person's body unless objections are raised by the deceased during their lifetime or by their relatives after their death. This approach operates on the premise that relatives consent to the state's disposition of the body unless proven otherwise.

Legal Foundation for Presumed Consent

Default Assumption of Consent:

In the absence of explicit objection, the default assumption is that relatives agree to the state's use of the deceased's body for scientific or medical purposes.

Conditional Consent in Hospitals:

According to this framework, patients who seek treatment in hospitals implicitly accept the institution's operational regulations.

These regulations may include facilitating research by permitting the use of bodies posthumously for scientific and medical purposes.

This implicit consent is viewed as part of the broader public interest, prioritizing societal benefits.

Practical Implications

Objection Mechanisms:

Relatives must actively express their objection to prevent the state from utilizing the deceased's body.

Explicit Objection: By the deceased during their lifetime.

Posthumous Objection: By relatives after the death.

Administrative Safeguards:

Authorities must ensure that relatives are informed of their right to object and establish clear mechanisms for documenting objections.

Rationale and Ethical Considerations

Balancing Public and Individual Interests:

This approach prioritizes public health and scientific progress while maintaining a pathway for respecting individual or familial objections.

Ethical Concerns:

Critics argue that presumed consent may inadvertently override the autonomy of individuals or families who are unaware of their rights to object.

Transparent communication and robust objection processes are essential to mitigate these concerns.

Conclusion

The presumed consent framework offers a pragmatic solution for advancing scientific and medical research by defaulting to consent in the absence of objections. However, its implementation must carefully balance the public interest with the rights of individuals and families, ensuring respect for autonomy through transparent processes and adequate safeguards.)¹(

The Basis of the State's Right to Handle the Body of Executed Individuals: Legislative and Jurisprudential Perspectives

From the preceding discussion, it becomes clear that comparative legislations and laws regarding the basis of the State's right to handle the bodies of executed individuals diverge into two main directions:

First Approach: Permitting the State to Handle the Body of the Executed Individual

This approach argues that the state has the right to handle the body of an executed individual, including harvesting their organs, to achieve public interest, particularly in saving the lives of others.

Key Foundations of This Approach:

The Crime Committed:

Executed individuals often commit heinous crimes against society, justifying the deprivation of certain rights, such as bodily sanctity.

Prioritizing Public Interest:

Saving lives through organ donation is a public humanitarian interest that outweighs the individual rights of the executed person.

Utilizing the body of the executed individual for scientific and medical purposes is viewed as a form of compensating for the societal harm caused by their actions.

Legislative Examples:

Syrian Law: Permits the state to handle the body of the executed individual under Article (3), Paragraph (3).

Egyptian Law No. 103 of 1962: Regulates the removal of corneas from the executed without requiring family consent.

Egyptian Law No. 119 of 1974: Specifies that the body of an executed person is handed over to university institutions if their family does not claim it within seven days.

Second Approach: Prohibiting the Handling of Executed Bodies

This approach opposes granting the state the right to handle the body of the executed under any pretext, emphasizing the need to respect human dignity, even after death.

Key Foundations of This Approach:

Bodily Sanctity:

¹) Dr. Belhaj Al-Arabi, previous source, p. 202. In this direction, the Syrian legislator came in Article (3/5/A), as he permitted the disposal of the body if there was no written and explicit objection from this person before his death. By contrast, this means that the deceased person is assumed to have agreed to open the body unless there was a written and explicit objection from him during his life and before his death. It would have been possible to say that this approach was dangerous had the legislator not left the matter to the objection of the deceased, but rather exceeded it to the non-objection of his relatives whose kinship does not exceed the third degree. In this is a safety valve. Dr. Hussam Al-Din Al-Ahwai, Legal Problems Raised by Human Organ Transplantation Operations, a study published in the Journal of Legal and Economic Sciences, Issue 1, Year 17, January, Ain Shams University Press, 1975, p. 220. In contrast to this trend, we find the trend adopted by the Kuwaiti legislator, pursuant to Article (2) of Decree No. 55 of 1987, which prohibited the disposal of a person's body except after obtaining a written declaration witnessed by two fully competent witnesses. When we say that the consent of the deceased's relatives is required, this means the explicit consent of his family members to remove a part of his body, and this consent is a freedom related to public order. However, if one of the closest relatives in rank to the deceased objects, then the disposal cannot be carried out. The same applies if there is a conflict between the person's will in one degree, the desire that prevents tampering with the body returns. This trend was adopted by both the Lebanese law on medical ethics in paragraph (sixth) of Article 30 thereof, as well as the Luxembourg law issued on January 17, 1958, as well as the UAE law No. 15 of 1993 and the Brazilian law issued in 1982.

Proponents argue that even if the individual has committed a grave crime, it does not strip them of their inherent dignity, and their body should remain untouchable except as legally predetermined.

Constitutional Rights:

Legislations that prohibit tampering with executed bodies uphold the principle of respecting human dignity. Any alteration or interference with the deceased's body constitutes a violation of their personal rights.

Legal and Religious Boundaries:

The state cannot replace agreed-upon execution methods with medical intervention to extract organs. Extracting organs without the deceased's consent or their family's approval contradicts religious values and societal traditions.

Preferred View

We lean toward supporting the approach that permits organ donation from executed individuals, provided strict conditions and frameworks are established to ensure:

No Coercion:

Respecting the executed individual's right to refuse organ donation, whether through a prior will or by obtaining family consent after death.

Adherence to Religious Norms:

Compliance with religious principles governing the treatment of deceased individuals. Observance of rituals associated with death and burial.

Achieving Humanitarian Goals:

Prioritizing saving and treating patients when no alternatives are available. The state should organize the process transparently while ensuring respect for human dignity. This balanced preference harmonizes public interest with the preservation of individual dignity, aligning legal, religious, and humanitarian values.)¹(

CONCLUSION

At the conclusion of this study, it is essential to highlight the most significant findings and recommendations derived from the research, as follows:

First: Findings

The State's right to inherit from those without heirs:

This right is an exceptional and specific pathway, differing from traditional inheritance rules.

The State's right over non-financial matters:

This right may extend to non-financial matters related to the deceased. In this study, the focus was on the deceased's body as part of these non-financial matters.

Absence of legislative regulation for apostates' inheritance:

Legislators have not addressed special provisions for the inheritance of apostates. Cases of apostasy and the financial rights of the deceased apostate remain unregulated.

Divergence in scholars' opinions:

Islamic jurisprudence has seen diverse views on how inheritance transitions to the state.

Emergence of new financial and non-financial issues:

These issues include matters such as dealing with the deceased's body or managing their assets.

Varied rulings on the deceased's body:

The rules differ based on whether the deceased is known or unknown. They also differ for the bodies of those sentenced to death compared to natural deaths.

Divergence in jurisprudential approaches to apostates' inheritance:

Some scholars argue that the inheritance reverts to the state as "fay'" (spoils of the state). Others believe it should be inherited under specific Islamic legal principles.

SECOND: RECOMMENDATIONS

Issuance of clear legislation:

It is crucial to regulate the issue of dealing with the deceased's body, considering the circumstances of death and the deceased's status.

Establishing a legal framework for apostates' inheritance:

Issuing specific legislative texts to determine how inheritance transitions in cases of apostasy, in accordance with Islamic law.

¹) Look at this trend. Fawzia Abdel Sattar, Explanation of the Penal Code, Special Section, 3rd ed., Dar Al Nahda Al Arabiya, 1990, p. 116.

Regulating the handling of bodies of those sentenced to death:

Clear guidelines should be established for the state's right to deal with the bodies of those sentenced to death, ensuring respect for human dignity.

Unifying rules between known and unknown deceased persons:

Addressing legal gaps concerning the bodies of unknown deceased persons to balance public interest with human dignity.

Enhancing the role of jurisprudential reasoning:

Encouraging jurisprudence to address emerging issues, particularly in matters of inheritance and non-financial matters.

Incorporating religious principles into civil laws:

Aligning civil legislation with religious values, especially in matters related to the deceased.

This study aspires to provide a comprehensive perspective on the issue of the State's right to deal with the deceased's body and to pave the way for further research in this critical area.

Second: Recommendations

Legislative Regulation of the State's Financial Rights:

Legislative authorities must enact a law addressing the State's financial rights over the deceased's inheritance, as well as its rights over the deceased's body.

Drafting Specific Legal Texts for Apostates' Inheritance:

A legal framework should be introduced to regulate the transition of an apoState's inheritance to the state, ensuring clarity and addressing the current legislative gap in this matter.

Adding a Provision for Inheritance Barriers:

Incorporate a specific clause in the Iraqi Personal Status Law No. 188 of 1959 regarding the barriers to inheritance to address ambiguities and ensure legal consistency.

Inheritance Between Muslims and Non-Muslims:

A provision should be added stipulating that a Muslim can inherit from a non-Muslim.

However, if the non-Muslim is a dhimmi (non-Muslim under Islamic protection), the transfer of inheritance should require the approval of a Muslim judge.

Inheritance in Cases of Apostasy:

If a Muslim relative is judicially proven to have apostatized, their Muslim relatives should inherit their wealth.

This applies to both wealth acquired before and after apostasy, as long as the relative was present at the time of the apoState's death, execution, or judicial ruling declaring them aligned with an entity hostile to Islam.

These recommendations aim to address gaps in existing legislation, ensure justice, and align legal provisions with societal and religious principles.

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