The Legal Effects of Death-Illness on the Formation and Dissolution of Marriages in Islamic Law

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Abstract

Death-illness is the illness from which death is anticipated in most cases and by which the patient dies before a year has expired, whether he has been bed-ridden or not. Muslim jurists have looked into various modern diseases to check whether they can be declared as death-illnesses or not. In view of some contemporary Muslim jurists, a death sentence may also be considered as death-illness. This concept has significant legal consequences under Islamic law, particularly in the branch of family law. Death-illness has operations in almost every aspect of family law. It has effects on the formation of marriage, its consummation, and upon quantum and mode of payment of dower. It also affects the matters pertaining to divorce, waiting period (*'iddah*), and determination of shares in inheritance. In further consideration, it also has a vital role to play in the issues of gifts and wills. The details about the legal effects of death-illness are scattered in the manuals of *fiqh* (Islamic law). This paper attempts to analyse the legal effects of death-illness under family law.

Introduction

The death-illness (*maraḍ al-mawt)* has a significant role in various civil law matters in general and in Islamic family law in particular. It holds the potential to affect the legality of the marriage, to mitigate the effectiveness of a will with respect to the shares of inheritance, and to nullify the effects of *talāq* if pronounced during this state. Under the common law system, the death-illness alone does not have any significant role. It only becomes relevant when there is an issue of determining the capacity of a person and the sickness has impacted his or her mental control over the actions. However, under Islamic law, death-illness holds its distinct value. Therefore, to identify the legal implications of *maraḍ al-mawt,* it is pertinent to define and elaborate upon its essential features. For this purpose, this paper, firstly, defines the concept to set the framework for further analysis. Based on this, we shall determine the applicability of *maraḍ al-mawt* in certain modern legal scenarios.

Defining *Maraḍ al-Mawt*

The term *maraḍ al-mawt* is a combination of two Arabic nouns, i.e., *maraḍ* and *mawt*.[1] Firstly, we shall elaborate on each of these terms separately and then explain the whole expression in the context of Islamic law.

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[1] This type of combination is called *al-Murakkab al-Idafī* in Arabic grammar in which, usually, the second noun is attributed towards the first one. The first one is called *al-Mudaf* and the second is known as *al-Muḍaf Ilayh*. See, Abbas Hassan, *al-Nahw al-Wafi* (Dar al-Ma'arif, n.d) 1:300.

Aḥmad b. Fāris al-Qazwīnī says that the word *maraḍ* is made of *al-Mīm, al-Rā*', and *al-Ḍad,* and is something which leads a person out of the limits of being healthy. The word *maraḍ* is *maṣdar* from *maraḍa yamraḍu mariḍan.*[2] Zaynuddin al-Rāzī, a prominent linguist, says that *maraḍ* is *suqm*, which means an anomaly. While elaborating on certain other words of the same root, he states that *Amraḍahu Allah* means 'Allah made him sick', *marradahu tamrīdan* denotes looking after the sick person, and *tamāruḍ* is the illusion of sickness when in reality the person is absolutely fine.[3] Ibn. Manẓūr states that *maraḍ* is opposite of health and happens to both, the human beings and the camels (animals).[4] According to *al-Mu'jam al-Waṣīṭ,* an Arabic dictionary compiled by Arabic Language Academy, Cairo, *maraḍ* is when any living thing crosses the limits of health and moderation due to any sickness or hypocrisy. Hypocrisy is included in the definition because the *Qurān* terms it as a hindrance in accepting the religion, and says: "*fī qulūbihim maraḍun*"[5] which translates as "Illness is an unnatural condition in the human body by reason of which the physical, psychological and biological functions become faulty and unsound".[6] According to Al-Zaila'ī, a well-known Ḥanafī jurist, "*Maraḍ* is a condition due to which the balance of natural disposition is lost."[7]

As far as *mawt* is concerned, al-Fārābī defines it as opposite of life, "*al-mawt ẓidd al-ḥayat".*[8] Ibn. Fāris al-Rāzī says that *mawt* is when the strength and power of anything vanishes and is also the opposite of life.[9] According to Ibn. Manẓūr, *mawt* is a creation of Allah Almighty[10] and is the opposite of life.[11] Abu'l-Fayḍ al-Zabīdī also says that *mawt* is opposite of life and is also metaphorically used to mean the state when something stops or halts. He quotes certain examples of this usage as well.[12] In all these literal explanations, one thing is common: *mawt* is opposite to *al-Hayāh* (life). These experts of linguistics did not provide the meaning of *mawt* on its own merits; instead, they relied upon other terms and understood it as contrary to *al-Hayāh*. Thus, in order to understand this concept, we first need to understand the latter.

When we consult the Arabic dictionaries to understand the meaning of *al-Hayāh*, we are often pushed back, as many dictionaries define *al-Hayāh* as contrary to *al-Mawt*.[13] Al-Zabīdi,

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[2] Aḥmad b. Fāris b. Zakariyyā' al-Qazwīnī al-Rāzī, *Mu'jam Maqāyīs al-Lughah*, (Beirut: Dār al-Fikr, 1979) 5:311.
[3] Zaynuddīn Abū 'Abdullah Muḥammad b. Abī Bakr b. 'Abdul Qādir al-Ḥanafī al-Rāzi, *Mukhtār al-Ṣiḥaḥ,* (al-Maktabah al-'Asriyyah, 1999) 293.
[4] Muḥammad b. Mukarram b. 'Alī Abu 'l-Faḍal Jamāluddīn ibn. Manẓūr al-Anṣārī, *Lisān al-'Arab,* (Dār Ṣādir, 1414 AH) 7:231.
[5] Majma' al-Lughah al-'Arabiyyah Bi 'l-Qāhirah, *al-Mu'jam al-Wasiṭ,* (Alexandria: Dār al-Da'wah, n.d) 2:863.
[6] Wazārah al-Awqāf Wa 'l-Shu'ūn al-Islāmiyyah al-Kuwayt, *al-Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah,* (Dār al-Salāsil, 1427AH) 36:353.
[7] See, 'Uthmān b. 'Alī Fakhrduddin al-Zaila'ī al-Ḥanafī, *Tabyīn al-Ḥaqa'iq Sharḥ kanz al-Daqa'iq,* (al-Maṭba'ah al-Kubrā al-Amīriyyah, 1313AH) 1:333.
[8] Abū Naṣr Isma'īl b. Ḥammād al-Jawharī al-Fārābī, *al-Ṣiḥāḥ Tāj al-Lughah Wa Ṣiḥāḥ al-'Arabiyyah,* (Dār al-'Ilm Li 'l-Malāyīn, 1987) 1:266.
[9] See, Aḥmad b. Fāris b. Zakriyyā' al-Qazwīnī, *Mu'jam*, 5:283.
[10] This is based on a verse of al-Qurān al-Karīm which reads, "the One who created death and life, so that He may test you as to which of you is better in his deeds. And He is the All-Mighty, the Most-Forgiving" (al-Qurān), 67:2.
[11] See, Ibn. Manẓūr, *Lisān al-'Arab,* 2:90.
[12] These examples include *Mātat al-Rīḥ* when the breeze stops and *Māta al-Rajul*, when the man sleeps. See, Muḥammad b. Muḥammad b. 'Abdurrazzāq al-Ḥusaynī Abu 'l-Faḍl al-Zabīdī, *Tāj al- 'Urūs min Jawāhir al-Qāmūs,* (Beirut: Dār al-Hidāyah, n.d) 5:98.
[13] See for example *Maqāyīs al-Lughah* which says: '*al-Hayāh* is antonym of *al-Mawt'*, 2:231.

however, in *Tāj al-'Urūs* quotes meanings of *al-Ḥayāh* from Imām al-Rāghib. These meanings are as follows:

1. The ability to grow which exists in animals and plants. Allah Almighty in the Qur'ān uses the word *hayy* referring to this meaning. He says, "And We created from water every living thing."[14]
2. The ability to sense. On the basis of this meaning, living things are referred to as *haywān*, i.e., the living things capable to sense.
3. The intellectual faculty is also referred to as *al-hayah*. In the same sense, the Qur'ān states: "Is it (conceivable) that the one who was dead and to whom We gave life."[15]
4. *Al-Ḥayāh* also means when the sorrow is gone away. It is said that "the person who is caught by sorrows and becomes happy is not dead."
5. It is the life hereafter. Quran refers to it in the words: "He will say: O Would that I had sent ahead (some good deeds) for (this) my life!"[16]
6. It is the quality of Allah Almighty that He is living in a sense that he will never die. In this sense *al-Ḥayah* is a specific quality of Him and no other than Him owns this quality.[17]

In light of the foregoing discussion, it can be said that *al-Mawt* is an antonym to *al-Ḥayāh*, and signifies the inability to grow, sense, think, and feel.

Maraḍ al-Mawt as a Term

Maraḍ al-mawt (death-illness hereinafter) has been defined differently by different jurists. Al-Imām al-Sarakhsī has given a very brief definition when he states that, "death-illness is that which causes death".[18] Al-Imam al-Kāsānī, however, provides a clearer and elaborate definition of it: "death-illness is that which weakens the patient and he becomes bedridden. In a nutshell, death-illness is that in which death is apprehended".[19] Al-Bābarti, in his well-known commentary on *al-Hidāyah*, defines it as the state "in which mostly death is apprehended".[20]

As per Mula Khusraw, a period of one year is to be fixed in order to determine if a disease is chronic or not.[21] He says that if a person is suffering from paralysis, or a disease of the foot due to which he is unable to walk, or the person is crippled and consequently dies in one year, the disease will be deemed as a death-illness. If these conditions are not satisfied, he will be deemed as a healthy person.[22] Al-Imām al-Ḥaṣkafī defines death-illness as the disease in which the person is unable to perform his duties out of the home. He, however, relies on Qahustānī to

[14] Qur'an, 21:30.
[15] Qur'an, 6:122.
[16] Qur'an, 89:24.
[17] Al-Zabīdī, *Tāj al-'Urus*, 37:507.
[18] al-Sarakhsī, *al-Mabsūṭ,* 6:167.
[19] Ibid.
[20] Mūḥammad b. Muḥammad b. Maḥmūd Akmaluddīn Abū 'Abdillah al-Bābartī al-Rūmī, *al-'Ināyah Sharḥ al-Hidāyah,* (Beirut: Dār al-Fikr, n.d) 4:151.
[21] Muḥammad b. Farāmurz b. 'Alī Mula Khusraw, Durar al-Ḥikām Sharḥ Ghurar al-Aḥkām, (Beirut: Dār Iḥyā' al-Kutub al-'Arabiyyah, n.d) 2:432.
[22] Ibid.

assert that the state to be bed-ridden is not necessary to constitute death-illness; rather, apprehension of death is sufficient to qualify a disease as death-illness.[23] Ibn Qudāmah al-Maqdisī, a great jurist of Ḥanbalī School of Islamic law classified sickness into four categories one of which is the death-illness. Qudāmah stipulates two conditions for any disease to be death-illness: i) the disease should be of a kind in which death is apprehended, and ii) the sickness ultimately results in death before cure.[24]

The four categories of sickness made by Ibn-e-Qudāmah include the following:

1. Non-Dangerous disease: This category includes the diseases which are not dangerous and the person is deemed as healthy as any other person. Such diseases include pain in the eye, headache, toothache, and slight fever.
2. Protracted disease: These are the diseases which last for a longer period of time. If such diseases make a person bed-ridden then they would be considered dangerous; however, if the person can easily move then the disease will not be considered a death-illness and all of his dispositions would be valid. These kinds of diseases include leprosy, paralysis in the last stage, and phthisis in its initial stage.
3. Close to death: It includes the diseases in which the person is close to death, in that case, there would be two considerations. First, it will be looked at whether the mental capacity of the person has been disturbed or not. If it has disturbed, then the disposition of the person will have no validity. However, if the mental capacity of the person is sound, then his dispositions in such circumstances will be valid and his will for charitable dispositions would be valid up to one-third of his estate. Such diseases include fatal wounds as well.
4. Protracted disease in which death is not close: This category includes a perpetual nose-bleed, lung disease, and a heart problem. This kind of disease is also considered to be dangerous and if it is connected to death, it would attract the rules of death-illness.[25]

Dr. Wahbah al-Zuhaylī concluded death-illness and its conditions in the following words:

> The patient of death-illness is the person who has been made bed-ridden by the sickness and he became unable of performing his outdoor tasks like a scholar is unable to visit mosque and businessman is unable to visit his shop. As far as the woman is concerned, she is unable to perform her tasks inside the home such as cooking and other [domestic] things. Thus, death-illness means the disease in which two things happen; first, that mostly the person dies of it and secondly, the disease is connected with death.[26]

Based on the different definitions of Muslim jurists, *Mujallah al-Aḥkām al-ʻAdaliyyah*, the civil code of Ottoman Empire, defined death-illness as follows:

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[23] See, Muḥammad b. ʻAlī b. Muḥammad b. ʻAlī b. ʻAbdirraḥmān al-Ḥanafī al-Ḥaṣkafī, *al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār Wa Jami' al-Biḥār,* (Beirut: Dār al-Fikr, 1992) 6:660.

[24] Abū Muḥammad Mawfiquddīn ʻAbdullah b. Aḥmad b. Muḥammad b. Qudāmah al-Jamāʻīlī al-Maqdisī al-Ḥanbali, *al-Mughnī*, (Cairo: Maktaba al-Qāhirah, 1968) 6:203.

[25] Ibid, 6: 202-3.

[26] Wahbah b. Muṣṭafā al-Zuḥaylī, *al-Fiqh al-Islāmī Wa Adillatuhū,* (Damascus: Dār al-Fikr, 1985) 9:6977.

> Death-illness is that from which death is to be apprehended in most cases, and what disables the patient from looking after his affairs outside his house if he is a male and the affairs within the house if she is a female, provided that the patient dies in that condition before a year has expired, whether he has been bed-ridden or not. If the illness protracts itself into a chronic condition and lasts like that for a year, the patient will be regarded as if he was in a state of health, and his dispositions will be regarded as those of a healthy person, so long as his illness does not increase, and his condition does not change. But if such chronic illness increases and his condition changes so that he dies of it, then such illness from the date of the change in his condition until his death will be regarded as death-illness.[27]

Essentials of Maraḍ al-Mawt

Against the backdrop of preceding discussion, we can derive three things which are essential for a disease to qualify as a death-illness. These are explained under the following sub-headings.

Disability from the Routine Work

It is necessary – to constitute as death-illness – that the person becomes unable to perform his routine work, which a person usually performs, including his or her professional activities. However, the important requirement is that the disability must be due to the sickness and not because of any other reason. Thus, if a person becomes unable to perform his routine work due to old age or weakness in his or her legs and arms, it will not be regarded as death-illness as old age is simply a phase of life. Initially, the *Majallah al-Ahkam al-Adliyyah* (The Ottoman Civil Code) stipulated the routine work for women in this regard to be those tasks which a woman performs inside the house.[28] This is because at that time it was customary for the women to take care of domestic affairs while men were supposed to work outside the house. In today's age, as it has become more acceptable for women to work outside the house, the same rule may be applicable to them as well. However, to determine whether or not such a condition exists is in the pure discretion of the judges.

Apprehension of death

It is essential that the person fears death due to the sickness and it happens when the disease is of a severe nature that normally results into death or in the case where it was initially a normal illness but with the passage of time, it becomes worse and ultimately it reaches the situation where it becomes fatal. On this basis, if a person is unable to walk, talk or see, he will not be considered to be in the state of death-illness unless he does not fear death due to the disease. Furthermore, any person suffering from chronic diseases – such as diabetes and blood pressure – will not come within the ambit of having a death-illness because such diseases normally do not

[27] Article 1595, *Majjalah al-Aḥkām al- 'Adaliyyah* (Karachi: Nūr Muḥammad KārKhāna Tijārat-E-Kutub, n.d) 1:314.
[28] Ibid, Articles 1595-1605.

make a person fearful of death in the near future.[29] According to an opinion of jurists, this condition negates the necessity of the first one, thus, with the apprehension of death, a person, even if he is able to perform his routine work, is to be regarded as suffering from a death-illness. However, other jurists insist equally on both these conditions.[30]

Actual Death

To constitute death-illness, the person shall die within a specific period of time. Thus, if the person is cured of the disease, he will not be considered to have a death-illness and all the dispositions made in that period will have the values of that of a healthy person. However, the person himself can nullify his dispositions during that period which he concluded under the fear of death and which might not be in his best interest after getting cured of the disease. It is conditioned that the person should die within a period of one year from the commencement of disease if the disease does not change in the condition. Thus, if a person survives for a year or more in uni-conditioned diseases – such as diabetes or blood pressure – he will not be considered to have a death-illness. This is when the disease is uniformed and its condition does not change. But if the disease gets severe after a period of one year, it will be reckoned from the date of the change in the condition of the disease. It is also not necessary that the person dies due to the disease. What is necessary is the actual death irrespective of the cause of it, be it the disease or any other reason such as murder, an accidental burn or drowning.

Modern Diseases and *Maraḍ al-Mawt*

Human beings have begun to face certain kinds of diseases which were not known in the era of classical jurists. These diseases may include diabetes and blood pressure. However, it is important to determine whether or not these diseases can be considered as death-illnesses. The status of these diseases can be figured out with respect to the four categories of diseases made by Ibn-Qudāma al-Maqdisī, the definition, and essentials of death-illness and other relevant information provided in the preceding section. As far as the nature of these diseases is concerned, they are fatal and can potentially result in the death of the patient. In this sense, these can be considered as death-illness; however, the disease must result in death within a period of one year from the beginning of illness if the condition of the disease is not changing gradually. Keeping in view the nature of these diseases and this specific condition – that the disease must result in death within one year – we may conclude that in normal situations, conditions like diabetes and blood pressure are not death-illnesses because people survive for a period of years with them without any change in the condition of diseases. On receiving appropriate medication and maintaining a healthy lifestyle, people can successfully deal with them. For this reason, we may make a statement that generally, such diseases are not to be considered as death-illnesses. Considering this, one may say in legal phraseology that death-illness is a mixed question of law and facts. On the one hand, there are certain characteristics which are considered as pre-

[29] ʻAla'uddīn Abū Bakr b. Masʻūd b. Aḥmad al-Kāsānī al-Ḥanafī, *Bada'iʻ al-Ṣana'Iʻ fī Tartīb al-Sharā'iʻ,* (Beirut: Dār al-Kutub al-ʻIlmiyyah, 1986) 3:224.

[30] Muḥammad b. ʻAlī b. Muḥammad b. ʻAlī b. ʻAbdirraḥmān al-Ḥanafī al-Ḥaṣkafī, *al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār Wa Jamiʻ al-Biḥār,* (Beirut: Dār al-Fikr, 1992) 6:660.

requisites for it, while on the other, it is to be determined in each individual case that whether a person alleged to be in death-illness does have such characteristics or not.

Death Sentence as Death-Illness

There are several other factors which may not be related to sickness however, death may still be apprehended in such situations. These factors include the death sentence, being engaged in warfare on the battlefield and being present in a sinking ship. The Jordan Civil Code in article 543(2) makes a reference to such factors which endanger the life without illness. The article reads: "The factors, which encircle man and endanger his life and normally people die though these are not diseases, are also considered to be death-illness".[31] The article of the Code, however, does not mention any example of such factors. Dr. Wahbah al-Zuhaylī mentions the death sentence and sailor in a sinking ship to fall under such scenarios. He argues that "the rules of death-illness also apply to the person who is sentenced to death or the person who is in a sinking ship."[32] However, mere sentence to death does not constitute death-illness because it takes a lot of time – years and decades in some cases – from sentence to the execution. Thus, the sentence would amount to death-illness only when the person is taken to the execution process.[33] In addition to this, if a person is in the battlefield, he will be deemed healthy unless he starts engaging himself in the fight and at that time he will be deemed to be in a death-illness. The aforementioned discussion clarifies that in such situations, a person is under the fear of death and is not ill (such as a warrior in a battlefield or a death-sentenced person). If a person concludes any legal dispositions in these conditions, they will attract the rules of death-illness.

Impacts of Death-Illness on Marriage

The impact of death-illness on marriage under Islamic law varies from situation to situation. Under certain circumstances, it invalidates the marriage contract and in certain other situations, it does not affect the validity of the marriage however it may affect the dower which is specified in the marriage. The other impact discussed below pertains to the consummation of marriage. In the following, we shall discuss all of the above aspects of the impact of death-illness on marriage.

Marriage during Death-Illness

In normal situations, death-illness does not incapacitate the patient from a marriage contract. Thus, if the patient of death-illness gets married, his heirs do not have any right to object on the marriage. In this situation, however, the death-illness plays a significant role in the dower fixed in the marriage. If the dower is equal or less than *mahr al-mithl*,[34] the marriage contract and dower both are valid and effective, and these will not be dependent on the approval of any person. Al-Kāsānī says: "if the patient marries a woman during his death-illness for the dower of

[31] Jordan Civil Code 1976, art. 543 (2).
[32] Al-Zuḥaylī, *al-Fiqh al-Islāmī Wa Adillatuhū,* 9:6977.
[33] In our legal system we can say that the issuance of black warrant converts the death sentence into death-illness because it specifies the date of execution.
[34] *Mahr al-mithl* is the dower which was stipulated for the marriage contract by a woman from the paternal side of the bride. Furthermore, the age, beauty, education, and piousness of the bride is also considered. See, ʻAli b. Abī Bakr b. ʻAbdil Jalīl al-Farghānī al-Marghīnānī, *Matnu Bidāyah al-Mubtadī fī Fiqh al-Imām Abī Ḥanīfah,* (Cairo: Maktabah wa Maṭbaʻah Muḥammad ʻAlī Ṣubḥ, n.d) 1:63.

one thousand dirhams and *mahr al-mithl* is also the same amount, the marriage is valid."[35] However, if the dower is more than her *mahr al-mithl*, the surplus amount of dower would be considered as will which will be dependent on the approval of all other heirs. If they refuse to approve the dower, the surplus amount of dower will be invalid and the remaining dower which is equal to *mahr al-mithl* would be given to the wife. *Al-Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah* states, "If the patient marries a woman with more than *mahr al-mithl* and the wife was entitled to inherit from the husband, i.e. she is a Muslim, in that case the surplus amount from *mahr al-mithl* would be – according to Shāfi'ī and Ḥanbalī schools of law – considered as a will which would not be effective except with the permission of other heirs."[36]

In a nutshell, a person suffering from death-illness may marry during such circumstances however, he may not stipulate dower for his wife which is more than her *mahr al-mithl*. If he stipulates more than *mahr al-mithl*, the surplus amount will be deemed a will and would be dependent on the approval of other heirs.

Death-Illness and the Validity of Marriage

In certain situations, the death-illness affects the capacity of the person which results in the invalidity of all of his dispositions, including marriage lacking validity under the Islamic law. In order to understand this, it is pertinent to consider the concept of capacity (*ahalliyah)* under Islamic law.

Legal capacity, which is also called *dhimmah* in Islamic jurisprudence, is the fitness of the person by which his actions come under the operation of the law. It is the quality in the individual by which he or she may be entitled to certain rights and becomes liable for the duties. This entitlement and liability are referred to by the phrase *mā lahū wa mā 'alayhi* in Islamic jurisprudence.[37] The *ahalliyyah* is generally divided into two categories; the first one, which is called *ahalliya al-wujūb,* is that by which a person inherits rights. This can be described as the receptive capacity. The second one, which is also called as *ahalliya al-adā,* is the capacity to exercise rights and fulfil obligations. The latter is described as an active legal capacity whereas the former is subdivided into two further categories. The first one is called the receptive capacity with a defect, i.e. *ahalliyah al-wujūb al-nāqiṣah,* and the second is titled as perfect receptive legal capacity, i.e. *ahalliyah al-wujūb al-kāmilah.* The former capacity comes into existence right after a new life begins in the womb of a mother and the latter one comes to operate after the birth of the child. Likewise, the active capacity, i.e. *ahalliyah al-adā,* is also further divided into two sub-categories. The first one is active capacity with a defect, i.e. *ahalliyah al-adā al-nāqiṣah*. The capacity comes to operate right after the birth of the child which is the stage where the receptive capacity becomes complete and active capacity begins to develop gradually. At this stage, the person has complete rights and limited liabilities. The second one is called perfect active capacity, i.e. *ahalliyah al-adā al-kāmilah,* in which the active capacity becomes complete

[35] Al-Kāsānī, *Badā'i',* 7:225.
[36] Wazārah al-Awqāf, *Mawsū'ah al-Fiqhiyyah*, 36:170.
[37] Sadr al-shariah*, al-tawdih*, (Karachi: Qadimi Kutub Khana), 1:16. For the whole discussion around the capacity under Islamic law we have primarily relied on the work of Sir 'Abdurrahīm. See, Abdur Rahim, M.A, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'I and Hanbali Schools,* (London: Luzac & Co., 1911) 217-19.

and the person becomes an addressee for the entire legal system. This capacity is attributed to a person when he reaches maturity. The maturity is the age of puberty when the mental faculties of the person are not defective.

Hence, it is observed that a person, under Islamic law, gains the status to be entitled to rights and becomes liable for responsibilities only when he becomes mature. Thus, it is possible that a person may not achieve the perfect active capacity as his mental faculties do not develop completely as a prudent person even after the age of majority due to certain circumstances *'awāriḍ* (impediments) which affect the capacity of the person. It is also possible that a person may lose his perfect active capacity if any disease affects his mental and physical faculties.

Returning to the issue of marriage during death-illness, we shall take the concept of *ahalliyah* into account to determine whether or not the death-illness invalidates the marriage contract. We have observed that the perfect active capacity of a person, by which his dispositions derive validity, might be lost, even after its existence, due to certain circumstances such as *awāriḍ* which affect the mental faculties of the person. Thus, if the death-illness of the person is of the kind – such as a severe head injury, or a high-temperature fever – which damages the mental faculties of the person under the illness, his active capacity becomes defective and his dispositions, including marriage, will be considered invalid. In a nutshell, the death-illness might invalidate the marriage contract which is concluded by the sick person during the illness.

Death-Illness and the Consummation of Marriage

Muslim jurists discuss the consummation of marriage in the chapter of dower when they discuss the circumstances where the complete specified dower becomes due and is liable to be paid. They state two ways by which a marriage may be deemed to be consummated. The first one is when the husband engages in sexual intercourse with the wife (*dakhala bihā*). The second situation, under which the marriage is deemed to be consummated, is when the husband and wife find some privacy, i.e. *khalawah,* in which they might engage in sexual intercourse. This privacy is of two kinds, valid and invalid, i.e. *al-khalawah al-ṣaḥīḥah* and *al-khalawah al-fāsidah.* The former is the privacy in which the marriage is deemed to be consummated. It gives rise to certain liabilities such as the payment of dower by the husband and the observation of *'iddah* by the wife. The *al-khalwah al-ṣaḥiḥah* is defined by jurists as follows:

> The *al-khalawah al-ṣaḥīḥah* is the privacy where there should be no physical, psychological or legal hindrance from intercourse. Thus, if any of them was in an illness which prevented him/her from performing sexual intercourse or any of them was fasting for *Ramaḍan* or was in *Iḥrām* or the wife was experiencing her menstrual period, the privacy would not be of the valid one due to the existence of psychological and/or legal hindrance. As far as the fasting of *qaḍa* is concerned, there are two opinions and according to the right one, the privacy would be valid because the sexual intercourse, in that case, will only cause for another fasting for one single day which is quite easy like any *nafl* fasting.[38]

[38] Al-Sarakhsī, *al-Mabsūṭ*, 5:150.

From what has been discussed about the concept of *al-Khalawah* under Islamic law, it is evident that the death-illness plays a significant role in the consummation of marriage with respect to the dower. As the illness is a valid hindrance from intercourse, the death-illness converts the privacy into an invalid one due to which the dower does not become due (*lā yata'akkadu*). Thus, if a person divorces his wife in such circumstances, the rules of un-consummated marriage will apply for the issue of marriage.[39]

Legal Effects of Death-Illness on Dissolution of Marriage

Since the death-illness has different legal effects on the different modes of the dissolution of marriage, it is important to know the various modes by which a marriage comes to an end. In the following, we shall first elaborate the different modes by which a marriage may be terminated.

The first and foremost mode of dissolution of Muslim marriage is the divorce which is pronounced by the husband to the wife and as a result of which the wife is freed from the bond of marriage. Divorce (hereinafter *ṭalāq)*, in the literal sense, means to set free or unfasten the knot.[40] In the legal sense, the term *ṭalāq* has been defined by many jurists in different ways; however, the basic theme is that it is the act of the husband by which the bond of marriage ends and the knot of *nikāḥ* is unfastened.[41] The *ṭalāq* can be given either verbally, or by writing or by gestures. The former two modes are available for both the persons who are deaf or can speak while the latter form can be used only by the person who has impaired speaking ability.[42] The *ṭalāq* is of two kinds – *Sunnah* and *bid'ah.* The former is the *talāq* which is given in the manner prescribed by the *Sunnah* and in the latter form of *ṭalāq*, the deviation is made from the manner of *Sunnah*. The *Sunnah* divorce is further divided into two categories – *Sunnah* as to the time in which the divorce is given and the *Sunnah* as to the number of divorces pronounced. As far as the *Sunnah* with regards to the time is concerned, it is the divorce which is pronounced in the *ṭuhr* in which the husband did not perform sexual intercourse. Thus, pronouncing *ṭalāq* during menstrual period or during the *ṭuhr* in which intercourse has been made, would be a deviation from the *Sunnah* and would be regarded as *ṭalāq bid'ī.*[43] As far as the *ṭalāq al-Sunnah* with

[39] According to the principles of Islamic law, if a husband divorces his wife before consummation of marriage and he had specified dower, he will be liable to pay half of the specified dower. Quran says; "If you divorce them before you have touched them, while you have already fixed for them an amount (of dower), then there is one half of what you have fixed, unless they (the women) forgive". [2:237, translation by Mufti Muhammad Taqi Usmani]. In the same case if the dower was not specified in the marriage contract in that case, if the divorce is pronounced before consummation of marriage, the husband would be liable to pay a gift to the divorced wife which is called *mut'ah al-ṭalāq* which is usually some dresses and money. Quran says; "There is no liability (of dower) on you if you divorce women when you have not yet touched them, nor fixed for them an amount. So, give them mut'ah (a gift), a rich man according to his means and a poor one according to his means – a benefit in the recognized manner, an obligation on the virtuous" (2:236).

[40] 'Alī b. Muḥammad b. 'Alī al-Zayn al-Sharīf al-Jurjānī, *Kitāb al-Ta'rīfāt,* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983) 141.

[41] Al-Imām al-Nasafī defines *ṭalāq as:* "that is to unfasten the knot which legally existed due to marriage". See, Abū 'l-Barakāt 'Abdillah b. Aḥmad al-Nasafī, *Kanz al-Daqa'iq,* (Madinah: Dār al-Sirāj, 2011) 269.

[42] See, Abu 'l-Ḥasan 'Alī b. al-Ḥusayn b. Muḥammad al-Sughdī al-Ḥanafī, *al-Nutf fi 'l-Fatāwā,* (Beirut: Mu'assasah al-Risālah, 1984) 1:385.

[43] That is why when 'Abdullah b. 'Umar –may Allah be pleased with them both – divorced his wife during menses period the Prophet of Allah Almighty – peace and blessings of Allah Almighty be upon him – commanded 'Umar b. ak-Khattāb as follows; "order him to revoke the divorce, so that she gets purified [from the menses] and then

regards to the number of divorces is concerned, it is further divided into two categories: *aḥsan* and *ḥasan.* The former is to pronounce one single *ṭalāq* during a *ṭuhr* in which no intercourse has taken place and let the *'iddah* period lapse, and the latter form is to pronounce three single divorces separated in three *aṭhār.* Thus, the pronouncement of more than one *ṭalāq* in one sitting or within one *ṭuhr* would be deemed to be *talāq bid'ī.*[44]

Apart from *ṭalāq al-Sunnah* and *ṭalaq bid'ī,* the divorce is further divided, with respect to its consequences, into two categories: *raj'ī* and *ba'in.* In the former case, the husband has the right to revoke the divorce within the *'iddah*[45] period for which the consent of the wife is required while in the latter, the husband does not possess any right to revoke the divorce. However, he may re-marry with the same woman within and after the *'iddah* with her consent, if the separation *baynūnah* is not completed with three divorces which is called *baynūnah al-kubrā* or *al-Ṭalāq al-Mughallaḍ.*[46]

The second mode of dissolution of Muslim marriage is known as *khul'*. This is a bilateral contract between husband and wife according to which the wife usually pays the dower back, and the husband gives her a divorce. The marriage dissolved by *khul'* is regarded as one *ṭalāq bā'in.* According to Ibn Manzur, the root of *khul'* is *khal'*. The verbal noun *khal'* refers to the act of extraction, removal, detaching or tearing out. In its real sense, *khal'* is generally associated with things or objects, such as garments.[47] Jurjani defines it as "dissolution of marriage through taking money [by the husband]."[48] According to the traditional view of Muslim jurists, *khul'* is a contract between husband and wife, therefore the consent of both husband and wife are required for the validity of *khul'*.

Apostasy – which is termed as *irtidād* or *riddah* under Islamic law – is that when a person abandons the faith of Islam. In such a case it is preferred that the person be given a time of three days for deliberation so that his misconceptions about Islam may be removed. If the person reverts to Islam, he will be set free without any punishment. However, if this does not

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experiences menses and then gets purified and then if he may pronounce divorce before intercourse if he wishes to do so". See, Ibn. Mājah Abū 'Abdillah Muḥammad b. Yazīd al-Qazwīnī, *Sunan Ibn. Mājah,* bāb ṭalāq al-Sunnah (Beirut: Dār Iḥya' al-Kutub al-'Arabiyyah, n.d), 1:651.

[44] Al-Sarakhsī, *al-Mabsūṭ,* 6:3.

[45] The *'iddah* period varies from woman to woman. If a divorce has been pronounced before consummation of marriage, there is no *'iddah* period which the divorced wife could be required to observe before marrying a third person. Quran says; "O you who believe, when you marry the believing women, and then divorce them before you have touched them, then they have no obligation of any *'iddah* (waiting period) for you that you may count" (33:49). However, if the marriage has been consummated, in that case we will look at the woman and determine to which class of women she belongs. If she is of the class who do not experience menstrual cycle either for being too young or for reaching the age of menopause, in that case her *'iddah* period would be three months. Qurān says; "And those women from among you who have despaired of (further) menstruation, if you are in doubt, their Iddah is three months, as well as of those who have not yet menstruated" (65:4). If the woman is pregnant, in that case her *'iddah* would be the termination of pregnancy. Quran says; "As for those having pregnancy, their term (of *'iddah*) is that they give birth to their child", (65:4). Lastly, if the woman experiences menstrual cycles and she is not pregnant, in that case he *'iddah* would be three menstrual cycles. Quran says: "Divorced women shall keep themselves waiting for three periods" (2:228).

[46] Abu 'l-Ḥasan al-Sughdī, *al-Nutf,* 1:323.

[47] Ibn Manzur Muhammad b. Mukarram, *Lisan al-'Arab* (Beirut: Dar Sadir, 1955-56) 8:76.

[48] 'Ali b. Muhammad al-Jurjani, *Kitab al-T'arifat* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983) 45.

happen, the person will be awarded the death sentence if the person is a male. However, if under the same circumstances, the person is a woman, she will be imprisoned for life unless she reverts back to Islam.[49] The marriage will stand dissolved right after apostasy irrespective of the fact that marriage has been consummated or not and whether the wife is a Muslim or someone from the people of the Book. This is because a marriage contract cannot exist between a Muslim woman and a non-Muslim man. On the other hand, if the wife and husband both commit apostasy, their marriage will remain intact.[50] Unlike the ownership, the marriage contract, once dissolved will not be restored after the husband returns to Islam, however, he may contract a fresh marriage with the woman with her free consent.

The Legal Effects of Death-Illness on Dissolution of Marriage

Among the different modes of dissolution of Muslim marriages, the impact of death-illness will be based on the question of whether or not the husband is *fār.* Thus, in the case of *ṭalāq,* the impact of death-illness will be different from that of *khul'.* In the following, we shall discuss the impact of death-illness on *ṭalāq* and *khul'* and other forms of dissolution can either be considered *talāq* or *khul'* for this purpose.

Divorce during Death-Illness

Jurists have unanimously agreed that the divorce pronounced by the person in his death-illness is effective whether it is revocable or irrevocable. However, they have differing views about the right of the divorced wife on the subject of inheritance from the husband. Ibn Hazm has quoted around twelve opinions in this regard, based on *ijtihad*.[51] If the divorce is revocable and the husband dies before the expiry of the '*iddah* period, then, in that case, the wife will receive her share in inheritance as the marriage has not been terminated completely. In the case of an irrevocable divorce, the jurists have different opinions. According to Imam Abu Hanifa, if a person pronounces an irrevocable divorce to his wife during death-illness and he dies during her '*iddah period,* she will receive her share because in that case he will be regarded as a person who is running away from his responsibilities towards his wife. But if he becomes well and then dies due to any other reason during or after her '*iddah period*, in that case, she will not receive any share.

There are three conditions to make a person *fār* (the one who escapes).

1. If he pronounces irrevocable *talāq* during his death-illness.
2. The capacity of wife to inherit from the husband remains intact from the date of divorce to death. For example, if the wife is Christian and the husband is a Muslim, the husband will not be regarded as *fār* and she will not receive any share because Muslims and non-Muslims do not inherit from each other. Likewise, if the wife converts to any other

[49] Al-Zayla'ī, *Tabyīn*, 3:285.
[50] al-Sarakhsī, *al-Mabsūṭ*, 5:49.
[51] Rashad al-Sayyid Ibrāhim 'Āmir, *Tasarrufat al-Marid Marad al-Mawt fi 'l-Qānan al-Madani al-Jazā'iri Muqārinan Bi 'l-Shari'ah al-Islāmiyyah Wa 'l-Qawānin al-Ukhrā* (Mphil thesis: Jamia al-Jazayir, n.d) 140.

religion after the divorce, her capacity of inheriting from a Muslim will lapse and she will not receive any share.
3. The wife does not ask for a divorce or she must not be happy with divorce.

The reason behind the concept of *fār* is that the husband tries to escape and deprive his wife of the share in the inheritance. So, the law turns his intention on him and makes the wife eligible for inheritance. In this situation, if the wife dies during *'iddah,* he will not be entitled to any share from her inheritance. There are certain situations in which the husband is not regarded as *fār*. These conditions are as follows:

1. The divorce is revocable.
2. The husband was forced to give a divorce and he pronounces an irrevocable divorce without his free will. In that case, the wife, since the husband is not *fār*, will not receive any share.
3. The husband recovers from his sickness and falls ill with any other disease and dies during her *'iddah period*. In that case, she will not receive any share because, with the cure from the previous disease, it was proved that the disease was not death-illness.
4. Wife dies after the expiry of the *'iddah period* or the husband pronounces a divorce before the consummation of marriage because, in that case, there is no '*iddah* and the basis for inheritance lapses.

Imam Ahmad and Ibn Abi Layla hold that if the person, with the intention of depriving his wife of inheritance, pronounces a divorce, she will receive her share even if the person dies after *'iddah* except if she marries any other person before the death of her previous husband. Imam Malik b. Anas holds that the wife, in the above situation, will be entitled to inheritance even if she marries another person before the death of her husband.[52]

Khula **during death-illness of the wife**

If a wife takes divorce from her husband in consideration of her dower or any other property during her death-illness, the consideration will be regarded as *wasiyyah* (bequest) and that will be operative only on 1/3rd of her estate. However, her other heirs may give effect to the whole of *wasiyyah*. In this case, if the husband does not divorce her, he is eligible for half of the estate (as the wife dies without having any child). In such a case, the *wasiyyah* may be operative up to a 1/3rd of the estate. This is because 1/3rd is less the 1/2 which would have been the actual share of the husband had he not pronounced the divorce. However, if his share would have been 1/4th as the wife had some children, in that case, the quantity of *wasiyyah* should not be more than 1/4th. This is because this divorce can be used as a tactic to allot more share to the husband than his actual share. All of this happens when the wife dies due to that disease, but if she gets well, the husband will receive whatever consideration was already fixed for *khula*.

Conclusion

[52] For detailed discussion about the inheritance of wife when the husband dies during her *'iddah* of *ṭalāq* please see, al-Zuḥaylī, *al-Fiqh al-Islāmī*, 9:6979.

In Islamic law, death-illness has legal effects in almost every aspect of matrimonial affairs. It has effects on the marriage contract, in the consummation of marriage, and on making the dower due on the husband. It also has an operation in the matter pertaining to divorce. The death-illness normally does not affect the validity of the marriage contract unless it affects the mental capacity of the person and thus incapacitates him for concluding any kind of contract. The death-illness has effects in the consummation of marriage as it mitigates the effects of privacy and turns it as - *al-Khalwa al-Fāsidah* (defective privacy) due to which the dower does not become due. If a person gives revocable *ṭalāq* during death-illness and dies during the *'iddah period*, the wife will not be deprived of her share in the inheritance of the husband. However, in the case where he pronounces *bā'in ṭalāq*, the jurists hold differing opinions. Some hold that the wife may inherit if he dies during the waiting period, while others are of the opinion that she may not inherit from him. If the wife takes *khul'* from the husband during his death-illness, she will not inherit from him irrespective of the time of death. It does not make any difference if he dies within or after the *'iddah* period.

Certain Muslim countries have incorporated the element of death-illness in their legal systems by legislation. The remarkable legislation in this regard includes the *Majalla,* which was the Civil Code of the Ottoman Turkey, the Jordanian Civil Law, and the Egyptian Civil Law. As there have emerged some new diseases which were not known to the classical jurists, a fresh interpretation of death-illness is needed within the principles set down by Muslim jurists.