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Evaluation of the Doctrine of Marz-ul-Maut *in Muslim Law: A Pakistani Perspective*

Dr. Aatir Rizvi*
Incharge, Dr. Muhammad Iqbal Law School,
GCU Lahore.
Muhammad Azeem Farooqi**
PhD (Scholar-PULC), Visiting Faculty Member,
Dr. Muhammad Iqbal Law School, GCU Lahore

ABSTRACT

In Islamic law there are rules and doctrines for almost every aspect of human life and property owned by a Muslim is at his disposal during his lifetime and even after his death, he has the freedom to make a will (upto a certain extent). The transfer of property during deathbed illness or Marz-ul-Maut is somewhat in between the transactions inter vivos and testamentary dispositions and here too, Muslim jurists have provided elaborated rules and principles. This article will briefly discuss different rules regarding transfers during marz-ul-maut and also the effects of this deathbed illness on other aspects of human life especially marriage, divorces and acknowledgment of debt etc during this illness. This article will discuss different laws, rules and principles applicable in Pakistan in the context of marz-ul-maut and also discuss the rules pertaining to different schools of thought. Further the principles being followed by courts in Pakistan in cases pertaining to issues involved with marz-ul-maut are also elaborated. The research is qualitative and doctrinal in nature.

Keywords: *Marz-ul-Maut, Deathbed Illness, Gifts, Mortis Causa, Muslim Law*

1. Section I: Introduction

There have been divergent views regarding marz-ul-maut among scholars belonging to different schools, like Malikis do not allow it whereas; Shais and Hanafis accept its applicability upon different acts. The doctrine, donatio mortis causa meaning a gift of personal property in contemplation of death, is a legal maxim and is valid in case death of donor occurs due to that illness. This has been recognized in different laws like in India section 191 of Succession Act 1925 explains the requirements in this regard, in Pakistan. A Muslim is required to make a will of his property upto 1/3rd limit and in case no will is made, the

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property is distributed according to inheritance rules, elaborated in detail by the Sharia. However, in case of apprehension of maut in the sufferer's mind, he has been allowed to make gift of such property (upto a certain limit) and this is known as, gift in marz-ul-maut or deathbed gift and rest of the property goes according to the rules of inheritance. Muslim law imposes strict conditions for the proof of marz-ul-maut in order to be effective. This whole concept emerges from the hybrid mix of hiba (gift) and wasiyat (inheritance). Usually both will and gift during marz-ul-maut are executed after the death of the maker, but will can be made at any time during the life time, whereas, deathbed gifts are only possible during the deathbed illness. Section 129 Transfer of Property Act 1882 also deals with donations mortis causa and Muhammedan law in Pakistan.

Methodology

This article is written by following the doctrinal research method, where data is collected from classical books, case law, statutes and research publications available in different printed and online resources. The study is qualitative and interpretative in nature.

2. Section II: The Concept

It is to be remembered that the concept of marz-ul-maut is a hybrid type of concept in which both aspects of will and gift are amalgamated and are strictly followed under the Muslim law. Further, any transaction which is done under the deathbed illness becomes amalgamated with the rules of deathbed illness and the rules of that particular transaction of action, which make it more technical and intricate. *Deathbed Illness is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.*[1] In Arabic it is called, '*marz-ul-maut'* i.e., when a person, suffering from a marz (Illness), is under the apprehension of maut (Death), he is said to be suffering from *marz-ul-maut.* In short, it is an illness which is highly probable, will ensue fatally.[2]

Essential Conditions for Marz-ul-Maut

In leading case titled, *Shaikh Nurbi versus Pathan Mustanbi & others*[3], three essential conditions required for application of doctrine of marz-ul-maut were discussed i.e.

(1) The malady must have caused the death of the person making gift

(2) There must be subjective apprehension of death in the mind of the person suffering form that illness and

(3) Presence of some external indicia such as inability to attend daily routine matters.

In case of gifts, another condition is also imposed i.e. delivery of possession, as it is one of the most important conditions for the validity of gifts. It is an essential condition for *marz-ul-maut* that the person suffering from the marz must be under an apprehension of death. Where the malady is of long continuance and there is no immediate apprehension of death, such malady is not *marz-ul-maut,* but it may become *marz-ul-maut*, if it subsequently reaches a stage as to render death highly probable. If a malady lasts for more than a year, it becomes a disease of long continuance, which familiarizes the patient with his disease and hence does not constitute marz-ul-maut.[4]

Amir Ali as well as, Durr-ul-Mukhtar is unanimous on the point that if the malady continues for more than one year, it ceases to have any influence in respect of apprehension of death in the mind of the sufferer, as he becomes accustomed to the disease and starts living with it. So, no hard and fast rule can be laid down in this regard, as in one case only a week's illness may be regarded as *marz-ul-maut,* on the other hand, in another case even that of one year may not amount to it. Following points are worth noting in this regard, in order to understand a malady to be declared as *marz-ul-maut*: -

(a) Proximate danger of death and result in death.

(b) Apprehension of death in mind of sick person.

It is the most proper test for *marz-ul-maut* and if the apprehension is there in the mind of sick person, then all transactions by him are known as, *death bed transactions*. Now it is important to understand three basic aspects involved in the deathbed illness i.e. (1) deathbed illness; (2) external factors and (3) apprehension of death in sufferer's mind.

(1) Deathbed Illness/ Disease

It must be kept in mind that the scenario which was prevailing in the past has been changed in recent times, due to advancements in medical science and now those diseases which were contagious in the past are not so in the present and will further change in the future. As today, people with life-threatening illnesses live for a longer period of time due to their treatment and availability of different medicines and procedures. So, now calculating a year for the applicability of deathbed illness doctrine should be according to the condition of the person and not from the start of the malady and where the condition gets worsen it should be considered. The opinion of medical expert can be taken in this regard and acted upon accordingly. Diabetics, blood-pressure, paralysis and asthma cannot be declared deathbed illnesses unless condition gets worse.

The maladies which continue for a long time such as asthma, lingering illness, diarrhea, general debility due to age, paralysis, palsy or phthisis consumption

and albuminuria, are not marz-ul-maut. [5] A child birth is prima-facie death illness provided pains have begun and death is caused, but under Shia law child birth is not by itself treated as death illness.[6]

(2) External Factors

It means seriousness of malady. But it is not a real test, as a malady may be very grave yet it might not produce fear of death in the mind of person suffering from it. There must be some external indicia as, inability to attend any ordinary avocations etc. One must keep in mind that the sufferer must be unable to attend his day to day business due to that illness and apprehension of death and dies within a year of such condition, as after a year, his transactions are treated as the transactions entered into by a person who is well, unless a condition comes where his illness becomes worse and he dies due to that. There are some diseases in which it is medically proven that certain external indicia ensue that disallow the sufferer from attending to his daily life routine and he is confined to bed due to physical and/or mental disability due to that disease, these indicia play a vital role in determining the deathbed illness and evidence will be entail accordingly. Whereas, only confining to bed due to some fracture or normal disease, for a shorter period of time, does not constitute a marz-ul-maut, unless circumstances get worsen and medical experts treat that in such malady.

(3) Apprehension of Death

Apprehension of death in the mind of the sufferer is very crucial factor in the whole debate and it is to be understood in the context of two aspects. (a) in the view point of the donor / sufferer and (b) in the opinion of others. But in both scenarios, this whole concept of apprehension of death is subjective one. Therefore, in *Hassarat Bibi versus Golam Jaffer*[7], only definition and indicia of deathbed illness were mentioned, which included seriousness of disease which ultimately results into death, apprehension of death by making him realize that he would die, inability to attend day to day functions and in case of long continuing illness the turn of events into worsens the condition and results into apprehension of death in his mind. So, it is well settled principle that without apprehension of death in the mind of sufferer the application of the doctrine of deathbed illness is not possible. It must be kept in mind that mere apprehension of death due to extreme old age does not attract the doctrine of marz-ul-maut.

3. Section III: Position in Pakistan

As Pakistan is an Islamic state and as per the constitution of Pakistan, rules of Muslim law are applicable in the day-to-day affairs of all Muslims, so the doctrine of deathbed illness is very much applicable in the courts. Section 191 of Succession Act 1925 deals with the gifts made in contemplation of death and states that movable property can be disposed of by a man in contemplation of death in the same way as he could dispose of by will. It further elaborates that in such a gift, if due to illness and apprehension of death in the mind of donor, he delivers the possession of property to another person to keep as a gift, in case of his death and where he recovers from that illness, the gift is revoked or where the donee dies before him, it will be presumed to have not been made at all, otherwise it would be valid in case of death of the donor. Section 129 of Transfer of Property Act 1882 also provides saving to the gifts of immovable properties made in contemplation of deathbed illness under Muhammedan law. Pakistani courts tend to ask for medical evidence pertaining to marz-ul-maut of the sufferer as well as, independent witnesses to corroborate the stance of the parties. In one of the leading cases on marz-ul-maut namely, *Mst. Channan Bibi & 4 others versus Muhammad Shafi & 3 others*[8], the criteria as to what transactions are to be treated as under deathbed illness and what not was discussed in detail by the Supreme Court of Pakistan (SCP) in the shape of few questions regarding which court has to satisfy itself before deciding the matter in hand:-

(1) "Was the donor suffering at the time of gift from a disease which was the immediate cause of his death?

(2) Was the disease of such a nature or character as to induce in the person suffering, the belief that the death would be caused thereby, or to engender in him the apprehension of death?

(3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations, a circumstance which might create in the mind of sufferer an apprehension of death?

(4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?"

Hence it becomes clear that all the circumstances surrounding the transaction, including but not limited to the nature of disease, physical and mental condition of the sufferer, proximity of death, medical expert's opinion, external indicia and the extent to which disposal is allowed in Muslim law, must be taken into account while deciding cases pertaining to the deathbed illness. Where the

possibility of subjective apprehension of death in the mind of deceased is raised, the burden of proof shifts upon the person who takes the disposition under this doctrine, to show and prove the circumstances and facts to enable the court to understand that the transaction was genuinely under the apprehension of death due to the malady which resulted into the death of the person in question.

4. Section IV: Effects on Different Transactions

Suffering from a malady which is deathbed illness, a person is bound to apprehend about his death in near future. Islamic law provides detailed principles and rules in this regard, where such person enters into different types of relationships, transactions and dealings pertaining to his movable as well as, immovable properties. The Islamic law tends to create a balance between the power of disposal of such person and the legitimate expectation of gaining property by the legal heirs of such person, incase death ensues. This intricate relationship between granting autonomy to transfer property according to the whims of the owner and protecting the interests of already existent legal heirs is very beautifully discussed in details by the Muslim scholars. In the recent times, when things have changed due to technological advancements and modern medical procedures and medications, things need to be reconsidered and rules need to be reset and reformulated by inculcating the medical expert's opinion, nature of new and old maladies, and availability of health facilities on the case-to-case basis. As a disease which is curable for one segment of society due to availability of resources and adequate medical facilities might not be for someone belonging to downtrodden segment of the society and a disease which is very normal for one segment might be contiguous for the others having no access to even basic health and medication facilities.Here are some transactions which, if entered into during *marz-ul-maut*, are called death bed transactions and the doctrine of marz-ul-maut applies to cases where, transactions are made under the pressure of a sense of imminent death. In this case the contractual capacity of such person is defected due to presence of illness and apprehension of death in his mind. Let us consider some transactions in this regard:-

Gift / Hiba

If made during *marz-ul-maut*, is subject to certain restrictions; but such a gift must fulfill all the conditions[9] necessary to make a valid gift. Hanafi's and Shias hold that such gifts are valid to the extent of 1/3rd unless heirs consent, but Malkis treat these gifts as void.[10] The donor can dispose of property during *marz-ul-maut* to following persons:-

(a)Non-Heir: A person can't make valid gift of more than 1/3rd of his property. [11]

(b)Heir: It is altogether invalid.[12]

In case of gift of dower debt by wife during death bed illness in favor of husband, it is invalid,[13] as husband is an heir and consent of all the heirs is necessary.

Sale

Sale can be validly made during marz-ul-maut. As, all the transactions with full consideration are excluded from the application of rules regarding *marz-ul-maut*. Further, it is the sale of assets which usually takes place during life threatening diseases in order to meet hospital and medical expenses and other intricate issues attached to the malady. Hence, the doctrine of deathbed illness is not applicable in such cases of sale of movable and immovable properties of the sufferer.

Acknowledgement of Debt

It's valid, if made in favor of non-heir and invalid, if made in favor of heir, unless all heirs consent to it. Shia Law regarding acknowledgement in favor of heir is that it is valid to the extent of 1/3rd without the consent of other heirs. In Shafai Law, all acknowledgements are valid. There needs to be some caution when dealing with this, as acknowledgment of debt in favor of a legal heir, might be with a view to give him/her some extra benefit from the leftover property of the diseased and to deprive others indirectly. Burden of proof will always lie upon the one who takes benefit to prove that debt was originally give and at that specific time, that person had those means and capacity to give debt, in contested cases.

Waqf

Waqf is the donation of property for some pious, religious or charitable purposes, in which the maker of the waqf transfers the ownership of the property in God's name and benefits are to be spent upon the given purposes and objects. Waqf once established or started to take effect, cannot be reverted back under Islamic law. A Muslim is authorized to make waqf of his whole property during his lifetime and upto one third through will in normal circumstances. Here in case of making waqf under marz-ul-maut, it will only be valid up to the extent of 1/3 of the property.[14] However, with the consent of all the legal heirs, exception can be made in this regard.

Dower

Dower is part and parcel of Muslim marriages and is so important that in case it is not agreed upon by the parties at the time of marriage, the law presumes it. It

is husband's duty to give settled dower to his wife either during the subsistence of marriage or afterwards. Even it can be recovered by the wife after the death of her husband from his leftover property through court under Pakistani law. Dower can be in shape of money, property or anything having value. All rules[15] of *mehr-e-misl*[16] apply, if dower is contracted during *marz-ul-maut.* When a guardian gives a minor husband/ person into marriage tie and stands as a surety for dower during his death illness, his liability would extend to 1/3rd of his estate, but if either of the husband or wife is his heir, the contract would be void and the dower will not be payable.[17]

Marriage

A marriage contracted by such a sick person[18] is dependent on consummation, so where the husband without consummating the marriage dies as a result of that illness, the marriage contract becomes void resulting into woman having no right of dower as well as, succession,[19] as such marriage is irregular. But where the person recovers, the consummation can make marriage valid. According to Abu Hanifa and Al-Shafi it is permitted; Malik said it was not permitted. The reason for their disagreement is the vacillation of marriage between sale and gift, because the gift is not permitted except to the extent of 1/3rd but sale is permitted. There is another reason for their disagreement, which is the fear that he (the *mareez*) may be accused of intending to harm the heirs by introducing an additional heir.[20] It is always better to avoid entering into marriage tie during marz-ul-maut, as for few this type of marriage will be void form the start and for few it would be irregular having no legal effects until consummated. Pakistani law does not directly deal with this issue and leave the question to be determined by the courts under the light of principles of personal fiqh of the parties as ordained in Muslim law.

Dissolution of Marriage

Dissolution of Muslim marriage can be from husband side (talaq) or by the demand of wife (khula) or with mutual consent (mubarat) or it can be through court where things are not settled by the parties. In case of pronouncement of revocable divorce by the husband in deathbed illness, the wife will be entitled to inheritance. If husband (on death bed) pronounces irrevocable talaq, he himself will not be entitled to get inheritance from the property left by his deceased wife, if wife dies before him, only Shafais hold view that such wife can't inherit[21]. On the other hand, wife is entitled to inherit till the period of Iddat and not afterwards. If wife (on death illness) asks talaq from the husband, then husband is entitled to inheritance till period of iddat and not the wife from

him. According to Shia law, the wife will have the right to inherit from the husband if he dies within one year from the date of pronouncement of divorce by him, provided she remains unmarried. The reason given by Imam Jaffer-us-Sadiq (AS) is that if the husband conceiving himself to be on deathbed illness were to attempt to deprive her from her lawful share in inheritance, her right for the inheritance would be protected and secured by the law as a punishment for his unjust attempt[22].

Apostasy

In case of apostasy of either party on death bed illness, husband and wife both can inherit from each other, not other legal heirs.

5. Sectin V: Marz-ul-Maut and Donations Mortis Causa: *Compared*

Usually they are treated as same, yet there are minor differences between the two. The marz-ul-maut is dealt under the Muhammedan law; whereas, donations mortis causa are dealt in section 191 Succession Act 1925. Further, under marz-ul-maut both movable and immovable properties can be transferred whereas, under donation mortis causa, only movable properties are dealt with. It is further to be noted that under doctrine of mortis causa there is no limitation imposed on the extent of disposition of property, whereas in deathbed illness under Muslim law only upto 1/3rd can be disposed off. It is also to be noted that if the donor recovers from the illness, under Muhammedan law the gift will remain valid whereas, under doctrine of donation mortis causa, it will become invalid.

6. Section VI: Conclusion

The doctrine of deathbed illness is recognized in many jurisdictions but Islamic doctrine provides much detailed and clear rules pertaining to extent, nature, to whom disposal is allowed and in what conditions it is allowed. The Shia and Sunni Laws on this subject are almost the same, although some Shia authorities are divided on the subject. The presence of malady along with the apprehension of death, in the mind of person suffering from it, is necessary and it must be noted that a sense of imminence of death is essential to constitute *marz-ul-maut*, but an apprehension on the part of an elderly person, that merely because he is old, that he may die suddenly, is not *marz-ul-maut*."[23]

If a person recovers from the illness, there is no marz-ul-maut. So, it can be said that all depends upon the individual cases to decide whether some illness if death bed illness or to be treated otherwise. Nevertheless, if it is proved that a transaction is made during death bed illness; it will be subject to certain restrictions as discussed above. In Pakistan the rules and principles

enunciated by Muslim law are applicable in the courts and courts tend to follow the criteria and rules discusses above before deciding the cases pertaining to the involvement of the question of marz-ul-maut in different transactions coming in cases being adjudicated by them.

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References

[1] Dr. Nishi Purohit, *The Principles of Mohammedan Law*, p-733.
[2] *Baillie*.
[3] (2004) 4 ALT 624
[4] *Hedaya.*
[5] Dr. Nishi Purohit, p-734.
[6] *Shamsul Hasan v Syed Hassan,* AIR 1923 All 173
[7] (1899) 3 C.W.N. 57
[8] PLD 1977 SC 28
[9] (1) Declaration (2) Acceptance (3) Delivery.
[10] *Fatawa-e-Alamgiri*, IV, 561.
[11] Unless all heirs consent to it.
[12] Unless all heirs consent to it.
[13] *Baillie*.
[14] Unless all heirs consent to it
[15] The rules may be: (1) Social position of woman, (2) wealth of husband, (3) qualifications (age, beauty, virtue etc.) of wife, (4) status of both, (5) time/period, (6) Dower given to wife's female paternal relations etc.
[16] Customary dower, it is also called, '*proper dower*'.
[17] Dr. Nishi Purohit, p-736.
[18] Here sick person means a person on death bed.
[19] *Sharaya-ul-Islam*.
[20] Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, p-270.
[21] *Minhaj*, 332.
[22] Aatir Rizvi, Muslim Law & Jurisprudence, p-267
[23] *Begun v Kazbanoo* ('57) P. Kar. 884 and *Allah Rakha v Nawab etc,* PLD 1967 Lah. 613.