



Legal and Jurisprudential Examination of Marriage and Divorce for Terminally ILL Patients

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<http://dx.doi.org/10.18415/ijmmu.v10i8.5076>

Abstract

One of the important issues in the legal world is preventing the abuse of rights. The institution of marriage, due to its non-monetary nature with significant financial implications, can create opportunities for abuse of rights in certain circumstances. One such circumstance is when one spouse is afflicted with a fatal illness, and divorce can be used as a means to disinherit them. The findings of this theoretical research, which was conducted using a descriptive and analytical method, show that according to Shiite Islamic jurisprudence and Iranian law, if a terminally ill man divorces his wife due to fear of abuse of rights, she may still inherit from him under certain conditions. In reality, illnesses can be divided into two categories: those that result in death quickly and those that are prolonged. It appears that only the former are covered by the law, while the latter are not. However, it is essential to consider other financial implications of marriage beyond inheritance, such as alimony, dowry, and other expenses. Therefore, the legislature's coverage gaps related to these issues require transparency to increase awareness and prevent potential problems resulting from prolonged illness, divorce, remarriage, and their consequences. In conclusion, inheriting from a terminally ill spouse is not deemed an exceptional circumstance under legal or jurisprudential frameworks, but rather it should be addressed within a broader context of legal frameworks to mitigate potential harms.

Keywords: *Terminal Illness; Pathology; Marriage; Financial Rights*

Introduction

Article 945 of the Civil Code discusses the marriage of a sick person and its effects. Some legal experts believe that this article implies that the sickness at the time of marriage must be terminal, but it is not necessary for the sickness to be the cause of death. In support of this view, it can be argued that the word "dar" in the phrase ". . dar hamān marž bemirad. . ." has the capacity to indicate the presence of illness at the time of marriage. In other words, just as the word "fi" indicates the truth about the word mentioned in the container for the word "dar," the truth of that capacity has been recognized. The difference in the interpretations used in Articles 944 and 945 of the Civil Code can also support this

claim, as Article 944 states that "and dies from that disease," which indicates that the presence of illness at the time of divorce is necessary for death. However, in Article 945, the phrase "in the same illness he dies" is used, which apparently refers to the capacity of illness at the time of marriage for death. In fact, if the cause of the illness at the time of marriage was desirable for the legislator's death, it was necessary to express it with an interpretation similar to that of Article 944.

On the other hand, many legal experts (Adl, 2015, p.25; Emami, 2020, p.298) believe in the causality of illness for death in interpreting Article 945 of the Civil Code. In explaining this opinion, one can use the principle of inheritance of spouses and the necessity of interpreting the narrowness of Article 945; explaining that the rule of Article 945 is contrary to the norm and cannot be relied upon in cases of doubt and must be interpreted narrowly. On the other hand, it can be said that the apparent meaning of Article 945 conveys causality because the phrase "in that illness he dies" refers to the importance and causality of illness at the time of marriage, and the implication of the phrase is that the husband's death is due to the same illness. At the same time, it is appropriate for the legislator to amend Article 945 to eliminate any ambiguity and clarify the causality of illness for death, especially since this view is supported by Islamic jurisprudence.

One of the important issues that is not mentioned in Article 945 of the Civil Code is the interval between marriage and death or, in other words, the duration of illness from the time of marriage until death. There is no mention of the interval between marriage and death in the narrations that discuss the annulment of marriage.

Allocation of the Ruling to the Sick Spouse and the Assumption of Non-Consummation

If death occurs during illness and lack of inheritance resulting from it, on the one hand, it is specifically allocated to the death of a sick spouse, and it cannot be extended to the assumption of the sickness of the wife, and on the other hand, it is assumed that there has been no sexual intercourse between the husband and wife. Article 945 deals with the ruling of the marriage of a sick man. Therefore, it should be seen if a sick woman gets married during her illness and dies before consummation and recovery from the illness, whether this marriage is also ineffective like the marriage of a sick man. In fact, the issue under consideration is the possibility or impossibility of extending the ruling of a sick man to a sick woman.

The Civil Code is silent about the marriage of a sick woman and the inheritance of the husband from her. Most legal scholars have considered the special ruling regarding marriage in illness specific to a sick man and have not considered it applicable to a sick woman. Nonetheless, some argue that if a man marries a sick woman who then dies during the illness, the likelihood of the man's greed for the woman's inheritance is very strong. Therefore, if the woman dies (whether before or after consummation), doubts arise as to whether the husband inherits from his wife, and in such cases, it must be said that doubt has arisen in "the appropriate criterion," and despite the doubt in the appropriate criterion, the man does not inherit from the woman. They also believe that using the literal interpretation of Articles 864 and 940 of the Civil Code is irrelevant and cannot hinder human reasoning and interest evaluation. As a result, inheritance should not be ruled by relying on the silence of the Civil Code in such cases.

Some criticisms have been made against this view, arguing that the principle of inheritance applies regardless of the consummation of marriage, and deprivation of inheritance requires explicit provisions in the law, which are absent in this case. Moreover, contrary to what is stated in the text, the requirement for matrimonial relation must exist for inheritance to apply. Therefore, the interpretation of Article 945 should be limited to its precise meaning."

The Marriage of a Sick Person and its Effects on Inheritance in Imami Jurisprudence

One of the effects of marriage in illness is inheritance, which refers to the specific effects of such a marriage. According to the Imami jurists, if the principle of marriage in sickness is valid and there has been no consummation due to lack of intimacy, then the assumption of the wife's non-inheritance is stronger due to the invalidity of the marriage contract (Khansari, 1405 AH, 5/356; Sabhani, 1415 AH, 337). Intimacy means its conventional meaning, not just physical intimacy, and the wife's refusal does not affect this. Intimacy is something that cannot be witnessed and it does not matter whether it is physical or emotional.

Najafi believes that the reason for the wife's non-inheritance is to prevent the contrary intention of the husband and to consider the heirs' circumstances. If the wife dies, the consideration of the husband's circumstances becomes irrelevant, and the issue arises when the husband dies and the wife survives. In this case, it is desirable to rule against inheritance and refer to some narrations, and also some argue that the lack of intimacy is a reason for non-inheritance. However, Najafi only considers inheritance established when a sick person marries and dies before intimacy occurs with their spouse. In this case, inheritance is established because analogy is invalid in Imami jurisprudence, and general principles remain as they are. Therefore, the ruling should be limited to the specific case of marriage of a sick man, and the requirement for intimacy to validate the marriage contract of a sick man is contrary to the principles and regulations of the book and tradition. Thus, it cannot be extended, and one must confine oneself to the special case of the marriage of a sick man (Najafi, 1404 AH, 221/39; Tabatabai, 1418 AH, 14/392).

In contrast, some Imami jurists extend the ruling of marriage in sickness to a sick woman and believe that the reason for the wife's non-inheritance is her interference with the heirs. This reason also applies to the marriage of a sick woman, and therefore, if a sick woman marries and dies before intimacy, the husband does not inherit from her (Fakhr al-Muhqqiqin, 1387 AH, 2/599). In analyzing this topic, it can be said that there is a difference of opinion among Imami jurists regarding the marriage of a sick woman and her death due to illness before intimacy occurs. According to the narrow interpretation, the husband inherits if the wife dies before intimacy occurs, but according to the broad interpretation, the ruling of marriage in sickness is extended, and the husband does not inherit if the wife dies before intimacy occurs. The preferred interpretation is the broad one because the harm caused to inheritance in the event of the wife's death is greater than the harm caused in the event of the husband's death since the wife receives one-eighth of the inheritance from the husband. However, if the wife dies, the husband receives only one-fourth of the inheritance.

Idda

The waiting period of marriage (Iddah) can be considered one of the consequences of a marriage to an ill person. In case a man marries a sick woman, there are different perspectives regarding intimacy and lack of it.

In the first perspective, some Imami jurists consider marriage to a sick person as equivalent to non-existence if there is lack of intimacy. Some believe that in such cases, marriage is necessary, while others consider the contract invalid and void due to corruption (Najafi, 1404 AH, 1221/39). On the other hand, some scholars consider marriage obligatory and reject the idea of invalidation of the contract (Kashef al-Ghata', 1341 AH, 59).

Regarding this issue, Sunni jurists have also discussed the matter. Only some of the Maliki jurists believe that if a sick person marries and intimacy occurs, it is necessary for the couple to carry out the ritual washing (ghusl al-mayyit) upon the death of the sick person (Ibn Rushd, 1408 AH, 415/5).

It should be noted that the majority of Sunni jurists believe that marriage is still valid despite the lack of intimacy due to illness. They argue that the purpose of marriage is not only restricted to physical pleasure but also involves companionship and emotional support (Al-Shirazi, 1310 AH, 2/307).

The Theory of Conditional Validity

Imami jurists agree that marrying a sick man is permissible, but they consider its validity conditional upon intimacy with the improvement of the patient's condition. If a sick man marries and dies without intimacy, the marriage contract is void, and the wife is not entitled to dowry and inheritance (Sannad, 1429 AH, 2/347). However, if the patient improves, the wife will inherit and receive half of the dowry (Hakim, 1410 AH, 2/316).

Also, if a sick man recovers from his illness at the time of marriage but suffers from another illness or intimacy occurs, the marriage contract is valid, and all the laws of marriage apply (Tabatabai, 1418 AH, 14/1392). Imami jurists do not consider the validity of marrying a sick woman conditional upon intimacy (Mahdi Karaki, 1414 AH, 11/116). Based on this, some scholars believe that if a sick woman marries and dies before intercourse, the husband will inherit from her (Shahid Sani, 1414 AH, 13/196) because the marriage contract is necessary for the husband, and its necessity leads to the effects of marriage.

There is disagreement among scholars regarding the case where the wife dies before intimacy with her sick husband. Some Imami jurists believe that the husband does not inherit from his wife because the condition of intimacy was not fulfilled (Shahid Sani, 1414 AH, 196/13; Mahdi Karaki, 1414 AH, 104/11). On the other hand, some scholars reject the idea of the absence of inheritance and argue that not inheriting from a sick wife in case of lack of intimacy goes against the principle, and in such cases, one must rely on uncertainty and avoid analogy with Imami jurists (Sabzavari, 1415 AH, 342). Some scholars suggest compromising and settling matters related to inheritance with the heirs in such cases.

Marriage of a Sick Person and Its Effects in General Jurisprudence

There are three theories among jurists regarding the ruling of marriage to a sick person, which are discussed along with their evidence and evaluated.

Theory of Absolute Validity

Regarding marriage to a sick person, there is a difference of opinion among Sunni jurists. According to Abu Hanifa and the scholars of Iraq, as well as Shafi'i, Hanbali, Ibn Abi Layla, and Qayyim al-Kufi and Zahiri jurists, it is permissible and valid to marry a sick person at the time of illness leading to death (Ma'vari, 1420 AH, 8/279; Shibani, 1403 AH, 3/495). The majority of Sunni jurists consider the allowance of marrying a sick person based on four factors:

- 1- Quranic verse: "And marry those among you who are single and those who are fit among your male slaves and your female slaves; if they are needy, Allah will make them free from want out of His grace; and Allah is Ample-giving, Knowing" (An-Nur, 3). They believe that this verse is general and does not differentiate between the marriage of a sick or healthy person (Ma'vari, 1420 AH, 8/280).
- 2- Tradition: The narration "Bilghani An Maula said: Mu'adh bin Jabal asked his companions to get him married when he was feeling that he would die alone" (Beihaghi, 1414 AH, 6/276) indicates the permissibility of marriage to a sick person.
- 3- Analogy: Supporters of the theory of absolute validity consider the marriage of a sick person in the face of death analogous to buying and selling. They believe that just as a healthy person has the right to engage in trade, a sick person also has the right to do so. They argue that just as a sick person is not prohibited from having sexual relations with his female slaves, he is also not

prevented from marrying free women because marriage involves sexual relations (Ma'vari, 1420 AH, 8/280).

- 4- Reasoning: Marriage is one of the basic needs of humans, and it is necessary for the survival of humanity. Men are not prohibited from spending their wealth on their essential needs even when they are sick (Ma'vari, 1420 AH, 8/280).

The Theory of the Invalidity of Marriage for the Sick

According to the jurisprudence of the scholars of Medina and the famous Maliki jurists, marriage for a sick person is not permissible (Ibn Rushd Hafidh, 1995, 2/38). This is because a sick man is incapacitated and is prohibited from taking possession of his own property or giving it away without compensation if he does not need it. Since marriage involves the transfer of property without compensation, it is necessary to prohibit marriage for the sick. The reason for the prohibition of marriage for the sick is based on analogy with the prohibition of gifts and charity for the sick, which goes beyond one-third of their assets and only applies to one-third of their assets (Qarafi, 1994, 12/297).

Similarly, according to the scholars of Medina and the Maliki jurists, marriage for a sick woman is also not permissible (ibid, 4/209). In case of marriage, the marriage contract is considered null and void, and the couple must separate from each other (ibid, 4/208).

It is said that Malik initially believed in the invalidity and nullity of the marriage contract for a sick person who recovers from the illness, but later changed his opinion and declared the marriage valid. It is possible that the cessation of the disease may be the reason for Malik's change of opinion. In other words, since the reason for the nullification of the marriage contract for the sick is the defect in the contract due to the right of inheritance, once the disease is cured, the defect in the contract disappears, and therefore the marriage will be valid.

Hasan Basri also shares this belief. If it becomes clear that the purpose and motive of the sick person (man or woman) in getting married is to harm the heirs, then the marriage is not permissible. However, if no harm is caused and it is clear that the purpose and motive of the sick person in getting married is to fulfill a need for marriage, then the marriage is permissible (Mawardi, 1419 AH, 8/279).

Documentation for the Theory of Invalidity

According to the Maliki jurists and the scholars of Medina, a sick person cannot get married due to the closure of legal means. This is because a sick person is in a position of suspicion; in other words, it is possible that the purpose of the sick person in getting married is to cause inconvenience to the remaining heirs, which may reduce the inheritance of some heirs or even eliminate the inheritance of others (Mawardi, 1419 AH, 8/279).

In a critique of the theory of invalidity, Shibani, a Hanafi jurist, questioned the views of Maliki jurists and stated that there is no clear statement in the book regarding the invalidity of marriage for a sick person or the validity of marriage for a healthy person. Indeed, God has made marriage lawful until the Day of Judgment, and there is no difference between a healthy and sick person's marriage unless it is stated by the Prophet or his companions. If that were the case, Maliki jurists would have objected to it (Shibani, 1403 AH, 3/500). In response to the argument that a sick person who marries is accused of harming the inheritance, they say that such an accusation is unlikely for a person who has a disease related to death because such a person is usually seeking God's consent, and this harm does not affect contractual validity in transactions such as sales. Marriage, even if it harms the inheritance, is still beneficial to the sick person, who is more deserving of benefiting from the inheritance, and the reason for the sick person's interference with inheritance rights is also dismissed because marriage is not prohibited in illness as it is in health.

The majority of Sunni jurists consider marriage for a sick person to be valid and believe that in the event of the sick person's death, inheritance between the spouses is established (Mavardi, 1419 AH, 8/279; Shibani, 1403 AH, 3/495). However, Maliki jurists consider marriage for a sick person to be invalid and reject the idea of inheritance. According to them, if a sick person marries and the couple does not separate during the illness until recovery and then the sick person becomes ill again and dies due to the illness, inheritance between them is established.

There is also a difference of opinion among the Maliki jurists regarding the marriage of a sick man to a non-Muslim woman. Some Maliki jurists consider marriage between a sick man and a dhimmi woman to be permissible because the reason for prohibiting marriage between a sick person and a Muslim woman is the addition of a new heir to the inheritance, which does not apply in this case. Others believe that it is possible for the dhimmi woman to become a Muslim, in which case she inherits from the sick man, making marriage between a sick man and a dhimmi woman prohibited. It seems more appropriate to opt for the non-proven status of inheritance because one of the conditions for proving inheritance is the eligibility of the wife, which did not exist at the time of marriage if the purpose of marrying was not to inherit.

The famous Sunni jurists regard marriage for a sick woman as valid, just like marriage for a sick man, and believe that if the sick woman dies, her husband inherits from her, and the husband must pay the dowry to the heirs after her death. If the sick woman marries for less than her actual dowry, the difference is counted as a will for the husband only if he is entitled to inheritance, but if the husband is not an heir, there is a shortfall in the third of the estate. This is because a sick person cannot dispose of the property they possess during illness, but accepting and determining a dowry less than the actual amount is not strengthening, but rather a failure to acquire more. Additionally, it is forbidden for a sick person to perform acts that remain with the heirs and benefit them after their death, such as when a woman dies, leaving nothing to inherit. (Rafi'i Qazvini, 1417 AH, 7/53)

It should be noted that if a sick person passes away while having debts, the creditors are entitled to a share in the inheritance, and the deceased spouse, in proportion to their dowry, also inherits from the estate. If the specified dowry is more than the customary amount, the excess amount is included in the one-third of the property in which the sick person had the right to make a will. Therefore, if the spouse is an heir, the excess amount is returned to them. However, if the spouse is not an heir due to being a slave or a non-Muslim, they are given the excess amount and are prioritized over other legatees because it is a gift and charity from the sick person's lifetime, and therefore takes precedence.

If the spouse was a dhimmi at the time of marriage with a sick person and then became Muslim, they are considered an heir of the sick person. If the specified dowry exceeds the customary amount, they are prevented from taking more than the customary amount. If the sick person recovers from their illness and then passes away, or if they do not pass away, the specified dowry is paid from their estate before the customary amount.

Therefore, if a man marries a dhimmi woman for a dowry of 1,000 dirhams while the customary amount is 500 dirhams, and he passes away without any assets except for the 1,000 dirhams, the wife receives 666.66 dirhams from the estate, which is her rightful share as well as two-thirds of the remaining 333.33 dirhams. However, if a sick man marries a woman with a dowry of 1,000 dirhams while the customary amount is 500 dirhams, and the wife passes away before the husband and then the husband passes away due to his illness, having no assets except for the 1,000 dirhams, the wife is deprived of her inheritance because she passed away before the husband, who is now the heir (Mavardi, 1419 AH, 8/280).

Maliki jurists have detailed opinions on the consequences of marriage for a sick person. They believe that if the wife is aware of the husband's illness at the time of marriage and no intimacy takes place, the couple must separate, and the wife is not entitled to receive her dowry. If the wife is unaware of the husband's illness at the time of marriage but intimacy has taken place, the couple must still separate,

but if the husband recovers from their illness, the wife can claim her full dowry from him. However, if the husband passes away due to their illness with which they were afflicted at the time of marriage, the wife is entitled to receive her dowry from one-third of the husband's estate (Shibani, 1403 AH, 496-499).

In analyzing this article, it can be stated that the reason why the dowry does not belong to the husband if they are aware of the husband's illness at the time of marriage contract is due to a legal principle according to which if a person acts knowingly and causes harm to himself from others, the person who caused the harm is not responsible for compensation. The Maliki jurists also believe in the separation of the sick husband and wife in the case of marriage (Numari, 1400 AH, 2/549), and they believe that if there has been no consummation, the wife is not entitled to receive the dowry, but if there has been consummation, the specified dowry is payable due to the defect in the contract from one-third of the husband's property (Numari, 1400 AH, 2/549). The effect of the illness and its conditions, as previously mentioned, refers to a disease that is life-threatening (Sabzavari, 1413 AH, 30/200).

The Imamiyah jurists consider the marriage of a sick man valid if it is consummated, and they believe that if the specified dowry is equal to or less than the customary dowry, the specified dowry is paid from the principal assets, and otherwise, the amount exceeding the specified dowry is paid from one-third of the sick husband's property.

Conclusion

The nature of marriage is a non-financial relationship, and the prevailing atmosphere over it is considered part of individuals' privacy. Due to this description, the legislator minimizes the level of interference and imposition of regulations in this relationship and entrusts them to the principle of free will. However, despite the non-financial nature of marriage, it has significant financial effects such as dowry, inheritance, alimony, etc., which can create a platform for misuse of rights. In the Civil Code regarding inheritance, the legislator has deprived the wife of inheritance in case the husband dies from a disease that existed during the marriage contract. This deprivation is conditional on the absence of consummation. Initially, it comes to mind that by relying on the principle of validity and considering the consequences of nullifying the marriage contract, the status of the marriage must be considered valid. In fact, the legislator has only eliminated the relationship of inheritance from the effects of marriage, and it is not possible to assume the invalidity of the marital relationship based on the elimination of one effect.

In Article 945 of the Civil Code, the legislator has considered the wife deprived of inheritance in order to prevent abuse of rights under the specified conditions. However, it should be noted that in addition to inheritance, marriage has other financial effects such as alimony, dowry, the customary wage, etc. Therefore, covering these gaps by the legislator seems necessary to increase transparency. In this regard, determining the status of marriage in the case of Article 945 of the Civil Code and other financial effects according to jurisprudence seems an appropriate solution.

The Imamiyah jurists consider the marriage of a sick man valid if it is consummated, and they believe that if the specified dowry is equal to or less than the customary dowry, the specified dowry is paid from the principal assets, and otherwise, the amount exceeding the specified dowry is paid from one-third of the sick husband's property.

The present study shows that if a man suffering from a severe illness and whose doctors have given up on his treatment divorces his wife, he may divorce her with the aim of depriving her of inheritance due to feeling his imminent death. Therefore, Shariah severely condemns such a divorce and has taken measures to protect women's rights and counteract possible tricks by husbands. Contrary to the prescribed rules of inheritance between a divorced woman and her husband, the divorced woman is considered eligible for inheritance under certain conditions.

A legal system is actually a set of tools for regulating the relationships between legal subjects. Each tool has different uses, and individuals can also use these tools to infringe upon the rights of others. Divorce is one of these tools. If a couple is affected by a serious illness leading to death, it is possible for one party to divorce in order to deprive the other party of inheritance. In this case, the law has established conditions for inheriting the spouse in order to protect their interests. There are three conditions for a woman to inherit from her husband: the death of the man within a year of the divorce, the cause of death being the same disease that led the man to divorce his wife, and the woman not marrying another man during this time. If any of these three conditions are not met, the wife will not inherit. There is unanimity among Islamic scholars regarding this ruling, which is based on Imamia jurisprudence. This ruling appears to be contrary to the principle of exception, as divorce results in the dissolution of marriage and a woman who was not married to the man at the time of his death should not inherit from him. However, this ruling is likely based on the real reason for a woman's inheritance being barred: the sanctity or aversion to divorce that the husband may have felt in his final moments due to an illness. Therefore, this ruling is not considered an exception.

In terms of financial rights, it is not necessary to interpret the principle narrowly and assert the principle of non-inheritance of the wife when faced with challenges such as silence, generalities, conflicts or interference. It is important to note that the inheritance rule for a woman does not apply where the man becomes separated from his wife through means other than divorce. For example, if the man separates from his wife by cursing her or if one of the reasons for the dissolution of marriage – whether initiated by the man or woman – leads to their separation. Since the ruling in question is specific to divorce due to illness, it cannot be applied to such situations. It may appear that the existence of such a statement means that inheriting the wife is exceptional. However, it should be noted that Islamic principles and rules are based on titles. In other words, situations other than divorce have titles other than divorce (such as cursing, etc.). Therefore, divorce rulings do not apply to these situations as a matter of principle; therefore, they cannot be referred to as exceptional rulings because other situations have titles specific to themselves and therefore have separate (rather than exceptional) rulings.

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