

THE DOCTRINAL DEVELOPMENT OF “MARAD AL-MAWT” IN THE FORMATIVE PERIOD OF ISLAMIC LAW*

HIROYUKI YANAGIHASHI

(Tokyo University, Japan)

Abstract

Muslim jurists were at first reluctant to place restrictions on gratuitous dispositions by a dying person. During the first quarter of the second century/second quarter of the eighth century, however, they created a concept of “a sickness causing a fear of death” (*al-marad al-mukhawwif*) to safeguard the interests of heirs and creditors. They did so by introducing the principle that a gratuitous disposition made by a sick person for the purpose of modifying the inheritance rules should be subject to the bequest restrictions. At the same time, Muslim jurists permitted the wife divorced by her dying husband to inherit from him by according her, retrospectively, inheritance rights at the moment when her husband contracted a sickness which led irrevocably to his death. By the end of the third quarter of the second century/ end of the eighth century, the jurists had combined these two definitions of sickness to form the classical theory of death-sickness (*marad al-mawt*).

Introduction

THE DOCTRINE OF DEATH-SICKNESS (*marad al-mawt*) seeks to safeguard the interests of the creditors and heirs in the estate of a deceased person by regulating the legal effect of acts that he undertook after entering the sickness from which he eventually died.

The term *death-sickness* in its technical sense signifies not only a true sickness but also certain circumstances assimilated to it. For example, a prisoner who has been sentenced to death, a soldier on the battlefield, or a voyager on a ship struck by a storm can be considered to suffer from a death-sickness.¹ In what follows, I shall call such a person *a deceased*, *a dying person*, or *a sick person*, as suggested by context. According to the Ḥanbalī jurist, Ibn Qudāma (541-620/1147-

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¹ Mālik b. Anas al-Aṣḥabī, Abū ‘Abd Allāh, *Kitāb al-Muwatta’*, recension of Yahyā b. Yahyā al-Laythī, ed. Fārūq Sa‘d (3rd ed., Beirut: Dār al-Āfāq al-Jadīda, 1403/1983), 654; al-Ṭahāwī, Abū Ja‘far Aḥmad b. Muḥammad b. Sallāma, *Mukhtaṣar al-Ṭahāwī*, ed. Abū al-Wafā al-Afghānī (1st ed., Beirut: Dār Iḥyā’ al-‘Ulūm, 1406/1986), 159-60; Eduard Sachau, *Muhammedanisches Recht nach schafīitischer Lehre* (Stuttgart, Berlin: W. Spemann, 1897), 349; N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 262-63.

1223), the conditions required for a sickness to qualify as a death-sickness are as follows:

- (1) That the sickness is *mukhawwif*, i. e. “causing a fear [of death]”.
- (2) That the sickness leads directly to death. If a sick person recovers once from his sickness before he dies, this sickness is not regarded as a death-sickness.²

The first condition requires that a sickness was of such a nature as to cause a fear of death in the mind of the sick person; it is determined on an objective basis whether or not a sickness qualifies as a death-sickness. It does not matter whether the sickness actually caused a fear of death in the mind of the sick person.³ The second condition indicates that in the classical theory it cannot be determined whether or not a sickness was a death-sickness until a sick person has actually died, at which time the rules governing death-sickness are applied retroactively to his acts. The second condition also suggests that the moment at which the condition of a sick person begins to deteriorate irrevocably is the starting point of the death-sickness.

Although Islamic law forbids an insolvent person (*mufliṣ*) from disposing of his property beyond a certain limit, there are few effective measures that enable a creditor to prevent a debtor from disposing of his property if the value of that property is greater than the total amount of the debts.⁴ In the earliest stage of Islamic law the same was true of heirs, who, apart from the limitations placed on the size and destination of a bequest (*waṣīyya*), could take no measure to prevent a person contemplating death from disposing of his estate. That creditors and heirs were not sufficiently protected by law seems to have been due to the general tendency of Muslim jurists to abstain from intervening in the exercise of rights, in particular the right of ownership. But they were not indifferent to the interests of creditors and heirs. As I will demonstrate below, from the beginning of the second century of Islam onwards, they protected the interests of creditors and heirs by applying

² Ibn Qudāma, *Muwaffaq al-Dīn Abū Muḥammad ‘Abd Allāh b. Aḥmad, Al-Mughnī fī fiqh al-Imām Aḥmad b. Ḥanbal al-Shaybānī*, 12 vols. (1st ed., Beirut: Dār al-Fikr li-l-Ṭibā‘a wa-l-Naṣr wa-l-Tawzī‘, 1405/1985), VI, 108.

³ *Ibid.*, VI, 108-09; al-Shirāzī, Abū Ishāq Ibrāhīm b. ‘Alī b. Yūsuf al-Firūzabādī, *Al-Muḥadḍhab fī fiqh al-Imām al-Shāfi‘ī*, 2 vols. (Beirut: Dār al-Fikr, n. d.), I, 453; Coulson, *Succession*, 262-64.

⁴ For additional details on insolvents, see Ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, 2 vols. (7th ed., Beirut: Dār al-Ma‘rifa li-l-Ṭibā‘a wa-l-Naṣr, 1405/1985), II, 284-93; *idem*, *The Distinguished Jurist’s Primer, Bidāyat al-mujtahid*, translated by Imran Ahsan Khan Nyazee, reviewed by Mohammad Abdul Rauf, 2 vols. (Reading: Center for Muslim Contribution to Civilization, Garnet Publishing Limited, 1995-96), II, 341-52.

to the dispositions of a dying person some of the restrictions previously imposed on the dispositions of an insolvent person or on a bequest. This notion was articulated by al-Pazdawī (ca. 400-482/ca. 1009-1089), who wrote:

As regards sickness, it affects neither the capacity to validly acquire rights and duties (*ahliyyat al-ḥukm*) nor the capacity to perform a legal act (*ahliyyat al-ʿibāra*). However, if a sickness is the cause (*sabab*) of death, it occasions incapacity (*ʿajz*), because death leads to complete incapacity. At the same time, because death is the cause of succession (*ʿillat al-khilāfa*), sickness [leading to death] is one of the causes by which the rights of heirs and creditors are attached to the property [of a dying person].⁵

It is clear from this text that al-Pazdawī placed a dying person under interdiction by assimilating death-sickness to death itself. What is the rationale for this doctrine? Ibn Rushd al-Jadd (455-520/1063-1126), one of the few jurists who specifically addressed the issue, commented as follows on the Mālikī rule regarding a marriage concluded by a sick man, “A sickness affects the validity of a marriage only because of a fear of death (*min ajl mā yukhshā min al-mawt*).”⁶ This comment suggests that the sick man’s intention to reduce the value of the estate to the detriment of the heirs should be frustrated. The same idea emerges from the following statement attributed to al-Zuhri (50?-124/670?-741) regarding a marriage concluded by a dying man:

We do not regard his marriage as valid because he promised to pay her the nuptial gift (*ṣadāq*), which would violate the heirs’ rights [over two-thirds of the estate; this is] because [a dying man] exercises control over only one-third [of the estate], which can be disposed of [gratuitously] only by bequest.⁷

Some modern scholars concur with Ibn Rushd. According to Linant de Bellefonds, the idea underlying the doctrine of death-sickness is that a legal act made in contemplation of immediate death should be treated in the same manner as a bequest.⁸ Fyzee adopted the same position

⁵ Al-Pazdawī, Fakhr al-Islām ʿAlī b. Muḥammad, *Kanz al-wuṣūl ilā maʿrifat al-uṣūl*, on the margin of al-Bukhārī, ʿAbd al-ʿAzīz b. Aḥmad, *Kashf al-asrār*, 4 vols. (Istanbul: al-Maktab al-Ṣanāʿī, 1307-08/1890-91), IV, 307.

⁶ Ibn Rushd al-Qurṭubī, Abū al-Walīd, *Al-Bayān wa-ʿl-taḥṣīl wa-ʿl-sharḥ wa-ʿl-tawjīh wa-ʿl-taʿlīl fī masāʾil al-Mustakhrāja*, ed. Aḥmad al-Sharqāwī Iqbāl et al. 18 vols. (Beirut: Dār al-Gharb al-Islāmī, 1404/1984), IV, 373.

⁷ Saḥnūn b. Saʿīd al-Tanūkhī, *Al-Mudawwana al-kubrā*, 6 vols. (Beirut: Dār Ṣādir, n. d.), II, 246-47. The idea implied in this statement will be explained in 3. 1.

⁸ Y. Linant de Bellefonds, *Traité de droit musulman comparé*, 3 vols. (Paris, The Hague: Mouton & Co, 1965, 1973), I, 262-63.

when he invoked a Bombay decision according to which the crucial test of *marad al-mawt* is the subjective apprehension of death in the mind of the donor.⁹ This understanding of death-sickness contradicts, however, the second condition required of death-sickness, i. e. that the sickness led directly to death. For example, if a person whose sickness is of such a nature as to create in his mind a fear of imminent death eventually recovers from the sickness, his acts are *not* subject to the restrictions imposed on a dying person. Linant de Bellefonds found this rule difficult to understand.¹⁰

It was Coulson who correctly took into consideration the positive rules to explain the process according to which the doctrine of death-sickness operates. He distinguished two stages relating to the doctrine of death-sickness. First, one attempts to determine on a purely objective basis whether a situation should be considered a death-sickness. Second, once it has been determined that a person experienced a death-sickness, the legal effects of his acts are governed by the presumption that he acted in contemplation of his imminent death.¹¹ However, this explanation appears to fail when it comes to the Mālikī rule concerning a divorce by mutual consent (*khul'*) made between a dying husband and his wife, according to which the wife retains her inheritance rights, as does a wife divorced by *ṭalāq* [unilateral divorce declared by her husband].¹² The Mālikīs accorded inheritance rights to the wife divorced by a dying husband even if she initiated the divorce. Coulson conceded that the doctrine of death-sickness “does involve the subjective element of contemplation of death in a way which is systematically somewhat untidy and can be, admittedly, confusing.”¹³ Moreover, he did not explain why Muslim jurists required that the death-sickness led directly to death, and he maintained that the presumption that a dying person had acted in contemplation of his imminent death lay at the basis of the doctrine of death-sickness.

In my view, the doctrine of death-sickness cannot be reduced to a single principle. To support this view, I attempt here to trace the historical development of the doctrine. The following description is divided into four sections. In the first section, I argue that the doctrine of death-sickness initially may have evolved to regulate the emancipation of a

⁹ Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (4th ed., Delhi et al.: Oxford University Press, 1974), 371.

¹⁰ Linant de Bellefonds, *Traité*, I, 268-69.

¹¹ Coulson, *Succession*, 261-62.

¹² *Ibid.*, 278.

¹³ *Ibid.*, 261.

slave by a dying person, and was later applied to the case in which a dying husband attempted to divorce his wife. In the second section, I argue that the Hejazi and the Iraqi jurists created the concept of a sickness causing a fear of death in an attempt to regulate the charitable gift (*ṣadaqa*) and the ordinary donation (*hiba*) made by a dying person, on the one hand, and the emancipation of a slave made by a dying person, on the other. In the third section I analyze the manner in which each of the two conditions which constitute the definition of death-sickness originally operated. In the fourth section I describe the process whereby each of these conditions was applied to legal acts for which it had not been originally intended, with the result that they were combined to form the classical doctrine of death-sickness.

The main sources that I use in this article are: the *Muwattaʿ* of Mālik b. Anas (b. 90-97/708-714; d. 179/795), the *Kitāb al-āthār* of Abū Yūsuf (113?-182/731?-798), the *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī (126-211/744-827), the writings of al-Shaybānī (132-189/749-805), the *Umm* of al-Shāfiʿī (150-204/767-820), the *Muṣannaf* of Ibn Abī Shayba (159-235/775-849), and the *Mudawwana* of Saḥnūn (160-240/777-855). These texts shed considerable light on the different views relating to the doctrine of death-sickness until the end of the second century/ca. the turn of the eighth century, when the doctrine of death-sickness was brought to perfection by Mālik in the Hejaz and by the founders of the Ḥanafī law school in Iraq. Conversely, I make only limited use of later *ḥadīth* collections, legal texts, and *tafsīrs*, which contain little information relating to the early development of death-sickness, although I occasionally rely on later Ḥanafī texts to supply information on specific points of doctrine missing in the earliest texts.

I must also explain my attitude toward the accuracy of textual attributions to figures of the first and second centuries A.H. In my view, there is no objective criterion to determine the date at which reports attributed to the Prophet, the Companions, or the Successors were put into circulation. For this reason, in my attempts to establish chronology, I take into account only the content (*matn*) of these reports. At the same time, I regard as reliable the attribution of an action or a statement to later generations, particularly if the person who transmitted the report is known to have encountered the person who is the subject of the report. For example, I regard as authentic Mālik's attribution of a statement to Rabīʿa (d. 136/753) or al-Zuhrī (50?-124/670?-741), because Mālik studied with Rabīʿa and transmitted reports from al-Zuhrī.¹⁴ Similarly I

¹⁴ Joseph Schacht, "Mālik b. Anas," *EP*², VI, 263a.

regard as reliable Abū Yūsuf's attribution of a statement to Ḥammād b. Abī Sulaymān (d. ca. 120/737) on the authority of his teacher, Abū Ḥanīfa (ca. 80-150/ca. 699-767), for it is certain that Abū Ḥanīfa attended the lectures of Ḥammād.¹⁵

Finally, I must address, if only briefly, the problem of the alleged Prophetic origin of the doctrine. The classical doctrine of death-sickness has been unanimously upheld by Muslim jurists, with the exception of the *Zāhirīs*. However, the only evidence adduced by *Sunnī* jurists to support its Prophetic origin is the "six-slaves *ḥadīth*", to be analyzed below. It is impossible to determine whether or not the ascription to the Prophet of the event embodied in this *ḥadīth* is authentic. I shall argue that the doctrine of death-sickness took shape as a legal institution only after this *ḥadīth* had been put into circulation on the authority of al-Ḥasan al-Baṣrī (21-110/642-728), Ibn Sīrīn (34-110/654-728), or Ibn al-Musayyib (b. 15/636; d. 93-94/711-712), some time between 80/699 and 94/712. I will discuss this matter in detail in section 2. 2.

1. Terminology

The term *marāḍ al-mawt* appears not to have been used in the texts of the first centuries of Islam, where the expressions most often employed are "at the point of death (*inda al-mawt, 'inda mawti-hi*)", "death approaches him (*ḥaḍara-hu al-mawt, ḥaḍarat-hu al-wafāt*)", "in his sickness (*fī marāḍi-hi*)", and "a sick person (*marīḍ*)". According to the classical theory of death-sickness, these terms are synonymous with the *marāḍ al-mawt*. To take a single example, Q. 2:180 reads:

It is prescribed, when death approaches any one of you (*idhā ḥaḍara aḥada-kum al-mawt*), if he leaves any goods, that he make a bequest to parents and next of kin according to reasonable usage.

According to Fakhr al-Dīn al-Razī (543-606/1149-1209), the majority view held that this verse is addressed to someone who suffers from a sickness causing a fear of death (*al-marāḍ al-mukhawwif*), i. e. a death-sickness, but who is not at the point of death, for if he were at the point of death, he would be too weak to make a bequest.¹⁶ It is doubtful, however, that the expression "when death approaches any of

¹⁵ Schacht, "Abū Ḥanīfa al-Nu'mān," in *EL*², I, 123a.

¹⁶ Al-Rāzī Fakhr al-Dīn b. al-'Allāma Ḍiyā' al-Dīn 'Umar, Muḥammad, *Tafsīr al-Fakhr al-Rāzī al-mushtahir bi-'l-Tafsīr al-kabīr wa-mafātīḥ al-ghayb*, 32 vols. (Beirut: Dār al-Fikr li-'l-Ṭibā'a wa-'l-Nashr wa-'l-Tawzī', 1410/1990), V, 63. This verse obviously does not treat the doctrine of death-sickness.

you” was from the beginning considered to be synonymous with death-sickness.

To make this point clear, let us compare the frequency with which the expressions “at the point of death”, “death approaches him”, or “he was dying (*ashrafa ‘alā al-mawt*)”, on the one hand, and the expressions “in his sickness”, “a sick person” or “pain (*wajaʿ*)”, on the other hand, appear in the chapters concerning the emancipation of a slave by a dying person and the chapters concerning divorce by a sick husband in the *Muṣannaf* of ‘Abd al-Razzāq al-Ṣanʿānī (126-211/744-827) and the *Muṣannaf* of Ibn Abī Shayba (159-235/775-849). Of twenty-seven traditions found in “the chapter of a man who emancipated his slave at the point of death” in the *Muṣannaf* of ‘Abd al-Razzāq al-Ṣanʿānī, the expression “at the point of death” appears in twelve traditions (other similar expressions do not appear),¹⁷ while the expressions “sick person” or “sickness” appear in only three traditions.¹⁸ Conversely, of thirty-three traditions found in the three chapters concerning divorce by a sick husband in the same work, the expression “death approaches him” appears in a single tradition (other similar expressions do not appear),¹⁹ while the expressions “sick person”, “sickness” or “pain” appear in twenty traditions.²⁰ Of fourteen traditions found in the three chapters concerning the emancipation of slaves at the point of death in the *Muṣannaf* of Ibn Abī Shayba, the expression “at the point of death” appears in six traditions (other similar expressions do not appear),²¹ while the expression “sickness” appears in four traditions.²² Conversely of sixteen traditions found in the two chapters concerning the divorce by a sick husband in the same work, the expression “he was dying” appears in a single tradition (other similar expressions never appear),²³ while the expressions “sick person”, “sickness” or “pain” appear in fourteen traditions.²⁴ (See Table)

¹⁷ Al-Ṣanʿānī, Abū Bakr ‘Abd al-Razzāq b. Hammām b. Nāfiʿ, *Al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-Aʿzamī, 11 vols. (2nd ed., Johannesburg, Karachi, Gujarat: al-Majlis al-ʿIlmī, 1403/1983), IX, 159-160, no. 16751; 161-164, nos. 16754-16757, 16759-16761, 16763-16766.

¹⁸ Ibid., IX, 161, no. 16754; 163, no. 16761; 165, no. 16770.

¹⁹ Ibid., VII, 65, no. 12210.

²⁰ Ibid., VII, 61-68, nos. 12191, 12193-12195, 12199-12203, 12206, 12207, 12209, 12211-12215, 12217, 12219, 12220.

²¹ Ibn Abī Shayba, Abū Bakr ‘Abd Allāh b. Muḥammad, *Al-Kitāb al-Muṣannaf fī al-aḥādīth wa-ʾl-āthār*, ed. Muḥammad ‘Abd al-Salām Shāhin, 9 vols. (1st ed., Beirut: Dār al-Kutub al-ʿIlmiyya, 1416/1995), IV, 430-31, nos. 21752, 21753, 21756, 21760, 21762, 21765.

²² Ibid., IV, 430-31, nos. 21755, 21757, 21763, 21764.

²³ Ibid., IV, 177, no. 19035.

²⁴ Ibid., IV, 176-78, nos. 19026-19031, 19033, 19034, 19036-19041.

Table: Frequency of the expressions used to describe a dying person

Chapter Expression	The <i>Muṣannaḥ</i> of al-Ṣanʿānī		The <i>Muṣannaḥ</i> of Ibn Abi Shayba	
	Emancipation	Divorce	Emancipation	Divorce
' <i>inda al-mawt</i> ' etc.	12/27	1/33	6/14	1/16
<i>marāḍ</i> , <i>marīḍ</i> etc.	3/27	20/33	4/14	14/16

These results, taken in conjunction with the fact that the legal texts use only the terms "*marāḍ*" or "*marīḍ*", point to the following conclusion: In the first stage, the doctrine of death-sickness was aimed primarily at regulating emancipation (and possibly other gratuitous dispositions) by a dying person, and the term "'*inda al-mawt*'" etc. was commonly used. This expression gradually was replaced by the more sophisticated terms "*marāḍ*", "*marīḍ*" etc., as suggested by the fact that, with regard to emancipation, the ratio of usage of the term "*marāḍ*" etc. is higher in the *Muṣannaḥ* of Ibn Abi Shayba than in the *Muṣannaḥ* of al-Ṣanʿānī. It was at this stage that the doctrine of death-sickness began to be applied to divorce by a dying husband. (It should be noted, however, that the concept of "*marāḍ*" or "*marīḍ*", used in connection with gratuitous dispositions, was not necessarily identical with that used in connection with divorce, as will be shown.) Using this as a working hypothesis, I examine, first, restrictions imposed on gratuitous dispositions by a dying person.

2. *Primary Restrictions Imposed on Gratuitous Dispositions by a Dying Person*

Restrictions imposed on gratuitous dispositions by a dying person clearly derive from those placed on a bequest, of which the most important are, (1) "no bequest to an heir (*lā waṣīyya li-wārith*)", i. e. a bequest for a legal heir (hereafter heir) is null and void without the permission of the other heirs,²⁵ and (2) bequests to a non-heir that

²⁵ On the formation of this rule, see David S. Powers, *Studies in Qur'an and*

individually or jointly exceed one-third of the estate are null and void without the permission of the heirs to the extent of the excess portion (hereafter the one-third restriction).²⁶ When and how were these restrictions applied to gratuitous dispositions made during death-sickness? As will be shown, it is convenient to consider separately the rules governing a *ṣadaqa* and an (ordinary) donation, on the one hand, and those governing an emancipation of a slave, on the other hand.

2.1. *Ṣadaqa* and Donation

Many traditions are transmitted on the subject of *ṣadaqa* and *hiba* ["ordinary donation", hereafter "donation"]. Before examining those traditions which seem to have something to do with the doctrinal development which led to the formation of the doctrine of death-sickness, it is necessary to define the terms *ṣadaqa* and donation.

Muslim jurists seem to define donation as a gift which is neither a *ṣadaqa* nor a *hadiyya*, i. e. a gift given to honor the donee. Their disputes over the definition of *ṣadaqa* appear to center around the interpretation of Q. 9:60, which reads:

Ṣadaqas are only for the poor, and the needy, and those who are employed to administer the *ṣadaqas*, and those whose hearts have been reconciled [to truth], and slaves, and debtors, and in the way of God, and for the wayfarer.

Some jurists, interpreting this verse narrowly, defined *ṣadaqa* as a charitable gift given for one of the purposes enumerated therein. For example, the Mālikī jurist, al-Bājī (403-474/1013-1081) wrote that Saḥnūn (160-240/777-855) had said, on the subject of a man who donated (*wahaba*) a gift in an effort to strengthen the tie of kinship (*ṣila*), that, as was the case with a *ṣadaqa*, the donor could not revoke it.²⁷ Likewise, the second rightly-guided caliph, 'Umar b. al-Khaṭṭāb (r. 13-23/634-644) reportedly ruled that a donation (*hiba*) to strengthen the tie of kinship (*ṣilat raḥim*) and a *ṣadaqa* were both irrevocable.²⁸ According to this interpretation, it is incorrect to apply the noun *ṣadaqa*

Ḥadīth (Berkeley, Los Angeles, London: University of California Press, 1986), 158-72.

²⁶ On the historical development of the one-third restriction, see David S. Powers, "The Will of Sa'd b. Abī Waqqāṣ: A Reassessment," *Studia Islamica*, 58 (1983), 33-53.

²⁷ Al-Bājī, *Al-Muntaqā sharḥ Muwaṭṭa' al-Imām Mālik*, 7 vols. (3rd ed., Beirut: Dār al-Kitāb al-'Arabi, 1403/1983), VI, 116.

²⁸ Saḥnūn, *Mudawwana*, VI, 109.

or the verb *taṣaddaqa* to a donation to one's son, even if it is made for a praiseworthy purpose.²⁹ Others interpreted this verse loosely, defining *ṣadaqa* as a gift made with the object of obtaining merit (*thawāb*) in the eyes of God in general.³⁰ For example, Mālik b. Anas (b. 90-97/708-715; d. 179/795) referred to a gift for one's son as a *ṣadaqa*,³¹ probably because he thought that such a gift served the praiseworthy purpose of strengthening the tie of kinship.

Let us now examine the rule that a *ṣadaqa* is valid only when the beneficiary has taken possession of (*qabaḍa*) the object. This rule is ascribed to many Companions, Successors, and jurists, whether Iraqi or Hejazi. Among the Companions and Successors, this rule is attributed to the first three rightly-guided caliphs, Abū Bakr (r. 11-13/632-634), 'Umar b. al-Khaṭṭāb (r. 13-23/634-644), and 'Uthmān b. 'Affān (r. 23-35/644-656), and to Mu'ādh b. Jabal (d. 18/639), Ibn 'Abbās (d. 68/687), Masrūq (d. 63/682), and Shurayḥ (d. 76-80/695-699). It is also attributed to the Iraqi jurists, Ibrāhīm al-Nakha'ī (ca. 50-ca. 96/ca. 670-ca. 714), al-Sha'bī (b. 16-21/637-641; d. 103-110/721-728), Ḥammād b. Abī Sulaymān (d. ca. 120/737), and Ibn Shubruma (d. 144/761), and to the Hejazi jurists, 'Aṭā' b. Abī Rabāḥ (d. 114 or 115/732 or 733) and al-Zuhri (ca. 50-124/ca. 670-741).³² For example, to Ḥammād b. Abī Sulaymān, al-Zuhri, and Ibn Shubruma is attributed the statement, "A *ṣadaqa* is not legally valid until possession of it has been taken (*lā tajūzu al-ṣadaqa ḥattā tuqbaḍu*)."³³ Abū Yūsuf (113?-182/731?-798) transmitted from Abū Ḥanīfa (ca. 80-150/ca. 699-767) a statement of Ḥammād b. Abī Sulaymān to the effect that al-Nakha'ī said, "We regard as a legally valid *ṣadaqa* only a *ṣadaqa* of

²⁹ On this interpretation, see also Ṣan'ānī, *Tafsīr al-Qur'ān*, ed. Muṣṭafā Muslim Muḥammad, 3 vols. (1st ed., Riyadh: Maktabat al-Rushd, 1410/1989), I, 278-79; al-Ṭabari, Abū Ja'far Muḥammad b. Jarīr, *Jāmi' al-bayān fī tafsīr al-Qur'ān*, 30 vols. (4th ed., Beirut: Dār al-Ma'rifa li-l-Ṭibā'a wa-'l-Nashr, 1400/1980), X, 109-17.

³⁰ Al-Marghīnānī, Abū al-Ḥasan 'Alī b. Abī Bakr b. 'Abd al-Jalīl, *Al-Hidāya sharḥ Bidāyat al-mubtadi'*, 4 vols. (Beirut: al-Maktaba al-Islāmiyya, n. d.), III, 231; Fyze, *Outlines*, 267-68; Linant de Bellefonds, *Traité de droit musulman comparé*, III (Paris, The Hague: Mouton & Co., 1973), 318-19.

³¹ Mālik-Yahyā b. Yahyā, *Muwatta'*, 645-46; Mālik, *Al-Muwatta'*, recension of Suwayd b. Sa'īd al-Ḥadathānī, ed. Abdel-Magid Turki (1st ed., Beirut: Dār al-Gharb al-Islāmī, 1994), 238, no. 295.

³² Abū Yūsuf Ya'qūb b. Ibrāhīm al-Anṣārī, *Kitāb al-āthār*, ed. Abū al-Wafā [al-Afghānī] (Beirut: Dār al-Kutub al-'Ilmiyya, n. d.), 163, nos. 749, 750; Ṣan'ānī, *Muṣannaf*, IX, 121-122, nos. 16590-16592; al-Shāfi'ī, Muḥammad b. Idrīs, *Al-Umm*, ed. Muḥammad Zuhri Najjār, 8 vols. (2nd ed., Beirut: Dār al-Ma'rifa li-l-Ṭibā'a wa-'l-Nashr, 1393/1973), IV, 63; VII, 115; Ṣaḥnūn, *Mudawwana*, VI, 108.

³³ Ṣan'ānī, *Muṣannaf*, IX, 121, no. 16590.

which possession has been taken (*lā nujīzu al-ṣadaqa illā ṣadaqa maqbūda*).³⁴

From this rule I will attempt to reconstruct the doctrinal development which led to the formation of the doctrine of death-sickness. Al-Marghīnānī (d. 593/1197) explained the rationale for the *ḥadīth*, “A donation is not legally valid unless possession has been taken” (*lā tajūzu al-hiba illā maqbūda*), by saying that if a donation were held to be valid before delivery, it would be incumbent upon the donor to deliver it to the donee, which is contrary to the voluntary nature of the donation.³⁵ The same rationale, he added, applies to a *ṣadaqa*.³⁶ Whatever the original rationale of this rule may have been, I think that one of the most important situations to which it was intended to apply was that in which the donor died before the beneficiary took possession of the object. If so, this rule entailed that if a beneficiary does not take possession of a *ṣadaqa* prior to the donor’s death, the object belongs to the heirs. There are two reasons why I think so.

First, al-Shāfi‘ī referred to the rule that a *ṣadaqa* is valid only when the beneficiary takes possession of it immediately after mentioning the rule that a donation made during death-sickness is null and void if the donor dies before the beneficiary takes possession.³⁷ Al-Shāfi‘ī apparently thought that the rule regarding a *ṣadaqa* served the same purpose as the doctrine of death-sickness, i. e. the protection of the heirs.

Second, it is almost universally admitted by Muslim jurists that a *ṣadaqa*, once received, is irrevocable, unlike a donation (*hiba*) which can be revoked under conditions that vary from one school to another.³⁸ The irrevocability of a *ṣadaqa* is doubtless due to its religiously recommended nature.³⁹ As for the conditions under which the *ṣadaqa* is formed, the jurists adopted a stricter position, making the taking of possession essential. This suggests that a non-religious consideration was operating. Perhaps the jurists had in mind the case in which the donor died before handing over the object to the beneficiary. In such a

³⁴ Abū Yūsuf, *Āthār*, 163, no. 750.

³⁵ Marghīnānī, *Hidāya*, III, 224.

³⁶ *Ibid.*, III, 224, 231. See also Linant de Bellefonds, *Traité*, III, 360. On the details of this rule see, *ibid.*, 360-373; Tanzil-ur-Rahman, *A Code of Muslim Personal Law*, 2 vols. (Karachi: Islamic Publishers, 1980), II, 3-22.

³⁷ Shāfi‘ī, *Umm*, IV, 63. This rule implies that a donation, if executed before the donor’s death, is subject to the bequest restrictions.

³⁸ Aḥmad Ibrāhīm Ibrāhīm, “Iltizām al-tabarru‘āt,” *Majallat al-Qānūn wa-l-Iqtisād*, 3 (1933), 51-63; Linant de Bellefonds, “Hiba,” in *EI*², III, 350b-351a; T. H. Weir-[A. Zysow], “Ṣadaqa,” in *EI*², VIII, 713b-714a.

³⁹ Linant de Bellefonds, *Traité*, III, 318. But Weir-[Zysow], “Ṣadaqa,” in *EI*², VIII, 714a is less conclusive.

case, the execution of the *ṣadaqa* after the donor's death would result in a loss to the heirs. By invalidating a *ṣadaqa* whose beneficiary did not take possession prior to the donor's death, the jurists sought to safeguard the interests of the heirs. This idea must be verified in the light of positive rules.

Several examples suggest that a *ṣadaqa* was regarded with suspicion because it could impoverish the close relatives or heirs of the donor. Thus, Abū Bakr b. Muḥammad b. ʿAmr b. Ḥazm (before 40-120/before 660-737), one of "the seven jurists of Medina", reportedly transmitted the following *ḥadīth*: After ʿAbd Allāh b. Zayd al-Anṣārī (d. 32/652) had given one of his gardens as a *ṣadaqa* (probably for a charitable purpose), his father, Zayd, came to the Prophet, complaining that they [viz., the family of the donor?] were in need. The Prophet returned the garden to Zayd. When Zayd died, the Prophet returned it [to ʿAbd Allāh b. Zayd].⁴⁰ The views of Abū Ḥanīfa (ca. 80-150/ca. 699-767) and the earlier Iraqi jurists regarding a *ḥabs*, which is a special type of *ṣadaqa*, indicate more clearly their concern for the interests of the heirs.⁴¹ As has been pointed out by some modern scholars, the institution of *ḥabs* met strong opposition from the earliest jurists, particularly Abū Ḥanīfa, who limited the validity of a *ḥabs* to the following two cases: (1) if the founder of a *ḥabs* intended it to be a *ṣadaqa* that would take effect immediately, it was valid only during his lifetime, and on the condition that it was always revocable, like a loan of a non-fungible object (*ʿariyya*); (2) if the founder intended it to take effect after his death, it was assimilated to a bequest, subject to the restrictions on bequests.⁴² Clearly, Abū Ḥanīfa put stringent limits on the *ḥabs* in order to safeguard the interests of the founder's heirs. This theme is clearly expressed in statements attributed to earlier Iraqi jurists. ʿAṭāʾ b. al-Sāʾib (d. 136/753) reportedly said that when he asked Shurayḥ about a man who had designated his house as a *ḥabs* for his youngest child, Shurayḥ replied, "No *ḥabs* in circumvention of the shares fixed by God (*lā ḥabs ʿan farāʾiḍ Allāh*)."⁴³ The following

⁴⁰ Ṣanʿānī, *Muṣannaf*, IX, 121, no. 16589. *Ḥadīth* no. 16588 in the same work has almost the same wording.

⁴¹ I employ the term *ḥabs* instead of the term *waqf*, for the former is used in *Hujja* of al-Shaybānī, which I make use of here.

⁴² Willi Heffening, "Wakf," in *El*¹, IV, 1097; Louis Milliot, *Introduction à l'étude du droit musulman* (1st ed., Paris: Sirey, 1953), 554-55; John Robert Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (2nd ed., Leiden et al.: E. J. Brill, 1987), 11; al-Sarakhsi, Shams al-Din, *Kitāb al-Mabsūt*, 30 vols. (Beirut: Dār al-Maʿrifā, n. d.), XII, 27.

⁴³ Al-Shaybānī, Abū ʿAbd Allāh Muḥammad b. al-Ḥasan, *Kitāb al-Hujja ʿalā ahl al-Madīna*, 4 vols., ed. Al-Sayyid Maḥdī Ḥasan al-Kilānī al-Qādirī (3rd ed.,

statement attributed to Ibn Mas‘ūd (d. 32/652), al-Sha‘bī (b. 16-21/637-641; d. 103-110/721-728) and al-Nakha‘ī (ca. 50-ca. 96/ca. 670-ca. 714) should be understood in the same sense: “No *ḥabs* in the way of God (*fī sabīl Allāh*) except that which is created from a war horse (*kurā‘*) or a weapon (*silāḥ*)”.⁴⁴ Ibn ‘Abbās (d. 68/687) is reported to have said that when God revealed the *Sūra* of women in which He prescribed the fixed shares of inheritances, the Prophet said, “No *ḥabs* in Islam.”⁴⁵

These views show that *ṣadaqa* and *ḥabs* were regarded by some as harmful to the relatives and/or heirs of the donor. That these Iraqi jurists were keener to protect heirs from the foundation of a *ḥabs* than from a *ṣadaqa* is probably due to the fact that a *ḥabs* is often created to modify the inheritance rules in favor of an heir and his offspring, as may be inferred from the frequency with which a *ḥabs* for this purpose is referred to in the earliest legal texts, like the *Kitāb al-Hujja ‘alā ahl al-Madīna* of al-Shaybānī (132-189/749-805) or the *Mudawwana al-kubrā* of Saḥnūn (160-240/777-855).⁴⁶

From these two considerations, I conclude that the rule that a *ṣadaqa* is valid only when possession has been taken served, in particular, to safeguard the interests of the heirs with respect to a *ṣadaqa* (and donation, as will be shown) whose beneficiary did not take possession prior to the donor’s death. At the same time, however, the jurists paid special attention to a *ṣadaqa* or donation to an heir in a different sense, for it could be used to help weak heirs preserve their inheritance shares as fixed by the Qur‘ān. Consider the following statements attributed to Mālik:

The way of doing things in our community about which there is no dispute is that if a man gives a *ṣadaqa* to his son (*taṣaddaqa ‘alā bni-hi bi-ṣadaqa*) and the son takes possession of it, or if he gives it to his son who is under his guardianship and he summons witnesses to attest to the *ṣadaqa*, he cannot take back any of it, because he cannot reclaim any *ṣadaqa*.⁴⁷

Mālik also stated that a *ṣadaqa* in favor of a minor son was valid even if the son did not take possession of the object.⁴⁸ These statements

Beirut: ‘Ālam al-Kutub, 1403/1983), III, 60; Shāfi‘ī, *Umm*, IV, 58.

⁴⁴ Shaybānī, *Hujja*, III, 63-64.

⁴⁵ *Ibid.*, III, 61-62.

⁴⁶ *Ibid.*, III, 47-65; Saḥnūn, *Mudawwana*, VI, 101-09.

⁴⁷ Mālik-Yaḥyā b. Yaḥyā, *Muwatta’*, 645-46; Mālik-Ḥadathānī, 238, no. 295; *idem*, *Al-Muwatta of Imam Malik ibn Anas*, transl. Aisha Abdurrahman Bewley (London, New York: Kegan Paul International, 1989), 311.

⁴⁸ Saḥnūn, *Mudawwana*, VI, 125.

attributed to Mālik were intended to preserve the inheritance shares of weak heirs, such as minors and women, in view of the hardships they might face when the estate was divided. Likewise, in Iraq Abū Yūsuf attributed to al-Nakha‘ī the view that a gift a man gives (*yahib*) to his wife or to his son living at his expense (*fī ‘iyāli-hi*) is valid without the taking of possession of the object, if it is known.⁴⁹ This view was followed by Abū Ḥanifa, who maintained the traditional rule that a *ṣadaqa* is valid only when possession has been taken and applied it, in principle, to an ordinary donation, the only exception being a donation (*hiba*) to the donor’s minor children, which is valid without *qabd*.⁵⁰

However, this rule can easily be circumvented if, in contemplation of his imminent death, the donor hastens to deliver the object of a *ṣadaqa* or a donation. It was necessary for jurists to elaborate a method by which to prevent such a donor from gratuitously disposing of his property in violation of the bequest restrictions. This consideration led them to elaborate the doctrine of death-sickness.

One may object that the doctrine of death-sickness can be regarded as a natural extension of the bequest restrictions. Indeed, it is tempting to assume that Muslim jurists assimilated, from the beginning, a *ṣadaqa* or a donation made at the point of the donor’s death to a bequest, and that, by replacing “at the point of death” with a more sophisticated concept of death-sickness, they created the doctrine of death-sickness. However, I am inclined to regard the doctrine of death-sickness as a product of the conscious efforts of Muslim jurists. To demonstrate this, it is necessary to prove that a gratuitous disposition (i. e., a legal act to which the doctrine of death-sickness is applied) was originally subject to different regimes depending on whether the donor intended it to take effect before or on his death. If, for example, the regime applied to a disposition that a person intended to take effect a minute before his death was originally different from that which is applied to a disposition intended to take effect on his death (notably a bequest), the doctrine of death-sickness can be regarded as an innovation. However, there is no clue to decide if this was the case with a *ṣadaqa* or a donation, before the doctrine of death-sickness was established. For example, we do not come across the expressions “*inda al-mawt* [at the point of

⁴⁹ Abū Yūsuf, *Āthār*, 164, no. 752.

⁵⁰ Shāfi‘ī, *Umm*, VII, 115; al-Qudūrī, al-Baghdādī al-Ḥanafī, Abū al-Ḥusayn Aḥmad b. Muḥammad, *Al-Mukhtaṣar al-mushtahir bi-’ism al-Kitāb*, II, 173. In the upper part of al-Ghunaymī al-Dimashqī al-Maydānī al-Ḥanafī, ‘Abd al-Ghanī, *Al-Lubāb fī sharḥ al-Kitāb*, ed. Maḥmūd Amin al-Nawāwī, 4 vols. (Beirut: Dār Iḥyā al-Turāth al-‘Arabī, 1405/1985).

death]” etc. in the descriptions of a *ṣadaqa* or a donation. Conversely, these expressions are met frequently in connection with an emancipation of a slave, as I have shown above. Let us examine the exact nature of the rules applied to the emancipation of a slave made by his owner at the point of death.

2.2. Emancipation of a Slave by a Dying Person

The reason why expressions such as “at the point of death” or “when death approaches him” appear frequently in connection with the emancipation of a slave is that, unlike a *ṣadaqa* or donation, which, to be valid, must be executed before the donor dies, emancipation of a slave is not subject to such a restriction. The mere declaration by the slave owner is sufficient to set the slave free, notwithstanding the objections of the owner’s creditors or heirs. It seems that this consideration led the jurists to apply the one-third restriction to emancipation (as a slave cannot be an heir, the rule “no bequest to an heir” does not apply), before they began to apply this restriction to a *ṣadaqa* or a donation. What rights do heirs have with respect to the emancipated slave? Can they cancel the emancipation, or merely make the slave compensate for that part of his value which exceeds one-third of the estate?

The traditions dealing with this problem are divided into two groups. First, if a dying person owns a slave which is his only property, but his debts exceed the value of his slave, the generally admitted view is that the emancipation is valid, but that “the [emancipated] slave is required to work [to pay the debt left by his owner] to the amount of his own value (*yustas‘ā al-‘abd fī thamani-hi*).⁵¹ At the same time, Muslim jurists agree that a bequest may not be executed until the debts left by the deceased are paid.⁵² It follows that a deathbed emancipation becomes valid at the moment it is declared⁵³ and that the creditors of the deceased have no recourse except to demand that the slave work for them. Furthermore, if the dying person has no debts or if the value of

⁵¹ Ṣan‘ānī, *Muṣannaf*, IX, 164, no. 16765. See also, *ibid.*, IX, 161, nos. 16754, 16755; 164, no. 16766; Ibn Abī Shayba, *Muṣannaf*, IV, 430, nos. 21752-21754, 21756.

⁵² Al-Jaṣṣāṣ, Abū Bakr Aḥmad b. ‘Alī al-Rāzī, *Aḥkām al-Qur‘ān*, ed. ‘Abd al-Salām Muḥammad ‘Alī Shāhin, 3 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1415/1994), II, 120; Fakhr al-Dīn al-Rāzī, *Tafsīr*, IX, 223-24; Saḥnūn, *Mudawwana*, VI, 57.

⁵³ This position is expressly adopted in al-Samarqandī (d. 539/1144), *Tuḥfat al-fuqahā’*, ed. Muḥammad Muntaṣir al-Katānī and Wahba al-Zuḥaylī, 3 vols. (Damascus: Dār al-Fikr, 1964), III, 284.

his estate exceeds his debts, the logical solution, by analogy, is that the slave becomes free, but is required to work to compensate for that part of his value which exceeds one-third of the estate.⁵⁴

In fact, this appears to have been the view universally held by Muslim jurists *prior* to the introduction of the Prophetic “six-slaves *ḥadīth*” cited below. The nature of the work, as implied in this view, is suggested in a statement attributed to Masrūq (d. 63/682), according to which the slave is set free, but “he is obligated to do something which he owes towards God (*bi-dhimmati-hi shay’ ja‘ala-hu li-llāh*)”.⁵⁵ That is to say, legally the slave is completely free, but he is under a moral obligation to make up for the loss incurred by the heirs. In the *Muwatta’*, however, Mālik attributed to al-Ḥasan al-Baṣrī (21-110/642-728) and Ibn Sirīn (34-110/654-728) a *ḥadīth* which reads:

A man in the time of the Prophet emancipated his six slaves at the point of death. The Messenger of God, may God bless him and grant him peace, drew lots between them and freed a third of them.⁵⁶

Mālik added that these slaves were the only property of the emancipator.⁵⁷ The Syrian jurist, Makhūl (d. 112-118/730-736), reportedly heard the Medinan jurist, Ibn al-Musayyib (b. 15/636; d. 93-94/711-712), relate:

A woman, or a man, emancipated her six slaves at the point of death. She had no property except for these slaves. Then the Prophet, may God bless him and grant him peace, came to draw lots between them.⁵⁸

The rule implied in the two versions of this *ḥadīth* (the “six-slaves *ḥadīth*”) is that the emancipation takes effect only up to one-third of the estate, which is in accordance with the classical doctrine of death-sickness. However, this *ḥadīth* provoked negative reactions from some jurists. The Meccan jurist, ‘Aṭā’ b. Abī Rabāḥ (d. 114-115/732-733) is reported to have said, on hearing the second version of this *ḥadīth*, “We used to say that the emancipated slaves are required to work (*yustas‘awna*).”⁵⁹ The Syrian jurist, Sulaymān b. Mūsā (d. 115-119/

⁵⁴ See, for example, Ṣan‘ānī, *Muṣannaf*, IX, 159, no. 16751; 162, no. 16757.

⁵⁵ Ibn Abī Shayba, *Muṣannaf*, IV, 430, no. 21757.

⁵⁶ Mālik-Yaḥyā b. Yaḥyā, *Muwatta’*, 664; Mālik-Ḥadathānī, *Muwatta’*, 337, no. 422; *Muwatta*, tr. Bewley, 321.

⁵⁷ Mālik-Yaḥyā b. Yaḥyā, *Muwatta’*, 664; Mālik-Ḥadathānī, *Muwatta’*, 337, no. 422; *Muwatta*, tr. Bewley, 321.

⁵⁸ Ṣan‘ānī, *Muṣannaf*, IX, 159-60, no. 16751; Al-Muzanī, *Kitāb Mukhtaṣar al-Muzanī* (Beirut: Dār al-Ma‘rifa li-l-Ṭibā‘a wa-l-Nashr, n. d.), 406, in the eighth volume of al-Shāfi‘ī, *Umm*.

⁵⁹ Ṣan‘ānī, *Muṣannaf*, IX, 159-60, no. 16751.

733-737), is reported to have stated, on hearing a slightly different version of this *ḥadīth* from Makh̄ūl, “Nowadays we do not follow this. The judgment is not rendered in accordance with it, but we require that the emancipated slaves work to the amount of two-thirds [of their respective values].”⁶⁰

These statements should be regarded as genuine, because it is improbable that later traditionists, convinced of the authenticity of this *ḥadīth*, would have attributed a statement that might cast doubt on it to ‘Aṭā’ and Sulaymān. But their statements can be interpreted in two ways: It is possible that this *ḥadīth* existed but was not taken seriously. It is more likely, however, that this *ḥadīth* was first put into circulation during their lifetimes; and that, reluctant to reject this new *ḥadīth* as inauthentic, they asserted that it had been neglected in legal practice.

Be that as it may, there seem to be two reasons why these jurists were reluctant to adopt the rule prescribed in the “six-slaves *ḥadīth*.” First, it treats an emancipation in the same manner as a bequest, which takes effect only on the death of the testator, whereas the heretofore generally admitted opinion was that the emancipation takes effect at the moment when it is declared, and is not subject to the restrictions on bequests. Second, this *ḥadīth* yields a practical difficulty. As different slaves have different values, there is no guarantee that the value of the slaves who are emancipated will equal one-third of the estate.

When was this *ḥadīth* put into circulation? Schacht wrote that it “dates only from the second century” and that “it cannot have existed in the time of the historical Ṭāwūs who died in A. H. 101 [A. D. 720]”.⁶¹ Coulson wrote that this *ḥadīth* was first recorded some years later than a decision rendered by the Medinan governor, Abān b. ‘Uthmān (r. 76-83/695-702), with regard to a case in which a man emancipated all of his slaves who were his only property.⁶² In my view, this *ḥadīth* was first put into circulation between the years 80/699 and 94/712, for the following reasons. First, Ibn al-Musayyib, from whom Makh̄ūl reportedly transmitted this *ḥadīth*, died between 93 and 94/711 and 712. Second, al-Ṣan‘ānī (126-211/744-827) heard his teacher, Ibn Jurayj

⁶⁰ Ibid., IX, 160, no. 16752.

⁶¹ Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), 202. Ṭāwūs b. Kaysān (d. 101/720 or 106/725) was a famous traditionist active in the Yemen. On him, see G.H.A. Juynboll, *Muslim Tradition* (Cambridge: Cambridge University Press, 1983), 43.

⁶² Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 68; Mālik-Yaḥyā b. Yaḥyā, *Muwatta’*, 664; Mālik-Ḥadathānī, *Muwatta’*, 337, no. 422; *Muwatta*, tr. Bewley, 321.

(80-150/699-767),⁶³ relate that Sulaymān had stated: “He [viz., Makḥūl] transmitted it [viz., the solution adopted in this *ḥadīth*] from no one but the Prophet (*mā kāna ya’tḥiru-hu ‘an aḥad dūna al-nabī*).⁶⁴ In addition, the earliest jurists to whom al-Ṣan‘ānī attributed this solution — which treats emancipation as valid only up to one-third of the estate and does not give the emancipated slave a chance to complete the emancipation—are Makḥūl himself (d. 112-118/730-736) and the Baṣran jurist and traditionist, Qatāda (60-117/679-735).⁶⁵ It is interesting to note that al-Ṣan‘ānī also attributed the opposite view to Qatāda, on the authority of Ma‘mar b. Rāshid (d. 153/770): if a dying man, on the point of death, emancipated his slave who was his only property, the slave was required to work to make up for two-thirds of his value.⁶⁶ We can regard these attributions as genuine, for Ma‘mar emigrated from Baṣra to the Yemen, where he transmitted *ḥadīth* to al-Ṣan‘ānī.⁶⁷

The second opinion of Qatāda is equivalent to the legal practice as defined by ‘Aṭā’ and Sulaymān. Apparently, the “six-slaves *ḥadīth*” forced him to change his position. As it is unlikely that someone would have recorded an opinion expressed by a jurist before he reached the age of twenty, the date at which Qatāda expressed his earlier (and indeed his later) opinion cannot be traced back before 80/699. Similarly, since it is unlikely that it took a long time for Qatāda, who was a pupil of al-Ḥasan al-Baṣrī (21-110/642-728) and Ibn Sīrīn (34-110/654-728),⁶⁸ to change his opinion after hearing the “six-slaves *ḥadīth*” from them, we can safely place the date at which this *ḥadīth* was put into circulation at 80/699 at the earliest.

To return to the situation prior to the introduction of the doctrine of death-sickness, which seems to have been triggered by the “six-slaves *ḥadīth*”, it had been almost unanimously held that the emancipation of a slave takes effect on the spot when his dying owner declares it, but that the slave is under a moral obligation to compensate for the loss incurred by the creditors or heirs of his former owner. The idea which lies at the basis of this solution seems to be that a person, even when dying, has

⁶³ Harald Motzki, “Ṣan‘ānī,” in *EI*², IX, 7b.

⁶⁴ Ṣan‘ānī, *Muṣannaf*, IX, 160, no. 16752.

⁶⁵ *Ibid.*, IX, 160, no. 16752; 162, no. 16758.

⁶⁶ *Ibid.*, IX, 162, no. 16757.

⁶⁷ *Ibid.*, IX, 162, no. 16757. Ibn Qutayba, Abū Muḥammad ‘Abd Allāh b. Muslim, *al-Ma‘ārif*, ed. Tharwat ‘Ukāsha (6th ed., Cairo: al-Ḥay‘a al-Miṣriyya al-‘Āmma li-ḥ-ḥ-Kitāb, 1992), 506; Motzki, “al-Ṣan‘ānī,” in *EI*², IX, 7b; idem, *Die Anfänge der islamischen Jurisprudenz* (Stuttgart: Kommissionsverlag Franz Steiner, 1991), 56-58.

⁶⁸ Ch. Pellat, “Qatāda b. Di‘āma,” in *EI*², IV, 748b.

full authority over his property. The jurists had to content themselves with providing a minimal remedy to creditors and heirs. But the jurists must have felt that a dying person could circumvent the one-third restriction too easily by emancipating his slave shortly before his anticipated death. This seems to be why, despite the negative reaction of some jurists to this *ḥadīth*, it was finally accepted by the Muslim jurists in the Hejaz as well as in Iraq, although the Iraqians adopted the rule that one-third of each of the slaves is set free, instead of drawing lots.⁶⁹

2.3. The Attitude of the Muslim Jurists toward Gratuitous Dispositions

From our examination of the positive rules governing gratuitous dispositions, we can draw the conclusion that Muslim jurists were at first reluctant to place restrictions on these dispositions. As for *ṣadaqa* and donation, the only measure they took to safeguard the interests of the heirs (and doubtless the creditors) was to invalidate a *ṣadaqa* or a donation of which possession was not taken prior to the donor's death. This measure was not very effective, for a man was free to dispose of his property gratuitously until the last moment of his life. Likewise the protection accorded by the jurists to creditors and heirs against a deathbed emancipation was insufficient, for they could not cancel the emancipation, but had to be satisfied with demanding that the emancipated slave work for them voluntarily. The jurists gave priority to freedom of disposition over protection of creditors and heirs. But they were not indifferent to their interests. It is interesting, in this connection, to cite a tradition related by 'Aṭā' b. al-Sā'ib (d. 136/753):

I said to Shurayḥ, "Oh Abū Umayya, I would like to consult you." Shurayḥ replied, "Oh son of my brother, I am a qāḍī and not a *muftī*." I said to him, "By God, I do not intend to bring a suit, but a man of our tribe (*ḥayy*) has designated his house as a *ḥabs*." Then when he entered, I heard him [viz., Shurayḥ] advising a man whose adversary was approaching, saying, "Don't you know? No *ḥabs* in circumvention of the shares of inheritance fixed by God."⁷⁰

This tradition indicates that Shurayḥ, in his capacity as a qāḍī, could not issue a judgment in this case, although he was personally opposed to the creation of a *ḥabs* intended to modify the inheritance rules and

⁶⁹ Ṣan'ānī, *Muṣannaf*, IX, 164, no. 16764; Schacht, *Origins*, 202; Sarakhṣī, *Mabsūt*, XXVIII, 13.

⁷⁰ Shaybānī, *Hujja*, III, 64.

would have issued a *fatwā* to this effect had he been a *mufīī*. The story encapsulates the ambivalence of the jurists toward freedom of disposition, which can jeopardize the interests of the heirs (and creditors). It seems that, in an effort to restrain freedom of disposition by a dying person, the jurists adopted the principle that a gratuitous disposition made by him for the purpose of modifying the inheritance rules should be subject to the bequest restrictions. The concept of “a sickness causing a fear of death (*al-maraḍ al-mukhawwif*)” was introduced to make this principle operate in the positive legal system.

3. *Formation of the Doctrine of Death-Sickness*

I shall demonstrate that some time during the first quarter of the second century/second quarter of the eighth century, the concept of “a sickness causing a fear of death (*al-maraḍ al-mukhawwif*)” was formed to protect the creditors and/or heirs of a dying person from his gratuitous dispositions, notably a *ṣadaqa*, a donation, and an emancipation. This concept was probably formed at about the same time as the concept of “a sickness from which the sick person died (*al-maraḍ alladhī māta fi-hi*)”, created in an effort to permit the wife divorced by a dying husband to retain her inheritance rights.

3.1. *Ṣadaqa* and Donation Made during *al-Maraḍ al-Mukhawwif*

A report attributed to ‘Ā’isha (d. 58/678) indicates that heirs acquire ownership (of two-thirds, as will be shown) of the property belonging to a person who begins to apprehend his imminent death, and are authorized to take possession of it. When death approached her father, Abū Bakr (r. 11-13/632-634), he said to her:

By God, little daughter, there is no one that I would like to be wealthier than you after I die. There is no one whom it is more difficult to see poor than you after I die. I gave you (*naḥaltu-ki*) some palm-trees which produce twenty *wasqs*. If you had picked [them] and taken possession of them, they would belong to you, but they are today the property of the heirs, who are your two brothers and your two sisters. So divide it according to the Book of God.”⁷¹

The following three statements attributed to Mālik explain in greater detail the nature of the rights that the heirs can exercise over a sick person’s property:

⁷¹ Mālik-Shaybānī, *Muwatta’*, 286; Mālik-Yaḥyā b. Yaḥyā, *Muwatta’*, 643-44; Mālik-Ḥadathānī, *Muwatta’*, 236, no. 292; *Muwatta*, tr. Bewley, 310.

(a) He [viz., the sick man] is entitled to nothing but one-third of his property. If they [viz., the heirs] permit him to make a bequest exceeding one-third of his property in favor of an heir, they cannot revoke their permission... His asking permission of his heirs is valid with respect to the heirs, who can give him permission at the moment when authority over all his property is closed off from him and nothing outside of one-third is permitted to him, and the heirs are more entitled to two-thirds of his property than he is (*hum aḥaqq bi-thulthay māli-hi min-hu*). If he asks one of the heirs to give his inheritance (*mīrāth*) to him when death is approaching him, and the heir gives it to him, but the sick man does not dispose of it, then it is returned to the one who gave it.⁷²

That is to say, at the moment when someone enters his [death-] sickness, his heirs can take possession of two-thirds of his property. Thus, if a sick person intends to dispose of an object by means of a donation *inter vivos*, the object is included in the two-thirds of his property over which his heirs have authority, even if the object remains in his possession. In another case, a sick person, when making a bequest, said that he previously had gifted (*aʿṭā*) an object to one of his heirs but that the donee had not yet taken possession of it. Referring to the case in which the other heirs refused to permit the donation, Mālik reportedly stated:

(b) The object should be returned to the heirs as an inheritance (*mīrāth*) to be divided according to the Book of God, because the deceased (*mayyit*) did not intend it to be executed from one-third [of the estate].⁷³

That is to say, a sick person can dispose of up to one-third of his property by bequest, but he may not dispose of any property by means of an *inter vivos* gift, unless permitted to do so by his heirs. The reason for this is that, if the gift were regarded as valid, it might impoverish the donor, making him dependent on his heirs, thereby reducing the value of their inheritance. Conversely, there is no fear that a bequest by a sick person will impoverish him, for, by definition, it is executed after his death. This example indicates, at the same time, that death-sickness was defined as the point in time prior to which the donee must take possession of the object of the gift in order for the gift to be valid.

Similarly, Mālik said in the *Mudawwana*:

(c) If someone gave an object as a *ṣadaqa* or donated [it] to someone who is legally capable of taking possession on his own behalf, but the donee did not take possession before the donor became sick, the donee

⁷² Mālik-Yaḥyā b. Yaḥyā, *Muwaṭṭaʿ*, 654-55; *Muwatta*, tr. Bewley, 316.

⁷³ Mālik-Yaḥyā b. Yaḥyā, *Muwaṭṭaʿ*, 655; *Muwatta*, tr. Bewley, 317.

can no longer take possession of it, and it belongs to the heirs in general, whether the donee is an heir or not. The same rule applies to donations (*‘aṭyā, niḥal*).⁷⁴

Although the position attributed to Mālik in the *Mudawwana* is not always identical with that attributed to him in the *Muwaṭṭa’*, statement (b) seems to be based on the idea implied in statement (c).

In sum, the protection that Mālik accorded to the heirs with respect to gratuitous dispositions by a sick person is two-fold. First, the heirs can take possession of two-thirds of his property, with the result that he cannot dispose of more than one-third, without their permission. Second, if the recipient of a *ṣadaqa* or a donation fails to take possession before the donor enters his death-sickness, the *ṣadaqa* or a donation becomes null and void, unless the heirs permit it. In other words, from the moment at which a person enters the death-sickness, he can dispose gratuitously of one-third of his property only by bequest. The statement attributed to al-Zuhri (50?-124/670?-741) that a sick person “possesses nothing but one-third [of the estate], which can be disposed of [gratuitously] only by bequest (*laysa la-hu illā al-thulth yūṣā bi-hi*)” conveys the same idea, although he is also reported to have said that a *ṣadaqa* given by a sick person, possession of which was not taken prior to his death, can be executed from one-third of the estate, i. e. as a bequest. Rabī‘a (d. 136/753), too, reportedly stated that a sick person “is shut off from his property, and possesses only what is taken from his one-third (*qad wuqifa ‘an māli-hi fa-laysa la-hu min māli-hi illā mā ukhidha min thulthi-hi*)”, which may be understood in the same sense.⁷⁵ However, the heirs apparently cannot dispose of two-thirds of the property of a sick person, for Rabī‘a reportedly stated, regarding a husband who divorced his wife after becoming sick: “If he recovers [from his sickness] and once [again] acquires ownership of his property (*tamallaka māla-hu*), his wife loses her inheritance rights.”⁷⁶ That is to say, the wife and, indeed, the other heirs do not definitively acquire ownership of two-thirds of the property of a sick person. They take possession of it only for the purpose of safeguarding it against his gratuitous dispositions.

The idea that at the moment when someone enters the death-sickness, the entitlement of his heirs are attached to his property seems to have been held by the Meccan jurist, ‘Aṭā’ (d. 114-115/732-733) and

⁷⁴ Saḥnūn, *Mudawwana*, VI, 108.

⁷⁵ Ibid., II, 246-47; Ṣan‘ānī, *Muṣannaf*, IX, 123, no. 16598.

⁷⁶ Saḥnūn, *Mudawwana*, III, 38.

some Iraqi jurists, although we cannot specify the exact nature of their rights. This is inferred from arguments over the validity of the heirs' consent accorded before the testator's death to his bequest made during his sickness. In Iraq, al-Ḥasan al-Baṣrī (21-110/642-728), Ḥammād b. Abī Sulaymān (d. 120/737), Ibn Abī Laylā (b. 74-76/693-695; d. 148/765), and probably Abū Ḥanifa (ca. 80-150/ca. 699-767) reportedly held the view that such a consent is valid and binding on the heirs.⁷⁷ In the Hejaz the same view was attributed to 'Aṭā', al-Zuhrī, and Rabī'a.⁷⁸ According to the Ḥanafī jurist, al-Sarakhsī (d. ca. 490/1096), Ibn Abī Laylā held this view on the ground that "given that the heir's entitlement was attached to his [viz., a sick person's] property during the sickness, the heir can validly relinquish his entitlement (*bi-'l-marād qad ta'allaqa ḥaqqu-hu bi-māli-hi fa-yaṣiḥḥu isqātu-hu*)."⁷⁹ The aforementioned jurists seem to have held this view on the same ground.

The rule adopted by Mālik that a *ṣadaqa* or a donation, possession of which is not taken before the donor enters his death-sickness, is null and void unless the heirs permit it was adopted by the Kufan jurist, al-Sha'bī (b. 16-21/637-641; d. 103-110/721-728).⁸⁰

At this stage, the doctrine of death-sickness required only a subjective test, namely, that a person be aware of his imminent death, as may be confirmed by two examples. The first example is concerned with a sick wife who concluded a *khul'*-divorce with her husband. Asked about the validity of such a *khul'*, Rabī'a (d. 136/753) is reported to have replied, "The *khul'* is null and void, for if it were held to be valid, a wife, when conscious of her [imminent] death (*ḥīna tastayqīnu bi-'l-mawt*), would make a bequest to her husband."⁸¹ As is well-known, *khul'* is a form of divorce in which the wife redeems herself from the marriage for a consideration, which is determined by an agreement concluded between the wife and the husband. Rabī'a was attempting to

⁷⁷ Ṣan'ānī, *Muṣannaf*, IX, 87-88, nos. 16452, 16454; Shāfi'ī, *Umm*, VII, 129. In his *al-Muṣannaf*, no. 16454, al-Ṣan'ānī transmits from Abū Ḥanifa's son, Ḥammād, the statement that his father held to be valid the consent given by the heirs to a bequest made by a man to one of his heirs. I think that this report deals with a bequest made by a sick man for two reasons. First, al-Ṣan'ānī transmits this report immediately after the statement he dictated from Sufyān al-Thawrī, in which Sufyān is arguing about a consent to a bequest which was given by the heirs during the lifetime of the testator. Second, as it goes without saying that a consent given by the heirs to a bequest after the testator dies is valid and binding, this report related by Ḥammād should be taken to refer to a consent given by the heirs to a bequest before the testator dies.

⁷⁸ Ṣan'ānī, *Muṣannaf*, IX, 87, no. 16451; Saḥnūn, *Mudawwana*, VI, 76.

⁷⁹ Sarakhsī, *Mabsūṭ*, XXVII, 154.

⁸⁰ Ṣan'ānī, *Muṣannaf*, IX, 123, no. 16599.

⁸¹ Saḥnūn, *Mudawwana*, II, 352.

prevent a wife from making a bequest to her husband under the guise of *khulʿ*, in violation of the rule “no bequest to an heir”. For our purposes, it is important to note that the prohibition becomes effective at the moment when the wife becomes aware of her imminent death, which coincides with the first condition of the classical definition of death-sickness.

Second, asked about donation or *ṣadaqa* made by persons suffering from a grave sickness, such as semiparalysis or leprosy, Mālik replied that if “it [viz., the sickness] is of such a nature as to cause a fear [of death] in the sick person” (*mā kāna min dhālika amr yukhāfu ʿalā ṣāhibi-hi min-hu*), he can dispose of only one-third of his property; otherwise, he can dispose freely of his entire property. Mālik added that in the former case if the sick person divorces his wife by *ṭalāq*, she retains her inheritance rights “provided he died of that particular sickness (*in māta min maraḍi-hi dhālika*).”⁸² Clearly the essential criterion for the application of the bequest restrictions to a gratuitous disposition by a sick person is whether or not he was aware of his imminent death.

When did the concept of a sickness causing a fear of death take form? As I have shown, al-Ḥasan al-Baṣrī, Ḥammād b. Abī Sulaymān, Ibn Abī Layla, ʿAṭāʾ, al-Zuhrī, and Rabīʿa are reported to have held that if a person becomes sick and makes a bequest, the consent of his heirs to the bequest, prior to his death, is legally valid. This rule pre-supposes a precise definition of “sickness”. Because these men all died between 110 and 148/728 and 765, I maintain that the concept of a sickness causing a fear of death was formed during the first quarter of the second century/second quarter of the eighth century.

We would not do justice to the problem of the formation of the doctrine of death-sickness if we failed to address the view attributed to Ibn Masʿūd (d. 32/652), Shurayḥ (d. 76-80/695-699), Abū Ḥanīfa (who is therefore credited with contradictory views), and Sufyān al-Thawrī (97?-161/715?-778) in Iraq. According to these jurists, if, prior to the death of the testator, his heirs give their consent to a bequest that he made during his sickness, the consent is not valid.⁸³ Although we do not know how Abū Ḥanīfa explained his view, the Ḥanafī jurist, al-Sarakhsī (d. ca. 490/1096) justified it by stating that, by giving consent to a bequest made by a sick person, the heirs prematurely relinquish their rights, for they can exercise their rights over his property only after

⁸² Ibid., III, 36. See also Mālik-Yaḥyā b. Yaḥyā al-Laythī, *Muwaṭṭaʿ*, 653.

⁸³ Ṣanʿānī, *Muṣannaf*, IX, 86-87, nos. 16449, 16543; Shāfiʿī, *Umm*, VII, 129.

his death, at which time it will be determined whether or not he made the bequest during his death-sickness.⁸⁴ Sufyān al-Thawrī explained his position more clearly, saying that such a consent is not valid, because the heirs “have validated that over which they had no authority and what they did not own. They own it only after the testator dies.”⁸⁵ The idea implied in the statements of al-Sarakhsī and Sufyān is identical to the classical doctrine of death-sickness. Is the view attributed to Ibn Mas‘ūd and Shurayḥ based on the same idea, or is it dictated by the ancient idea that a person is placed under no interdiction until the last moment of his life? To answer this question, let us examine additional arguments over the validity of an emancipation that violates the one-third restriction.

3.2. Emancipation during *al-Marad*

I remarked above that the “six-slaves *ḥadīth*” attributed to the Prophet, regarded with suspicion by some jurists, subsequently came to be generally accepted. I will now explain how and why this shift took place. In the Hejaz, despite the negative reaction of ‘Aṭā’ to this *ḥadīth*, Ibn al-Qāsim (b. 128-132/746-749; d. 191/806) transmitted only the view of Mālik, who opined, in strict accordance with this *ḥadīth*, as follows: An emancipation of slaves declared during their owner’s sickness (*maradī-hi*) is valid only up to one-third of the estate. If the value of the slaves exceeds one-third, lots should be cast to decide who is set free. If the value of the winning slave exceeds one-third of the estate, he is partially set free to the extent of the one-third.⁸⁶ Similarly, al-Shāfi‘ī stated, in strict accordance with this *ḥadīth*, that an emancipation that violates the one-third restriction is valid only up to one-third of the estate and that the slave is not given the chance to complete the emancipation. He also asserted that the contrary view was supported only by a *ḥadīth* that was weak (*da‘īf*).⁸⁷ It is easy to infer the reason why the “six-slaves *ḥadīth*” was readily accepted in the Hejaz if we recall that Muslim jurists in that region universally held that at the moment when a person enters a sickness causing a fear of death, only one-third of his property belongs to him; it follows from this principle that a deathbed emancipation of a slave takes effect only up to the extent of one-third of the estate. It should be noted that this rule

⁸⁴ Sarakhsī, *Mabsūṭ*, XXVII, 154.

⁸⁵ Ṣan‘ānī, *Muṣannaf*, IX, 87, no. 16453.

⁸⁶ Sahnūn, *Mudawwana*, III, 180-81.

⁸⁷ Muzanī, *Mukhtaṣar*, 320.

constitutes an exception to the rule that he can dispose gratuitously of one-third of his estate only by bequest.

In Iraq, a statement attributed to the Kufan jurist, al-Sha‘bī (b. 16-21/637-641; d. 103-110/721-728) represents an ambiguous position on this issue. He is reported to have transmitted two statements on the subject of a man who, during his sickness, emancipated his slave who was his only property. On the one hand, he put the following statement into the mouth of Masrūq (d. 63/682): “I validate it [viz., the emancipation], but he [viz., the slave] is obligated to do something which he owes towards God. I do not annul it [viz., the emancipation] (*ujīzu-hu bi-dhimmati-hi shay’ ja‘alu-hu li-llāh lā aruddu-hu*).” On the other hand, al-Sha‘bī attributed to Shurayḥ (d. 76-80/695-699) the statement: “I validate [the emancipation to the extent of] one-third and I require that he [viz., the slave] work [to compensate] the remaining two-thirds.” When the Kufan reciter (*ḥāfiẓ*), Ismā‘īl b. Abī Khālid (d. 145-146/762-763), asked which opinion he preferred, al-Sha‘bī replied, “I prefer Masrūq’s opinion as a *fatwā*, but Shurayḥ’s as a judgment (*qadā’*).”⁸⁸ According to Shurayḥ, the slave is set free only to the extent of one-third of the estate, but he is given the chance to complete the emancipation by working for the heirs. This solution can be regarded as an effort to bring the Prophetic “six-slaves *ḥadīth*” into harmony with the legal practice according to which the slave is irrevocably set free at the moment when his owner declares him to be free. The same eclectic solution is attributed to Ibn Mas‘ūd (d. 32/652), al-Nakha‘ī (ca. 50-ca. 96/ca. 670-ca. 714), and Abū Ḥanīfa (ca. 80-150/ca. 699-767).⁸⁹

Let us return to the question posed above: was the view attributed to Ibn Mas‘ūd and Shurayḥ concerning the validity of the heirs’ consent, accorded before the testator’s death, to his bequest made during sickness based on the same idea as the classical doctrine of death-sickness, or does it represent the reluctance of the ancient doctrine to place a person under interdiction? I hold the former view, in light of the fact that these Iraqi authorities also were credited with the solution which applies the one-third restriction to a deathbed emancipation.

⁸⁸ Ibn Abī Shayba, *Muṣannaf*, IV, 430, nos. 21757, 21758. See also Ṣan‘ānī, *Muṣannaf*, IX, 164, no. 16764.

⁸⁹ Ibn Abī Shayba, *Muṣannaf*, IV, 431, nos. 21759, 21760; Sarakhsī, *Mabsūṭ*, XXVIII, 7.

3.3. Divorce by a Husband during Final Sickness (*al-maraḍ alladhī māta fī-hi*)

Many examples indicate that if a man becomes sick, divorces his wife, and dies from his sickness, his divorced wife inherits from him and her inheritance rights are unaffected by his awareness or otherwise of his imminent death.

Several traditions recorded in the *Muṣannafs* of al-Ṣanʿānī and Ibn Abī Shayba refer to the second condition of death-sickness, i. e. death resulted from the sickness, but not to the first condition, i. e. the sickness was of such a nature as to cause a fear of death. For example, asked whether a wife divorced irrevocably (*al-battata*) by her sick husband inherits from him, ʿAṭāʾ (d. 114-115/732-733) and al-Ḥasan al-Baṣrī (21-110/642-728) reportedly replied that she inherits from him provided he died as a result of that sickness (*idhā māta fī maraḍi-hi dhālika, idhā māta min maraḍi-hi dhālika*).⁹⁰ In a similar case, ʿAṭāʾ reportedly said that if the husband recovers once before he eventually dies during her *ʿidda*, she does not have inheritance rights.⁹¹ But the best indication is provided by the following tradition attributed to the third rightly-guided caliph, ʿUthmān (r. 23-35/644-656), according to which a wife who asked her dying husband to divorce her retains her inheritance rights. Mālik in his *Muwattaʾ* says that he heard Rabīʿa relate:

I heard that the wife of ʿAbd al-Raḥmān b. ʿAwf asked him to divorce her. He said, “When you have menstruated and become pure, then let me know.” She did not menstruate until ʿAbd al-Raḥmān b. ʿAwf became sick. When she was purified, she told him and he divorced her irrevocably (*al-battata*) or made the last pronouncement [i. e. for the third time] of divorce after which he could no longer divorce her. ʿAbd al-Raḥmān b. ʿAwf was sick at the time, so ʿUthmān b. ʿAffān made her inherit from him after the end of her *ʿidda*.⁹²

The point is that the wife inherited, although her ex-husband had decided to divorce her at her request and before he entered the sickness. The mere fact that the husband declared the divorce during his final sickness suffices for the wife to retain her inheritance rights.

⁹⁰ Ṣanʿānī, *Muṣannaf*, VII, 63-64, nos. 12199, 12200. See also, *ibid.*, VII, 62, no. 12194; 64, no. 12202; Ibn Abī Shayba, *Muṣannaf*, IV, 176-77, nos. 19028, 19029, 19033.

⁹¹ Ṣanʿānī, *Muṣannaf*, VII, 64, nos. 12206. See also, *ibid.*, 65, no. 12209.

⁹² Mālik-Yahyā b. Yahyā, *Muwattaʾ*, 474-75. See also, Mālik-Ḥadathānī, *Muwattaʾ*, 282-83, no. 357; *Muwatta*, tr. Bewley, 231.

4. *Classical Theory of Death-Sickness*

I have argued that each of the two conditions of death-sickness developed independently. How were these two conditions combined to form the classical definition of death-sickness?

4.1. Gratuitous Dispositions

As I remarked, in the *Muwatta'* Mālik provided the heirs with a two-fold protection with respect to gratuitous dispositions by a sick person. First, the heirs can take possession of two-thirds of his property, with the result that he may not dispose of more than one-third. Second, a donation which is not taken possession of before the donor enters the death-sickness is null and void unless the heirs permit it. In the *Mudawwana*, however, Mālik protected the interests of the heirs by according them the right to suspend gratuitous dispositions by a sick person. With regard to a case in which a sick person makes a donation or designates an object as a *ṣadaqa*, Mālik stated that the heirs can prevent the donee from taking possession of the object until the sick person's death, at which time the value of his estate can be precisely calculated, except when the sick person's wealth is so great that there is no fear that the value of the object will exceed one-third of the estate.⁹³ On the subject of a *khul'* divorce concluded between a sick wife and her husband, Mālik deemed "the money [that the wife promised to pay to her husband to dissolve the matrimonial tie] to be suspended (*mawqūf*) until she recovers from the sickness or dies therefrom."⁹⁴ The same rule was applied to the emancipation of a slave by a sick debtor. According to Mālik, if the value of the emancipator's debts exceeds the value of his estate, the emancipation is null and void.⁹⁵ That is to say, a suspended emancipation becomes null and void if the slave owner dies insolvent. It should be noted that the "estate" refers here to property left by the deceased on the assumption that the gratuitous dispositions made during his death-sickness did not take effect.

To summarize, by adopting a solution which regards a sick person's gratuitous disposition as a suspended (*mawqūf*) act, Mālik subjected gratuitous dispositions *inter vivos* to the same restrictions that are applied to bequests, for the legal effect of such gratuitous dispositions was now determined at the moment when he died, like bequests.

⁹³ Sahnūn, *Mudawwana*, VI, 90, 94.

⁹⁴ *Ibid.*, II, 352.

⁹⁵ *Ibid.*, III, 180.

Likewise, the founders of the Ḥanafī school, who adopted the same definition of death-sickness as Mālik did, in principle assimilated gratuitous dispositions made during death-sickness to a bequest. Therefore if the debts of the deceased exceed the value of the estate, the creditors can cancel, retroactively, purely gratuitous dispositions, with the exception of emancipation, which is valid, although the emancipated slave must work for the creditors.⁹⁶ Similarly, the Ḥanafīs permitted the heirs to challenge gratuitous dispositions by a sick person only after the latter's death. This solution raises the question as to whether any gratuitous disposition is susceptible to cancellation, even if possession is taken before the sick person's death. From this point of view, gratuitous dispositions or quasi-gratuitous dispositions are divided into three categories. For the sake of completeness, a special rule concerning onerous transfers to an heir should be added to these categories.

(1) Gratuitous dispositions other than emancipation are valid only to the extent of one-third of the estate. For example, if a donation (or a *ṣadaqa*) to an heir or a non-heir has become valid (by the taking of possession or through witnessing, if the donee is a son under the guardianship of the donor) during the death-sickness, the (other) heirs can cancel, wholly or partly, the donation, making the donee return it or the part of it that violates the bequest restrictions.⁹⁷ The heirs cannot, however, demand a third party who has acquired the object to return it. For example, if a sick person donates his slave to an heir, who in turn donates the slave to another heir before the sick person dies, the other heirs have no claim on the slave. All they can do is to demand that the heir who first received the slave pay them its value.⁹⁸

(2) The emancipation of a slave (*'itq*) is usually a unilateral and purely gratuitous act by the slaveowner which takes effect at the moment when the owner intends it to take effect, normally immediately. If the *'itq* is made by bequest, it is for the most part subject to the same rules as an *inter vivos* emancipation. But there are several special forms of emancipation: (a) *tadbīr* is similar to *'itq*, except that it takes effect

⁹⁶ Nu'mān 'Abd al-Razzāq al-Sāmarrā'i, *Taṣarrufāt al-marīd maraḍ al-mawt* (1st ed., Dār al-'Ulūm li-l-Ṭibā'a wa-'l-Nashr, 1403/1983), 160; Ṭahāwī and Jaṣṣāṣ, *Mukhtaṣar ikhtilāf al-'ulamā'*, ed. 'Abd Allāh Nadhīr Aḥmad, 5 vols. (Beirut: Dār al-Bashā'ir al-Islāmiyya, 1417/1996), III, 187; Sarakhsī, *Mabsūṭ*, XXIX, 22-23.

⁹⁷ Sarakhsī, *Mabsūṭ*, XII, 102. If a donation has not become valid before the donor dies, it is null and void. Nu'mān 'Abd al-Razzāq al-Sāmarrā'i, *Taṣarrufāt*, 163.

⁹⁸ Al-Shaybānī, *Al-Jāmi' al-kabīr*, ed. Abū al-Wafā al-Afghānī (Hayderabad: Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyya, n. d.), 135.

on the death of the slave owner. (b) the sale of the slave to himself, concluded between the owner and the slave, by which the slave is immediately set free and owes the price to his former owner; and (c) the *kitāba* or *mukātaba*, which will be considered under rubric (3), below. Since *ʿitq* and *tadbīr* are both subject to the same rules as far as the doctrine of death-sickness is concerned, I consider here only the example of an *ʿitq* that takes effect on the spot.⁹⁹ Abū Yūsuf and al-Shaybānī held that a slave emancipated during death-sickness is immediately set free, but must work for the heirs to complete the emancipation which violated the one-third restriction. The Ḥanafī jurist, al-Sarakhsī (d. ca. 490/1096) justified this rule by explaining that because the emancipation is unanimously regarded as an irrevocable disposition, it takes effect at the moment when the owner intends it to take effect, and the emancipated slave owes the heirs a debt (*dayn*) whose value is equal to the difference between his value and one-third of the estate. According to Abū Ḥanīfa, however, the slave is set free to the extent of one-third of the estate, but is given the chance to complete the emancipation by working for the heirs.¹⁰⁰

(3) The most important quasi-gratuitous dispositions are *muḥābāt* and *kitāba*: (a) The *muḥābāt* is a sale in which the sale-price is greater or less than the market price. If, during his death-sickness, the deceased had concluded a *muḥābāt* with a non-heir, the heirs can ask the beneficiary to either cancel the contract or maintain it by making up the loss incurred by the heirs in violation of the one-third restriction. For example, if, during his death-sickness, A had exchanged his slave worth 300 dirhams for another slave belonging to B worth 100 dirhams, leaving, at his death, no other property than the slave worth 100 dirhams, the heirs can ask B to cancel the exchange, or, if he wants to keep his slave worth 300 dirhams, to pay them 100 dirhams, which represents that part of the gratuitous disposition that exceeds one-third of his estate.¹⁰¹ (b) The *kitāba* is a contract made between a slave and his owner by which the *mukātab* [the slave who contracts the *kitāba*] promises to perform the obligations agreed upon between them, typically by paying in installments a determined amount of money. When the *mukātab* has carried out his obligations, he is set free. If he fails to do so, he reverts to his original status as a slave. A slave who concluded a *kitāba* with his sick owner can claim the continuation of the

⁹⁹ Ṣanʿānī, *Muṣannaḥ*, IX, 162, nos. 16757, 16760; 163, nos. 16761, 16762; 164, no. 16764.

¹⁰⁰ Sarakhsī, *Mabsūṭ*, XXVIII, 6-7.

¹⁰¹ Shaybānī, *Kabīr*, 368.

kitāba if, before or immediately after his owner's death, he paid the amount he promised to pay to his former owner, or an amount equal to that which exceeded the one-third restriction: For example, if a sick owner had concluded with his slave who was worth 3000 dirhams a *kitāba* by which the latter had promised to pay his owner 3000 dirhams, and the owner left nothing besides the *mukātab*, the *mukātab* must, without delay, pay the heirs of his deceased owner 2000 dirhams, the amount in excess of the one-third restriction; otherwise the heirs can cancel the *kitāba*, whereupon the *mukātab* reverts to his former status as a slave.¹⁰²

(4) According to Abū Ḥanīfa, if a sick person transfers an object to one heir by means of an onerous contract (*mu'āwada*), typically a sale, without reducing the value of his property, the other heirs can cancel this contract, because the rights of the other heirs are attached to every one of the objects constituting the property of the deceased from the moment when he enters his death-sickness. Abū Yūsuf and al-Shaybānī held such a contract to be valid, for they maintained that the heirs' rights attach only to the value (*māliyya*) of the deceased's property.¹⁰³

4.2. Divorce by a Sick Husband

By the end of the third quarter of the second/end of the eighth century the Iraqian jurists had adopted the rule that if a divorce by a sick husband was motivated by his intention to deprive his wife of her inheritance rights, she nevertheless inherits from him.

Al-Shaybānī (132-189/749-805) recorded a tradition according to which the Kufan jurist, al-Sha'bī (b. 16-21/637-641; d. 103-110/721-728) said, "If a sick husband repudiates his wife three times, she inherits from him as long as she observes her *'idda*, because he was evading [the inheritance rule prescribed in] the Book of God (*inna-hu fārran min Kitāb Allāh*)."¹⁰⁴ Conversely, al-Shaybānī related that Abū Ḥanīfa (ca. 80-150/ca. 699-767) held that if a divorce took place on the wife's initiative, as is the case with divorce by *khul'*, *tamlīk* [conferring on the wife the right to divorce herself] or *takhyīr* [authorizing the wife to choose between maintaining or dissolving the marriage], the wife loses her inheritance rights, even if her husband was sick.¹⁰⁵ The same

¹⁰² Shaybānī, *Kitāb al-Aṣl al-ma'rūf bi-'l-Mabsūt*, ed. Abū al-Wafā' al-Afghānī, 5 vols. (1st ed., Beirut: 'Ālam al-Kutub, 1410/1990), IV, 84-85.

¹⁰³ Bukhārī, *Kashf*, IV, 309; Sarakhsī, *Mabsūt*, XIV, 150-51.

¹⁰⁴ Shaybānī, *Hujja*, IV, 85.

¹⁰⁵ *Ibid.*, IV, 94-95.

idea is expressed in some of the traditions collected in the *Muṣannaf* of Ibn Abī Shayba. When asked about a sick husband who repudiated his wife three times, the Kufan qāḍī, Shurayḥ (d. 76-80/695-699) is reported to have replied, “Because he intended to evade the Book of God, she inherits from him.”¹⁰⁶ Similarly the Baṣran traditionist, Ibn Sirīn (34-110/654-728), is reported to have said that it is unanimously held that “he who has evaded the Book of God sees his act annulled (*man farra min Kitāb Allāh rudda ilay-hi*).”¹⁰⁷ By contrast none of the traditions attributed to the Iraqian authorities found in the *Muṣannaf* of al-Ṣanʿānī, in the chapters concerning divorce by a sick husband, refers to such a subjective element.¹⁰⁸

Although the Medinan contemporaries of al-Shaybānī justified the rules concerning the divorce by a sick husband on the same grounds as the Iraqian jurists, they opposed the positive solutions adopted by the Iraqians. According to al-Shaybānī, the Medinans justified their rule that the wife divorced by a *khulʿ* retains her inheritance rights by stating, “We cannot exclude the possibility that the sick husband prejudiced her by forcing her to redeem herself (*lam naʿmun bi-an yuḍirra al-marīd bi-mraʿti-hi idhā akraha-hā ḥattā taftadiya*).”¹⁰⁹ The same understanding of the doctrine of death-sickness is attributed to the Medinan jurist, ʿUrwa b. al-Zubayr (29-94/649-712), who is reported to have said, with regard to a husband who had divorced his wife irrevocably, if “he divorced her in his sickness with the intention of prejudicing her (*yutalliqu muḍārran fī maraḍi-hi*)”, she has the right to inherit from him and to demand maintenance from him.”¹¹⁰ It is interesting, in this connection, to cite a passage from the *Mudawwana* compiled by Saḥnūn (160-240/777-855). The tradition attributed to the caliph ʿUthmān which I have cited from the *Muwattaʿ* of Mālik is also found in the *Mudawwana*, where the following passage is added:

Ibn Shihāb [al-Zuhrī] related from Ṭalḥa [b. ʿAbd al-Raḥmān b. ʿAwf], “ʿUthmān was asked why he made the wife of ʿAbd al-Raḥmān b. ʿAwf inherit from her husband, when ʿUthmān knew that ʿAbd al-Raḥmān had divorced her neither to injure her nor to evade the Book of God. ʿUthmān replied, ‘I wanted my decision to establish the *sunna* that people fear to evade the Book of God.’”¹¹¹

¹⁰⁶ Ibn Abī Shayba, *Muṣannaf*, IV, 177, no. 19036.

¹⁰⁷ Ibid., IV, 177, no. 19040.

¹⁰⁸ Ṣanʿānī, *Muṣannaf*, VII, 63-65, nos. 12200-12202, 12204, 12205, 12208.

¹⁰⁹ Shaybānī, *Hujja*, IV, 95.

¹¹⁰ Ibn Abī Shayba, *Muṣannaf*, IV, 177, no. 19038.

¹¹¹ Saḥnūn, *Mudawwana*, III, 38.

This passage, omitted in the *Muwatta'* of Mālik, seeks to harmonize the ancient doctrine, which unconditionally accords inheritance rights to a wife divorced by her husband during a sickness which resulted in his death, with the new concept of the death-sickness which introduces a subjective element on the part of the husband.

Conclusion

The process by which the classical theory of death-sickness was formed can be divided into three stages.

(1) As champions of freedom of disposition, Muslim jurists were at first reluctant to place restrictions on gratuitous dispositions. The measures they took to safeguard the interests of creditors and heirs were insufficient.

(2) During the first quarter of the second century/second quarter of the eighth century, the jurists created the concept of "a sickness causing a fear of death" by introducing the principle that a gratuitous disposition made by a sick person for the purpose of modifying the inheritance rules should be subject to the bequest restrictions. The Hejazi jurists and some of the Iraqian jurists adopted a solution which transferred two-thirds of a sick person's property to the heirs, who were thus authorized to take possession of the property at the moment at which the latter entered a sickness meeting this condition. The other Iraqian jurists adopted a solution which is identical with the classical doctrine of death-sickness. At the same time, Muslim jurists permitted the wife divorced by her dying husband to inherit from him, if he divorced her after contracting a sickness that led irrevocably to his death.

(3) By the end of the third quarter of the second century/end of the eighth century, the jurists had synthesized these two definitions of sickness. On the one hand, Iraqian jurists held that if a sick husband divorced his wife in contemplation of his imminent death, she retained her inheritance rights. This principle was adopted by contemporary Medinan jurists, without affecting their traditional positive solutions. On the other hand, Iraqian and Medinan jurists required that the sick person's death had been caused by the sickness during which he made gratuitous dispositions in order that they would be subject to the same restrictions as those imposed on a bequest.