

ՂՈԼԱՍ ՌԵԶԱ ՇԻՐԱԶԻ
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CONDITIONS SET AT THE TIME OF MARRIAGE
CONTRACT IN I.R. IRAN

Introduction

No definition has been provided for stipulation in the civil code of Iran, but it could be defined as follows by using the articles relevant to stipulation: obligation and commitment are consequences of contract that are parallel to the main commitment and the subsequent stipulation may be also be nullified in case the contract is rescinded. The stipulations of contract are divided into void and valid stipulations. Some void stipulations also nullify the contracts while other stipulations do not nullify the contract of marriage although they are void. Articles 232 and 233 of the civil code of Iran state the condition of stipulations as follows: A stipulation that is incompatible with the nature of the contract of marriage as well as an unknown conditions the lack of information on which would lead to unknown compensation are both null and void and would nullify the contract. The nature of marriage contract is an essential subject and the particular reason for which the contract is concluded. The following stipulations are void in nature but do not nullify a marriage contract:

- 1- A condition that is impossible to be implemented.
- 2- A condition with no subsequent benefit or interest.
- 3- An illegal condition.

As it was mentioned earlier, marriage is a special legal constitution. People are totally free to choose their spouses and conclusion of a marriage contract rests on intent and consent of both parties as is the case of other contracts, but the consequences of this contract are determined by laws that leave no room for absolute dominance of the volitions of either party. In this case, the will of parties is restricted to mandatory laws or the laws are imperative (1, p.244).

These restricted wills of parties are included in the marriage certificate as guiding conditions and submitted to the notary public officer. The husband and wife may agree upon all or some of these proposed conditions. According to the circular no.10/22 of The State Organization for Registration of Deeds and Properties, all the marriage and divorce registries throughout the country are obliged to read and explain each of the conditions included in the marriage certificate to the couple prior to registration of marriage contract. Before the marriage contract is pronounced, the couple must also be warned that the

acceptance of conditions included in the certificate is not obligatory and that it merely rests on the previous agreement of the parties.

However, since the conditions are included in the marriage certificate and the youngsters are not sufficiently experienced and cognizant and because the ceremony takes place as a formal convocation before the eyes of attendees, they inevitably accept the entire conditions with no objections (2, p.25).

Considering the article 10 of the civil code of Iran which states that "the private contracts, if not explicitly opposed to law, are enforceable upon those who have concluded them", it seems that the parties to the marriage contract may include their restricted will as a condition and in form of an independent contract.

Stipulations included in the marriage certificate —

Couples usually include their demands in the marriage contract and rarely conclude independent and separate contracts for other conditions of marriage. A marriage certificate is an official deed when registered according to the regulations and the entire signatures and contents included in it are deemed valid and indispensable like other official deeds (3, p.344). The stipulations included in the marriage certificate mostly comprise two items. The first one is related to halving of properties obtained subsequent to marriage which is the financial aspect of it. The second is the power of substitution in divorce which is not pecuniary. Instances of the latter right are indicated in 12 clauses.

A- Stipulation of assets transferred by half

The first condition included in the marriage certificate is with regard to transfer of half of the properties acquired after the marriage. The stipulation reads as follows: "The wife has provisioned during the conclusion of marriage contract that whenever the divorces is not filed subsequent to appeal of the wife and in case the court does not discern the filing of divorce to be the result of a woman's violation of her duties or her misbehavior, the spouse is obliged to transfer half of his available assets or its equivalent that have been obtained during the course of marriage according to the verdict of the court of law".

Acceptance of this stipulation is not mandatory for the husband, but since it is included in the exiting marriage certificates, the spouse knowingly or unknowingly endorses it and becomes committed. The following conditions must be met in order to abide by this commitment:

1- According to the aforesaid stipulation included in the marriage certificate, transfer of half of assets rests upon the filing and pronouncement of divorce. Taking into account the title of article 29 of the bill for family support enacted in third month of 2013, the court verdict is based upon the conditions included in the marriage certificate.

2- The filing of divorce is not requested by the wife.

3- In the wake of an appeal by the husband, and in case the court does not discern the filing of divorce to be the result of a woman's violation of her duties or her misbehavior.

4- The other provision of the above mentioned commitment is that the husband possesses properties as the divorce appeal is files and that the property was obtained during the course of marriage.

In case a dispute rises between the husband and wife on whether the property has been acquired during the course of marriage, the wife should provide evidence for proof of her claims since the property in principle is not deemed to be obtained during the course of marriage and the wife's claims are contrary to the principle, thus the wife is the plaintiff and she must prove the fulfillment of stipulation that she alleges.

The stipulation of halving the assets is a provisional deed since the husband has been obliged to halve his properties when entering into the marriage contract. This provision is consistent with article 234 of the civil code of Iran and is deemed valid.

The aforesaid stipulation has no historical background in our social and religious traditions and is merely a bureaucratic procedure to support women and make up for the shortcomings of law but it is in fact a clumsy imitation of western culture that seems to exacerbate disputes in the families since it is often impossible to distinguish the infringement of husband or wife (4, p. 120).

As women are nowadays more involved in outdoor activities in addition to their housewife responsibilities and that the earnings are spent by the husband to run the family, inclusion of such stipulation is closer to fairness. Additionally, claiming the dissatisfaction or non-admittance of this provision is against the principle and the title of article 29 of the bill for family support emphasizes on adoption of decisions based on the stipulation included in the contract of marriage.

B- Condition of proxy in divorce

It is possible to empower the wife with the right of divorce when entering the marriage contract since the client (husband) and attorney (wife) like any other contract may express their wills whether in form of an independent contract, or as a stipulation in the marriage contract (restricted will according to the laws of Iran).

The legislator in Iran has ordained the following: the parties to the marriage contract may stipulate any condition that is not contrary to the nature of the aforesaid contract through the marriage contract or any other necessary contract, for instance it may be stipulated that if the husband acquires another wife or discontinues the payment of the cost of maintenance or abandons his wife for a certain period of time or attempts to murder his wife to the extent that living

together becomes unbearable for both of them, or that wife is empowered with the right of substitution in divorce subsequent to the final verdict of the court.

As of 1982, the power of substitution in divorce has been included in the marriage certificates. This provision reads as follows: the husband may entrust irrevocable power of attorney with the power of substitution to his wife through marriage contract or any other binding contract so that the wife may choose the type of divorce and file for divorce after recourse to a court and acquisition of permit and the wife is irrevocably empowered to accept the divorce on his behalf in case of munificence.

As it can be noticed, the contents of this provision are included in article 1119 of the civil code of Iran. In other words, inclusion of this provision in the marriage deeds is in fact a reminder for the couples to consciously agree upon, if interested.

Since according to the article 1133 of the civil code, the husband is allowed to divorce his wife through compliance with legal regulations and as the authority of attorney may not exceed that of the client, therefore the husband's attorney or any third party may not divorce the wife without the permission of court or referral of dispute to a jury. So in the current situation, the wife can recourse to a court and prove that one of the aforesaid dozen items included in the marriage contract are met in order to file for divorce as the power of substitution rests upon the satisfaction of the abovementioned conditions.

It seems that agreement on other cases in addition to the 12 conditions or stipulating the absolute power of attorney for the wife meet no barriers and depend on the parties' will. Since divorce is the right of the husband- which is compliant with article 1133-, she may implement this right through her attorney. This stipulation is neither contrary to the nature of the contract nor illegal (5, p. 50).

In case of the type of divorce, since the revocability and irrevocability of divorce is an imperative matter and the law determines its type not the will of parties, thus the court must determine the type of divorce in its verdict.

Satisfaction of the following items allows women to appeal for permission of divorce:

1- Abstaining from payment of alimony

The first paragraph of the provision of attorney ship in divorce is related to refusal of husband to pay alimony. In case the husband refuses to pay alimony for more than 6 months and he may not be obliged to do so, then the right to appeal for divorce will be established. Additionally, in case the husband does not fulfill the indispensable rights of his wife and his coercion to do so is impossible, then the right of appealing for divorce is preserved to the wife.

This provision is independently stated in article 1129 of civil code but in other words. Moreover, since the refusal to pay alimony would lead to suffering and hardship for the wife, she may file for divorce according to article 1130.

2- Maltreatment

Misconduct is the most prevalent reason that may terminate matrimony. According to the religious and legal customs, the wife and husband are obliged to have friendly relations with one another. Good temperament is a general concept that is the function of social customs and rituals, local culture and religious morality of one ethnicity to another. However, if the husband continues to misbehave to the extent that marriage becomes intolerable, the wife may become divorced as a delegate of her husband.

3- Refractory disease of husband

The third paragraph of provision of power of attorney in divorce is related to husbands with those types of diseases that may jeopardize the resumption of marriage for the wife. This article may appear to oppose ethical principles such as friendly relations or collaboration in marriage since the wife is supposed to show more sacrifice in such situations and not abandon her husband once he is stricken with the disease. But since the threshold of tolerance differs among the people, thus the capacity of a normal and standard person must be set as a criterion.

However, as the husband is entitled to divorce his wife through payment of her alimony and dowry in case he finds it unbearable to continue the marriage, the same right is preserved for woman under the shelter of law. The diseases subject to this paragraph must be contagious or refractory nature, causing pain and suffer for the wife.

4- Insanity in cases where rescission is impossible

Insanity and intellectual impairment refers to the state where the person becomes unbalanced in fulfillment of his usual daily duties and he commits causeless activities. Diagnosis of insanity must be performed by a specialist physician. In case of permanent insanity and no possibility of improvement, this right is preserved for the wife, otherwise if the doctor ensures recovery in 6 months, then skepticism is required with regard to this stipulation as the value and reverence of family is much more than being disintegrated due to such removable obstacles. Law may recognize this right but ethics castigate abandonment of an insane husband who is in need of care and nursing.

5- Jobs conflicting the domestic interests or prestige of wife

The fifth clause is about the failure to comply with the court order on prohibition of husband to be involved in a vocation which may according to an competent court contradict the benefits of family or impair the prestige of wife. Affairs that may conflict the interests of family are those that may weaken the foundation of families through disruption in upbringing of children or impair the social respect

of wife or upset the economical stability of family. No certain framework has been defined for denotation of such jobs as it is something impossible since the dignity of each person and family differs from that of another. Thus such affairs must be studied personally.

This right has been recognized for the husband in article 1117 of civil code of Iran. The wife is also entitled to this right, therefore the husband should not choose a job which may mortify and torture the wife whether the job is a crime according to laws. The power of attorney may be applied when it is impossible to enforce the man to forfeit his job.

6- Definite conviction to long term imprisonment

This clause refers to conviction of the husband to punishment for five years or more or to pecuniary penalty which would lead to five years of incarceration due to incapability to disburse the fines. Imprisonment and pecuniary penalty may sum up to five years if incarceration.

Long term detentions would dismantle the foundation of families. In fact, the same reasons that entail the formation of a family are permissible for divorce in case of long term imprisonments (4, p.128).

It seems that the reason of imprisonment is much more important than the period of detention. Although a five year imprisonment is a short period for dissolution of family, but in some occasion the reason of detention is so important that even a shorter period seems too much. Inclusion of this stipulation in the marriage certificate and agreement upon it seems to be an in vain attempt since the five year conviction of husband is explicitly stated in clause 3 of the amendment note of article 1130 of civil code.

7- Addiction of husband

The seventh clause discusses the addiction of husband. An addiction is suitable for divorce if deemed detrimental. Custom determines whether addiction is detrimental i.e. addiction is to the extent that disrupts the basis of life so that the solidarity among the family members is spoiled and the husband is deterred from his duties, making it impossible to resume marriage. The damage caused by detrimental addiction must be to the extent that living together according to the customs would become intolerable for the party filing for divorce. So, what causes divorce is the severity of married life (1, p. 412).

8- Unjustified abandonment of family life

Deliberate abandonment of family life is the condition of husband leaving the common life on purpose. There is no difference whether he is far or near or that whether his whereabouts are known. He may live in a place with unknown whereabouts or that other family members may not be able to see him every day. As abandonment of family life has no clear specification in law, this is a difficult issue for woman. The subject of abandonment was first recognized as one the

causes of divorce in the bill for family support enacted in 1967. Women have clear definitions for abandonment of life and those include abandonment of a common house by wife referred to as non-compliance. According to article 1029, four years of absence empowers the wife to appeal for divorce.

9- Absolute conviction of husband due to commitment of crime or execution of any punishment whether punitive or retribution due to commitment of crime contradicting the prestige and dignity of family.

As it was mentioned earlier, recognition of these types of crimes is not typical and generic but the arbitration of court depends on the conditions of both parties. In this case, the husband must first of all be convicted subsequent to a definitive verdict and second of all, this conviction must lead to embarrassment of wife in the community to the extent that such a situation becomes so agonizing for the wife. The arbitration of court with regards to impairment of family dignity is based upon the public judgment on the husband and wife while the sensitivity of the couple seems more important than the public judgment. In other words, the degree of crime is something personal. We can claim that after committing a crime by husband, if the wife shows ignorance of the crime and continue the common life, according to the custom, she cannot request divorce based on the commitment of the same crime [Ibid, p. 415].

The extent of punishment is not important in this stipulation, but the important thing is the definite conviction.

10- In case the wife does not conceive a child after five years due to infertility of husband or other physical defects.

Reproduction and upbringing of children is one the most significant purposes of marriage. Therefore, the obstacles to this goal may sometimes turn the marriage into a meaningless and unbearable affair. Infertility of husband or deliberate refrain from insemination of wife is only subject to divorce if deemed the only reason for not conceiving a child.

In such cases, the court issues the affair to the coroner's and based on its view about the infertility or other physical problem of the husband, orders for divorce. Achievement of this condition is possible if at least five years of marriage life passes.

However, if the wife and husband do not agree on having a child and man prevents it, the result is the same as his infertility. In such a situation, woman can get divorce by power of attorney.

In such a particular case, divorce is permitted if man's obligation is not effective for doing his duty. In fact, it is a kind of maltreatment.

11. Absence of husband during six month after approaching to the court

According to the paragraph one of attached note to the article 1130 of civil code, abandonment of family life by husband for 6 continuous months or 9 periodic months in a year without any excuse causes difficulty and hardship and

giving permission to issue the divorce sentence. The paragraph 11 of attorney condition is about absence of husband during six month since the wife's reference to the court. Because the wife's undecided situation, in such a case, puts her in an un-favorite and inadequate position. Absence occurs when a husband, intentionally or because of some forcible accidents, leaves his family for a long time and there is no news about him.

The article 1029 of civil code has assumed divorce for wife in the case of 4 years absence of husband. The privilege of paragraph 11 of marriage deed is that according to the latter there is no need for the wife to be patient for 4 years.

12. Husband marries to another woman without the first wife's consent or he does not treat them justly according to the court recognition.

In this paragraph, man promises freely that he does not marry another wife during their marital life. In other words, he should not use the religious right freely. This condition is one of most current and controversial conditions of marriage contract.

Some legislators and Faqihs (Jurisconsults) have declared this condition abrogated. They have taken it into account as sanction of a legal right [6, p. 302].

According to the article 959 of Iran's civil code, nobody can lose his total ownership right or execution of a part or entire of his/her civil right. Undoubtedly, law prohibits negation of right in general not partly. One of the ways to detail negation of right is to restrict it to a certain time. Thus, we conclude that waiving right of re-marriage is restricted to the time in which woman does her duties perfectly and correctly without any mistake or problem. In other words, husband does not marry based on his passions. Some experts has said that eradication of this instrument -re-marriage-desolates the alternative and resolution for protection of family by legislator; therefore, it is against public order [1, p. 270].

Some experts recognized as prevention of performing a legal action and they confirmed it as correct action. Undoubtedly, re-marriage is not obligatory according to law and religion. Instead it is legal by some restrictions and conditions. Therefore, if somebody commit to leave a lawful action, namely he promise not to remarry, he has not violated a legal right. Condition of non-use of right is not sanction of legal right [7, p. 65].

Some experts have suggested that court gives sentence of abrogation of the second marriage in order to prevent abuse. Moreover, it assumes punishment or bail for those who violate such condition because it harms family solidarity [4, p. 134].

Determining punishment for an action or its abandonment, namely criminalization of the action; therefore, determining punishment for re-marriage means assuming it as crime. Meanwhile, this enterprise is against religious law because of the religious permission for this action. No difference between the

kind of marriages, whether temporal/permanent, official/non-official give woman right of divorce. Use of this condition is possible if the woman is not the agent or cause of this problem. So, if woman acts her religious, common and lawful duties and man does remarry, she can request consideration.

The paragraph three of the article one of family law in Republic of Armenia has determined the equal rights for man and woman during marriage and marital life as well as its dissolution. It has emphasized the equality of rights of couples in family in the paragraph four of the article.

Conclusion

The stipulations included in the marriage certificate mostly comprise two items. The first one is related to halving of properties obtained subsequent to marriage which is the financial aspect of it. The second is the power of substitution in divorce which is not pecuniary. In fact, the aforesaid cases have been taken from the article 8 of family protection code in 1971. But, the mentioned cases, according to the law, should be respected lawfully. Actually, the court issues the certificate of disagreement while, it is a condition in the marriage contract and both sides can refuse these conditions in general or some of them in particular. Moreover, in code of family protection the majority of the mentioned cases are common between woman and husband, but the mentioned cases in marriage deed regards benefits of woman, namely only one condition can permit woman to request the court to issue disagreement certificate according to which she can get divorced. The entire conditions are result conditions and certainty of one condition gives woman to do divorce. The court plays the role of uncovering the acceptable condition of the right of divorce and issue permission to perform it by woman. Additionally, claiming the dissatisfaction or non-admittance of this provision is against the principle and the title of article 29 of the bill for family support emphasizes on adoption of decisions based on the stipulation included in the contract of marriage.

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Վերջերս ընդունված Ընտանիքի պաշտպանության օրենքը 29 հոդվածը սահմանում է, որ դատարանը պետք է հաշվի առնի ամուսնական պայմանագրի պայմանները: Մույն հոդվածում հեղինակը նպատակ ունի քննարկել ամուսնական պայմանագրի պայմանները: Անհրաժեշտ է նշել, որ ներկայումս գործող ամուսնական փաստաթուղթը ձևավորվել է Իրանում իսլամական հեղափոխությունից հետո: Դրանում ամրագրված կարգավորությունները հիմնականում ներառում են երկու պայման: Առաջին պայմանը ֆինանսական է և վերաբերում է ամուսնության ընթացքում ձեռք բերված գույքին, իսկ երկրորդը վերաբերում է ամուսնության մեջ փոխարինելիությանը: Մրա նպատակը ընտանիքի պաշտպանությունն էր, բայց իրականում այն պաշտպանում է կնոջ իրավունքը և ոչ ընտանիքինը որպես միավոր: Բացի այդ ոչ միշտ է, որ զույգերը հասկանում են, թե ինչ են ստորագրում ամուսնության ժամանակ: Մա վերլուծություն է հիմնված գրքերի, փաստաթղթերի և հոդվածների վրա: