



A Jurisprudential-Legal Analysis of the Remedy for the Condition “the Conditioned Thing Becomes the Property of a Third Party” Embedded in the Marriage Contract

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Introduction

One of the general principles governing marriage (nikāh) is that it may be concluded subject to conditions; parties to the contract are permitted to stipulate any lawful condition in the body of the contract. This right is also recognized by the legislator in Article 1119 of the Civil Code. Now, suppose that within the marriage contract a condition is inserted requiring transfer of ownership of a specified property to the wife, and after conclusion of the contract it becomes clear that the conditioned item (the specified property) is in the ownership of a third party. Given that the performance of that condition has in practice become impossible, according to the jurists' opinion such a condition is void but it does not invalidate the marriage itself. The legislator likewise, in clause 1 of Article 232, generally treats conditions that become impossible to perform as void, while at the same time not considering them to be nullifying of the contract. However, with respect to the sanction or remedy for the invalidity of such a condition, when the marriage contract contains such a clause there is no specific legal text or explicit statutory provision and the legislator has remained silent on the matter. In other words, the issue can be framed by the following question: if the husband, in the “other conditions” section of the official marriage booklet, undertakes to transfer ownership of a specified property to the wife, but after marriage it is discovered that the conditioned item (the specified property) is owned by a third party and performance of the condition is impossible, what is the remedy for that condition?

A review of the relevant sources and authorities indicates that among jurists, although most have not specifically addressed the remedy for breach or impossibility of a condition of performance (an obligation to do) in the marriage contract, some Twelver Shi'i jurists have explicitly considered such a condition to be without remedy. Among Sunni jurists, the majority treat a condition of performance within the marriage contract that is not intrinsic to the contract's essential terms— even if it is not contrary to the

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contract's nature— as void and ineffective. For example, this group of jurists holds that if a condition of good treatment (husn al-mu'āsharah) or the husband's spending on the wife is stipulated, that condition is valid and binding, but in other cases they consider the condition void and ineffective even if it does not oppose the contract's nature. In contrast, some Sunni jurists and also certain other jurists, legal scholars and researchers have recognized a remedial right of rescission (khiyār al-fasakh) for the beneficiary of the condition when the condition is breached or becomes impossible.

However, it appears that regarding the present case—i.e., the conditioned item's coming to belong to a third party (mustahiq lil-ghayr) in a marriage contract—an alternative view to those advanced by some jurists and legal scholars can be proposed. Given the need for examination of the issue, the present study seeks to explain the remedy for impossibility (ta'adhdhur) of a condition of performance embedded in the marriage contract on the basis of jurisprudential foundations and legal rules, and accordingly to clarify the remedy when the conditioned item becomes vested in a third party.

Research Background

Regarding prior research, although there is no independent study that deals exclusively with the remedy for the conditioned item's becoming vested in a third party within a marriage contract, there are related works that we briefly review here and explain how the present research differs from them. Amirkhani and Javān, in a study entitled “Feasibility of Rescission (Faskh) of Marriage in the Case of Breach of a Condition to Perform an Act in Islamic Jurisprudence” (Amirkhani & Javān, ۲۰۱۸), after reviewing the opinions of jurists of the Islamic schools on remedies for breach of a condition to perform an act in the marriage contract, conclude that according to the general rules of contracts—based on rational principles—the option of stipulating a contract (khiyār al-ishtirāʾ) for breach of a condition to perform an act, like that for breach of a condition of quality, exists in marriage contracts as well. The difference between that study and the present one is that the aforementioned view will be critiqued here and, contrary to it, a view based on the non-existence of the option to rescind the marriage contract due to impossibility or breach of the condition will be advanced. In another study titled “An Analysis of Conditions Inserted in the Marriage Contract” (Mohiqq Damād, ۱۹۸۵), after listing the types and characteristics of conditions within the marriage contract, the author briefly addresses the remedy for a condition to perform an act in marriage, noting that if obligation to perform the act is impossible, one cannot hold that a right of rescission accrues. The difference between that study and the present research is, first, that here the focus is specifically on the remedy for impossibility of a condition to perform an act within the marriage contract; and second, although the right of rescission is denied as a remedy in this case, the present study argues that the obligation to pay the equivalent value of the conditioned item (ta'diyeh al-ma'ādel) is a valid remedy—a point not addressed in the earlier work. In another study, “Conditions in the Marriage Contract: Examination and Comparison of Some Cases in Imami and Sunni Fiqh” (Mirshamsi, ۲۰۰۸), the author, after discussing types of conditions and their validity



requirements, treats the condition to perform an act such that if the obligor (the husband) fails to perform, simply obliging him to his promise is permissible and non-performance in that particular case is not counted as non-fulfillment (*nushūz*) on the wife’s part. The present study, however, is concerned with impossibility (*ta’adhdhur*) of the condition, and it is obvious that when performance is impossible the obligor cannot be compelled to perform; hence the present research differs fundamentally from that work. In another article, “A Re-Reading of the Validity and Guarantee of the Condition of Non-Remarriage in Jurisprudence, Law, and Psychology” (Mollā’i, ۲۰۲۴), the author treats breach of a condition in the marriage contract as affecting the validity of a subsequent marriage to the extent that the wife gains the right to affirm the husband’s subsequent marriage, and if she does not affirm it the second marriage will be null. Although this claim is surprising, the present study rejects the destabilization of the marriage contract due to breach or impossibility of a condition and offers a novel view in the case of impossibility.

Methodology

This study is descriptive-analytical and refers to sources from both Imami and Sunni jurisprudence as well as statutory laws and existing judicial practice.

Findings

The findings of the present research indicate adoption of a novel view on the remedy for the conditioned item’s becoming vested in a third party within a marriage contract: namely, that in the case of impossibility of the condition due to the conditioned item vesting in a third party (for example, when the marriage contract contains a condition that the husband transfer ownership of a specified property to the wife, and after conclusion it is discovered that that property is owned by a third party and performance is practically impossible), the remedy for impossibility should be the obligor’s obligation to pay the monetary equivalent of the conditioned item to the beneficiary. Although jurists and legal scholars have not discussed this view, because it rests on sound reasons it can be considered a legitimate and well-founded position on the matter.

Conclusion

Concerning the remedy for the conditioned item’s becoming vested in a third party within the marriage contract, despite the silence of some jurists, a review of existing views reveals two positions:

A. The view denying any remedy for impossibility of a condition to perform in the marriage contract: According to this view, held by some Imami jurists who rely on grounds such as consensus, the principle of obligation (*aṣl al-luzūm*), the principle of precaution (*aṣl al-iḥtiyāt*), and the devotional (*‘ibādī*) nature of the marriage contract, departing from the contract’s essential nature, in the event of impossibility of a condition to perform, the right of rescission—which is the customary remedy for breach or impossibility of a condition in other contracts—is denied for the marriage contract. The majority of Sunni jurists likewise generally consider conditions to perform acts that are outside the contract’s essential terms to be void and ineffective; according to



this group, by parity of reasoning the case of impossibility of a condition to perform in marriage lacks a remedy. Each of these grounds, however, can be critiqued.

B. The view that the option (*khiyār*) exists as the remedy for impossibility of a condition to perform in the marriage contract: Some, basing their position on rational grounds and the juristic maxim *lā ḍarar* (no harm), treat the remedy for impossibility of a condition to perform in marriage like other contracts—i.e., destabilization of the contract and creation of a right of rescission for the beneficiary. However, first, the reasons of this group face objections, and second, the special status of marriage relative to other contracts prevents application of some general contractual rules to marriage.

After examining and critiquing both views, the present study concludes that in the event of impossibility of performance of a condition to do an act in the marriage contract where the impossibility is due to the conditioned item's having become vested in a third party (for example, a stipulation to transfer ownership of a specified property that after contract formation is found to belong to another person), because actual performance of the condition is impossible, the proper remedy for the impossibility is to obligate the obligor to pay the monetary equivalent of the conditioned item to the beneficiary.

The strength of this view lies in that, first, the principle of obligation applies both to the principal obligation (the contract) and the secondary obligation (the condition). Although full performance of the secondary obligation has become completely impossible, payment of the equivalent value prevents the obligation from falling away entirely and thereby partly secures fulfillment of the condition and the subsidiary undertaking. In addition, by the juristic rule of *maysūr* (when complete performance is impossible, that which is possible must be performed), payment of the equivalent of the conditioned item becomes obligatory. Second, this view is based on the maxim *lā ḍarar* (no harm), and the loss caused by impossibility of the condition can be partially remedied by payment of the equivalent.

Keywords: Marriage contract (*nikāḥ*), condition within the contract, impossibility of condition (*ta'adhdhur al-shart*), remedy, conditioned item becoming vested in a third party (*mustahiq lil-ghayr*)