

## MARRIAGE, AN EXCEPTIONAL CONTRACT

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**Introduction.** According to the social history of mankind, human has to adjust to the rules and regulations in order to co-existence. diversity of cultures, rituals and customs is resulted in diversity of structures and frameworks in which conventions fall. Individuals who seek a disciplined and particular relations, choose their favorite pattern and frame with regard to their needs. The way of emergence and conditions of obligations depicts their mutual rights, as well as, determines their particular effects. That is why it is believed that legal actions are originated from willing, intention and mutual consent.[1,p.9]

In this study, we try to find an answer to the question whether marriage is a usual (common) convention, like other contracts, or not.

### 1- Law affairs

The law includes a set of life rules and regulations in the society. In other words, the codes regulate social relations of mankind. Law affairs are divided into two groups of law actions and incidents(occurrences). The law occurrence is an incident by human(consciously or unconsciously) or other agent in the external world. Consequently, it is followed by legal effect(s)[2,p.33]. In other words, the effect of law occurrences does not depend on its doer's will, instead, the law confirms its effect(s). For example: usurpation, birth, death, intentional destruction.

The law actions consist of the conditions which are constructed by encludingly will of

individual(s) in the credit world in order to prove realization of the law effects. The law actions, by extension, are divided into the following categories: a) the law actions which need composition such as transactions and unilateral acts(eigha), b)those which rely on the will, but they do not need composition because they are news such as; claim, testimony, confession[3,pp17-18].

The word (eigha)- unilateral will- literally means realization. In the law term; it is composition of a law essence to a will. For example, we mention divorce in Iran's law which depends only on the husband will and does not need the acceptance of wife.

Transaction is a law condition which is the result of mutual agreement of two or more persons' will in a nominal form. The will of the individuals who want to enter a transaction, move and work harmoniously in the mental and psychological world. To make a transaction essence the will of two persons- natural or legal- are necessary as the two parties of the contract. Therefore; transaction consists of mutual cooperation of two or some persons' will in formation of a law essence[2,pp.39-47].

Iran's civil code in article 183 has defined the contract as follows: a contract is concluded when one or more person(s) enter into a mutual agreement with one or more other person(s) regarding a specific matter and where the obligations involved are accepted by all parties. Law professors find this definition incomplete.

### 2- Definition of Marriage

Marriage and family is not a new phenomenon. It has been among all nations and societies and its background dates back to the creation of Adam on the Earth. With regard to its own tradition, costumes and culture, each nation and community, did it as

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they do it in our contemporary time. In Iran, the civil law has not a comprehensive definition for marriage and it dominantly deals with its conditions and impacts. In the legislated law of Iran, marriage is a civil contract and it keeps its public aspect and religious situation like the past periods. In the civil law of Iran, marriage is not taken into account as formality contract and it is held by the couple consent and agreement and not being registered in the marriage office would not result in invalidity [4,p.45].

Law professors have produced different definitions for marriage that is implied below:

Marriage contract means the legislative relation between man and woman by a contract and it gives them the right of sexual enjoyment [5,p. 286].

Marriage contract is a legal-emotional relation by a contract between man and woman and it gives them the right of living together and the evident manifestation of this relation is sexual enjoyment [6,p.42].

Lord Penzes defines marriage contract as intentional and exclusive union of man and woman for a life time [7,p. 27].

One of the sociologists recognizes three factors causing marriage: instinct of having a child, economic need and love [8,p. 15].

Marriage is a divine treaty and legal-emotional relation by a contract between man and woman and give them the right of living together. The right of private enjoyment is the evident manifestation of this relation [9,p. 13].

By use of article one and ten in Family Law of Republic of Armenia, marriage is defined as: it is a contract relation based on mutual intention and consent of a man and woman. By this contract, both man and woman recognize mutual love, respect, protection and responsibility. The contract

contains both property and non-property aspects.

Marriage is a contract that is the basis of family couple relation between man and women, therefore, it should have the basic conditions of other contracts. But what are the general conditions of contracts?

### **3- General conditions of contracts**

By general conditions of contracts, we mean those terms which are not for a particular one. In other words, the general conditions includes the entire contracts. Article 190 of Iran's civil code has declared : for a contract to be valid, the following conditions must be met. 1- the intention and mutual consent of all parties to the contract. 2- the legal capacity of all parties. 3- the existence of a definite subject-matter to the contract. 4- that the basis of the transaction is lawful.

Some general conditions as intention and consent are resulted from freedom of domination of humans' will (ruling human will) in the social relations as well as analysis of the relations. It is impossible for a normal conscience to accept law realization without intention and consent. Some general conditions as legitimacy and prosperity of subject protect and guard social and judicial order.

The basic condition of intention and consent contain both sides. Therefore, if one side is in lack of intention and consent, the contract shall not be valid. In law action, consent consists of desire for doing the action. It is achieved in the decision-making stage after assessment. If intention or will of composition is the constructor element of the contract, it will be realized in the next stage- namely stage of execution of decision [2,pp.133-137].

#### **a. Capacity**

In law term capacity means human's competence for possession or exercise of rights and duties. Article 956 of Iran's civil code and paragraph 2 of article 20 in civil code of Armenia have defined the capacity

of possession of right in the same way as: "a human being possesses the capacity to exercise rights from the moment of birth to the death." Thus, by alive birth, everybody achieves condition of citizenship rights and duties. According to article 958 of Iran's civil code, legal capability is the necessary condition to apply and exercise civil rights. It puts it so : " every human being is entitled to the enjoyment of civil rights but may only exercise those rights if they are legally qualified to do so."

The question raised here is that what is legal capability, and who has legally qualified to do so? Article 211 of the same code reply in this way:"for parties to a contract to be competent, they must be of full legal age, in full command of their senses and fully mature." So, to exercise civil rights, one must be of full age, sane and mature. Paragraph 1 of article 24 in civil code of R. Armenia determines that capacity of a citizen by his actions to acquire and exercise civil law rights, to create for himself civil law duties and to fulfill them(civil law dispositive capacity) arises in full with the attainment of maturity, i.e., on the attainment of the age of eighteen. The same article and article 30 in the civil code of Armenia has recognized some kind of incomplete or partial capacity for ages between 14-18. By article 10 of family code of Armenia in which the marriage age is 17 for women and 18 for men, and paragraph 3 of article 24 in civil code, it is concluded that the age of full civil law dispositive capacity for women is 17 provided that they are married. Moreover, according to article 22 in civil code the age of complete capacity can be less than 17 or 18 for both men and women based on the necessity or expedience.

The condition of capacity, in fact, returns to the condition of intention and consent. In other words, the person who is lack of capacity, he/she is lack of composition intention and consent or legal valid consent.

The annulment and not binding of law actions of individuals who are lack of capacity refer to the lack of one of the two elements- intention or consent. Besides, reason is the obligatory condition for capacity, because without reason, intention of composition is impossible. Moreover, maturity and growth are necessary because the insane and minor that is capable of making decision cannot recognize their benefits; therefore, they are lack of legal valid consent, although they can have intention of composition[2,pp.253-254].

#### **b. Maturity**

In legal term, maturity means passage of individual into the natural perfection in which the sexual force is awakened and the individual becomes ready for marriage. This stage of natural trend is accompanied by a kind of rational and mental evolution, although it is not by itself enough for ending incapacitated period. moreover the maturity must be proved. The note of article 1210 in Iran's civil code has determined 9 lunar year for girls and 15 lunar year for boys to be accounted as mature. The second note of the same article declares that on reaching the age of maturity, the property of minors can be transferred to them provided that it is established that they have been matured. By these two notes, it is concluded that reaching the age of maturity decisively does not mean maturity.

With regard to the note of the one article of permission of opening deposit account for infants; mother can open an account for her orphan child, and she can withdraw money from this account until the child reaches 18 solar year.

The article 1 of the code of infants and adolescences protection, protects the entire individuals who are below 18. According to this article and other articles, it is concluded that the age of 18 is the circumstantial evidence of full maturity for both men and women; so, everybody who intends to

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achieve full dispositive capacity has to prove his/her maturity before the age of 18.

### **4- Conditions for Family Formation**

As mentioned before, family is constructed by two persons -a woman and man-through marriage contract. Man and woman who recognize their readiness for acceptance of the responsibility, those who believe their ability as father or mother, should sign this contract. Now, we deal with the conditions of the two persons:

#### **a. Age Condition**

Marriage is a contract; therefore, it should have all general conditions of contracts including intention and consent of the participants and their legitimization consisting mature, rational. Note 1, article 1210 civil code has declared age 15 for boys' and 9 for girls' maturity. Also, note 2 say an immature orphan can get his/her properties if his/her maturity has been proved.

Actually, marriage contract has simultaneous financial and non-financial commitments. Now, the question is whether we can define a financial commitment for a boy whose age is 15 but his maturity has not been proved in the court. Certainly the answer is negative because the boy, in the marriage contract, undertakes to pay a property to the girl as alimony. Although article 1041 in civil code approved by Expediency Council declare: Marriage contract of a girl below 13 and a boy below 15 is possible by their parents or master's permission and recognition of a just court, according to the precedent united verdict number 37/62 in 23/12/1985 reaching the age of maturity is not enough for any financial activity but his/her maturity should be confirmed by court. Thus, intervention of a mature orphan in financial properties is possible by the court recognition and confirma-

tion.

With regard to the point that binding code for marriage age is the approved article 1041 by Expediency Council; therefore, marriage age is 13 for a girl and 15 for a boy. The legislative law removed the age limitation by court recognition; consequently, it provided possibility of marriage with the age lower than the age of maturity. For example, father and mother of a 7 years old girl die in an accident, the girl's grandfather is not able to protect and maintain her, and there is not any other close relative to protect and maintain her, it is impossible to give the girl to the general institutes; therefore, an honest family in the region suggests the marriage of the orphan and its only son who is five years elder than the girl and both girl and boy are protected by the family. The grandfather recognizes it suitable for the girl and embraces the suggestion [4,pp. 128-129].

Article 1041 in Iran's civil code approved in 1934 has prohibited the marriage of a girl below 15 and boy below 18, although it contains exceptions by public prosecutor suggestion and court approval. This exemption would not apply for the girls under 13 and boys under 15.

#### **b. Conditions of Father or Paternal Grandfather Permission**

Article 1043 in civil code says "the marriage of a virgin girl, even after she has reached puberty, requires the permission of her father or paternal grandfather. If, however, her father or paternal grandfather withhold their permission without sufficient justification, the girl can introduce the man she wishes to marry to the court, giving full particulars of him as well as the term of the marriage contract and the agreed dowry. After receiving permission of marriage from the special civil court, they should proceed to the Registry Office in order to register their marriage". Moreover the article adds: "a girl can get married if her father or grandfather is not present and their permission is

impossible.

Note: Registration of this marriage in the Registry office requires that the aforementioned conditions related to the special civil court are fulfilled.

The two above articles show that a virgin girl, although she is mature (13 years old), has to have one of the following conditions for her marriage registration: permission of her father or grandfather or Particular Civil Court verdict. Additionally, virginity (legal or illegal) deprives her father's permission. Thus, removing of virginity causes independence in marriage.

It is noteworthy of consideration that there is a contradiction in note 1 of article 1210 in which the maturity age is 9 for girl and article 1043 in which father's permission is the only condition for registration of a virgin matured girl and article 1041 in which marriage contract, before age 13, is possible by two conditions: parent's permission and court recognition. The only resolution is the point that marriage of a virgin girl, although she is mature, has to be concluded by father's, grandfather's or court permission if she is lower than age 13 because article 1041 has been approved by Expediency Council and two other articles by The Islamic Consultative Assembly. Exceptionally, marriage age is 13 for girl and 15 for boy has been recognized.

### **Conclusion**

Marriage is a contract by which a boy/man and a girl/woman are united to form a family and participate in the life. It is a contract with both financial and non-financial effects, because a man, after such a contract has to pay his wife's and family maintenances, besides; gives a property to his wife as the marriage portion(Mahr). In the other side, the husband and the wife must cooperate with each other over the welfare of the family and the education of their children.

Although paragraph 2 of article one in

the family code of Armenia has declared the recorded marriage in Civic Status Registration Department as lawful; and Iran's legislator has obligated registration of it with 6 signature(minimum), in addition to determining punishment for the man who has not done it; marriage is a consent contract. Thus, a man and a woman who decide to set up a family and common life, and express their will evidently,(themselves or their representatives), their agreement is resulted in marriage contract. In this way, registration or not, do not undermine the essence of marriage contract. However, it should be registered in order to get official benefits of such a contract. That is why the provident individuals register marriage in the official office. To protect their rights it is necessary to do so. On the whole, non-registration of marriage does not abrogate it.

According to Iran's codes, there are two differences between marriage contract and other contracts: first, the two parties in other contracts choose the effects of contract by choice and agree on them, but the effects of marriage contract have been determined by legislators before. therefore, the couples cannot determine the entire effects of the contract freely, but in some details and trivial cases as residence right or education. In short, according to Iran's law marriage is a particular legal frame or situation in which man and woman put themselves by consent.

Second, although maturity is a requisite condition for both parties in other contracts, it is not necessary in marriage contract. In contrast, an immature person can be married based on the benefit or expedience.

According to the codes of R. Armenia the couples choose the entire effects of marriage freely.

As a result, marriage contract with regard to the mentioned explanations, is an exceptional contract and it can be defined as: a contract in which a girl/woman and a

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boy/man themselves or their father/grandfather are allowed to declare consent. It is for

one or some purposes of common life, sexual enjoyment, reproduction and children training.

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## ԱՄՈՒՆՆՈՒԹՅՈՒՆԸ ՈՐՊԵՍ ՀԱՏՈՒԿ ՊԱՅՄԱՆԱԳՐԻ ՏԵՍԱԿ

### Գոհեմ ՌԵԶԱ ՇԻՐԱԶԻ

*ԵՊՀ քաղաքացիական իրավունքի  
ամբիոնի ասպիրանտ*

Հոդվածի նպատակն է բացահայտել, արդյո՞ք անուսնական պայմանագիրը նյուս պայմանագրերի նման սովորական պայմանագիր է, թե ոչ: Հարցի լուծմանը հասնելու համար, սկզբում ուսումնասիրվում են ընդհանուր պայմա-

նագրերը, ապա, հիմնվելով Իրանի օրենսդրության վրա, ուսումնասիրվում են այն հիմնական պայմանները, որոնց արդյունքում կնքվում է անուսնական պայմանագիրը: Ուսումնասիրության մեթոդը գիտական վերլուծականն է: Ուսումնասիրության արդյունքը ցույց է տալիս, որ անուսնական պայմանագիրը առանձնահատուկ պայմանագիր է, այսինքն որոշ պայմաններ, որոնք անհրաժեշտ են նյուս պայմանագրերի համար, այս դեպքում էական չեն:

