

## The conflict between two supporting institutions of dowry and the condition of halving the property in the marriage contract

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### ABSTRACT

*Dowry has long been recognized as a supporting institution for protecting the wife. Those who believe in the participatory effect of marriage, consider the dowry as the woman's right to divorce as it has a fully protective facet. In contrast, a condition has been recognized by the lawmaker in recent years as "halving the property", which, under certain circumstances, entitles the woman to half of the husband's property at the time of divorce. The present study, having investigated the legal jurisprudential principles of the two institutions of dowry and halving the property, raises a theory upon which the assumption of merging the two institutions in a contract is against the individual interests of the husband while being in favor of obtaining illegitimate loss. We will see that the dowry precedes the meeting of the halving condition as it is a debt to be paid, thus the wife first takes the dowry out of the husband's property and then takes share of the rest in a halving manner. Based on the findings presented in this study and with the aim of achieving the best theory applicable, the condition of halving the property can be considered only in a situation where it is not made possible to fully pay the dowry for any reason from the husband's property or that the amount of the dowry is so insignificant, i.e., the dowry has been regarded as some branches of flower in good will or the assumption that a significant amount of the husband's property is subject to the consequent objective right and it is not possible to access it at the time of asking for the dowry. Since both the dowry and the halving of properties are among the financial supporting institutions of the wife, because the absence of both will be in loss of the wife, its aggregation also inflicts harm on the husband. Therefore, a theory shall be true which, assuming the customary balance between the dowry and the condition of halving, claiming one of it is possible while paying both will be a source of difference.*

*Keywords: Dowry, halving the property, marriage, rule of will, condition*

### Introduction

Concluding an agreement is a will to bring about legal effects. Although the legal effects of certain contracts, such as marriage, have been specified by the lawmaker, the lawmaker has allowed the parties to the contract to accept terms in the contract to the extent that they are not contrary to the law. These terms or conditions can be regarded as a secondary obligation within a main obligation. Article (10) of the law states: "Private contracts are applicable for those who have concluded it, unless it is explicitly against the law." Thus, in a permanent marriage, which denotes an agreement of the will between a woman and a man for marriage, cohabitation and permanent life, it's no problem for the parties to accept secondary obligations, i.e., housing, employment and finances. In the past, according to the Law on the Establishment of Special Civil Tribunals, it was necessary for the couples to go to the court in the event of a dispute, but this did not negate the aforementioned ruling in Article (1133). If the couple had some sort of agreement, it was not necessary for the couples to go to the court, and the parties would perform the

divorce proceedings by presenting to the notary's public. At the order of the former Supreme Judicial Council, and for reasons never officially stated, some conditions or terms were inserted in the marriage contract that were mainly in favor of the woman. Of course, like all contracts, the parties are not required to sign these terms while concluding the marriage. However, man's failure to sign is considered lack of good will and therefore, practically almost all of these terms are signed by the parties to the contract. Apparently, it is inferred that the philosophy behind these detailed conditions in the marriage contract is nothing but to protect the woman and maintain the existence of the family and to follow the necessary provisions to prevent the abuse of the right to divorce in man's control. According to the Law on Amending the Rules on Divorce, enacted by the Islamic Parliament on March 12, 1991, "From the time this law is enacted, the couples who intend to divorce must present to a specific civil court to litigate in order that their disputes are resolved". This requirement, i.e., presenting to the court, also encompasses the couples agreeing on divorce. Therefore, although legally or even implicitly, Article (1133) is not negated, according to the provisions set in the aforementioned law and the signing of the terms during marriage as being common, the main philosophy of it is to protect the woman and families and prevent the abuse of Article (1133); this is while practically one can say the absolute power of man to have the right to divorce has been reduced, and this is in line with individual and collective interests. This is because exercising the right to divorce is in the hands of someone who has not fully benefited from the cultural and moral principles of Islam; it is like putting a blade in the hand of a drunken individual who does not know how to use it and inevitably causes harm to others and oneself. Of course, this argument can also be defended that part of Article (1133) of the Civil Code has been abrogated; as according to this article: "A man can..... whenever he wished..." while at present it is subject to the will of the court to issue a certificate on the impossibility of compromise and not whenever the husband intends.

### **Basic principles on the authority of the couple in financial matters**

The principle of couples' financial independence and the right to manage and seize their property are among the indisputable principles of Shiite jurisprudence and there is no doubt or difference about it. The Civil Code has also accepted it in Article 1118 and according to it: the woman can use her property anyway she wants. To prove this principle in Shiite jurisprudence, two reasons can be mentioned from jurisprudential sources. There is a verse saying: *Men can take benefit of what they have gained and women can also take benefit of what they have gained too*. Accordingly, based on this verse, man and woman will have the right to possess and use what they have obtained independently. Hence, the verse states that each man and woman will get what they have obtained; i.e., be it is voluntary such as earning or involuntary such as inheritance, etc. it belongs to themselves and they shall have the right to use and exploit it independently. On the interpretation of this verse, the late Allameh Tabatabai says: If men or women gain something through action, it belongs to them and God Almighty does not want to oppress His servants. One commentator states with a broader understanding of this verse, regarding the freedom of women in employment and trade: "In business, God grants His blessings on every man or woman, according to their efforts ... *The holy verse is the reason that women can also engage in business and also benefit from God's blessings on their efforts.*"

The basic rule "People rule over their property": This rule, which is known as the rule of domination, is one of the rules widely accepted by Shiite jurists and is cited in jurisprudence. The terms of the rule are as follows: All people, including men and women have the right to their own property and can use it anyway they intend and no exception is set as to forfeit the man and woman of this right.

In addition, there is a narration saying: Seizure of a Muslim's property is not permissible unless s/he permits. Hence, some other principles or even verse have suggested that there have been no exception for man to seize the wife's property. Accordingly, man forfeits the power to seize the woman's property with man's power to interference being negated. Hence, with respect to the independence of woman from man in ownership, management, seizure and benefiting of the property, there is no doubt as both Sunnite and Shiite sources have provided. However, there are some quotes in the Sunni sources that women are prohibited to have the right over their property as citing the verse in the Quran, reading "The unwise shall forfeit the right to own" as the unwise refer to the children and women. This is while based on Shiite

sources, the verse relates to the orphans and by the unwise, it is meant the orphans. The basic rule "People rule over their property": This rule, which is known as the rule of domination, is one of the rules widely accepted by Shiite jurists and is cited in jurisprudence. The terms of the rule are as follows: All people, including men and women have the right to their own property and can use it anyway they intend and no exception is et as to forfeit the man and woman of this right.

On the one hand, our civil law compels the man to pay the alimony to his wife; in other words, to prepare clothes, food and shelter for her. In many European countries, including France, meeting the cost of living for a common life is a mutual obligation and both man and woman are required to earn money and support the family. But according to Islam, it is the man's responsibility to provide for the family, including the woman's personal expenses (alimony, with the woman having no responsibility in this regard. Therefore, the man's obligation to pay the alimony to a woman is a one-sided obligation, no matter the woman is affluent or incapable of doing work. That shall have no impact on the alimony payment. Even if a woman has a large wealth, she does not have to provide for her living expenses and necessities from her personal property.

That the husband has authority and the wife should take permission from him in matters relating to the handling the family affairs are both based on legal and sharia entities. According to Islamic law and Article 1102 of the Civil Code, after a marriage contract is finalized, each of the man or woman shall have rights and obligations against each other. As it is stated in the Holy Qur'an: *For women, as well as the duties that are incumbent on them, decent rights are assigned to them, just as the duties assigned to women, they have rights, and there is a balance between their rights and duties.* Therefore, in Islamic law, according to verse 34 of Chapter An-Nisa': the obligation of almsgiving and providing for the family's living expenses is vested upon the man, and the woman is obliged to follow the man as the head of the family structure.

Based on its comprehensiveness, the religion of Islam has also discussed man's relations with his fellow human beings in order to achieve the desired and ideal society, while explaining man's duties against God. The rulings governing man's relations with his fellow human beings are in form of a set of rulings and obligations, that is, the rights that man has over others and the obligations others have over his rights. Basically, the rights and duties that apply to human social behavior and their interactions involve reciprocal, with each one ensuing a responsibility for the latter. Of course, it should be noted that the right is optional, but the obligation is mandatory; the one having a right in a case can utilize it or ignore it, but others are obliged to shoulder his right and must respect it. Social rules of Islam involve the rights and obligations that members of a family, especially man and woman enjoy. Islam has regarded the foundation of the family as one of the most significant social institutions for the survival of the human race, residence and peace, satisfaction of sexual instinct, participation in material and spiritual affairs and generational education, providing directions for health and preventing its instability. As marriage is concluded and family is established, the marital relationship is realized and both man and woman have rights over the other, the other is obliged to obey. Some of these rights, such as good association, are common to both, and some, such as guardianship and obedience, are reserved for men, and some, such as alimony, are reserved for women. On the other hand, man and woman's rights are divided into financial and non-financial rights; financial rights are rights that belong to property. In marital relations, financial rights often belong to the wife, and non-financial rights, such as guardianship - by which the woman has the right to obey her husband- and custody, often belong to the husband, and in addition to inheritance, the husband has no financial right over his wife. Of course, since rights and obligations conflict with each other, and there is not an obligation after death, inheritance cannot be considered the realm of the rights of the couple. Thus, the couple's financial relations and women's financial rights can be viewed as the same. In this article, we have briefly provided the views by some of the jurists concerning a part of the wife's financial rights, and with their critique being removed from here.

### **Dowry and its necessity**

In Persian, "dowry" is synonymous with money, and in Arabic it refers to "reward/fee", as it has two meanings; one is punishment for the act and the other is compensation for the defect, both of which may

have the same meaning. Other names are also mentioned for dowry, such as Sodaq, Nahlah, Farizah, Sadaqah, Ughar, Aliqah, Habba and Tawl. In the Qur'an, dowry is interpreted by the words Sodaq, Nahlah, Farizah.

From a jurisprudential point of view, dowry is a finance established by means of marriage conclusion in non-adultery process by which the husband is entrusted to pay it to the wife. In the Qur'an, dowry is interpreted as "Nahla" and it implicates forgiveness based on the good of the soul and satisfaction, which is without price or exchange. Therefore, dowry is in reality a free gift the couple is obliged to pay, so it is not correct to trade the dowry for the sexual pleasures. Of course, dowry in a temporary marriage is not a gift, rather a fee paid to the woman in exchange for pleasure.

- **Dowry Terms**

The following conditions have been prescribed for the validity of the dowry set in the marriage contract:

It must be possessed: What is not to be possessed such as beverages and pigs, cannot be considered dowry as the Sharia has suggested. If something not permissible to be possessed is regarded as dowry, there shall be a difference of opinion on the validity of such a contract.

It must be in finance terms: that is, it enjoys a financial value and is worth exchanging in the economic market, though it is not usually traded for. This finance may be in different forms:

- Specific value: Like a certain house.
- General value: Like a few kilos of a particular wheat crop, or an indefinite general thing, like several hundred dollars.
- Specific interest: Like the ten-year interest of a home.
- Interest of action and work: Like teaching the Quran, driving instruction.

Where an interest ensued by the action is regarded as the dowry, if it is absolutely entrusted by the husband, he or the latter can shoulder responsibility for it. However, there are two theories where a husband is hired for a certain period of time to work for his wife or someone else, such as the father of the wife:

It must be transferable: The property not transferable cannot be used as the dowry. Like endowments and public property.

It must be known: in the process of dowry, it is not necessary to for the dowry to be known in detail; however, if the ignorance is removed by way of description, reference and observation, that suffices and like other exchanges, there is no need for delving into the knowledge, because the marriage ruling differs from other exchanges. Therefore, if a house is regarded as a dowry and its characteristics are not specified, the husband should pay the wife house at a moderate level. However, if the dowry is completely unknown, the official dowry is invalid and the fee should be paid.

- **Woman's ownership over the dowry**

There is no doubt that the wife becomes the owner of the dowry as soon as the marriage is finalized. An important discussion concerning the ownership of the dowry is whether the woman becomes the owner of the entire dowry as soon as the marriage is concluded, or owns half of it by marriage with the other half via intercourse with the man. There are two theories over this issue:

**First theory:** Ownership over all the dowry by marriage.

The wife owns the dowry by marriage, but her ownership is unsettled and undermined; this is while the ownership becomes settled down under certain reasons.

Allameh Helli, the owner of the book *Javaher*, Mohaqeq Hali, Shahid Thani, and many other jurists have considered this theory as a popular one, with Sheikh Tusi in his book considering the opposite of this issue as a consensus. For this theory, the verse "وَأَتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلًا", and some narrations have been referred to. Marriage is also said to have been an exchange contract, and just as the husband owns all the sexual pleasures, so does the wife become the owner of all the dowries.

**Second theory:** Ownership of half the dowry by marriage, and the other half by intercourse. In various books, Allamah Helli has attributed this theory to Ibn Junaid, while citing a narration from him « الذي يوجبه »

العقد من المهر المسمى النصف، و الذي يوجب النصف الثاني من المهر بعد الذي وجب بالعقد منه هو الوقاع أو ما قام مقامه من تسليم المرأة نفسها لذلك.

The author of Javaher does not consider Ibn Junaid's phrase explicitly in opposition to the consensus opinion, and like some others, he thinks that ownership of the dowry by intercourse is meant to establish it not to prove it. Of course, some narrations may use the second theory, which is avoided. The wife's undermined ownership of half of the dowry is imposed on the husband via several factors:

- **Intercourse:** The most important factor that causes the establishment of the entire dowry for the wife is "intercourse" as all the dowry is obligated on the husband. The difference of opinion is whether the whole dowry is established by intimate arrangements, such as the solitude of man and woman, confrontation, touch, etc. or not? Well-known jurists believe that the dowry will not be established by intercourse. In Nehaya, Sheikh Tusi has finally remarked: Making arrangements for intercourse is a matter for which the ruler and the judge call it sexual relationship, but if no intercourse does take place, the woman cannot receive more than half of the dowry.

**Death of the husband or wife:** The death of the husband or the wife before the intercourse is one of the factors establishing a dowry.

**Husband's heresy:** Whenever one of the couples apostatizes, that is, abandons the religion of Islam and becomes an infidel, the marriage contract is dissolved. Now, if this heresy is before the intercourse and on the part of the wife, no dowry will benefit her, but if it is on the part of the husband, there are two theories:

**First theory:** half of the dowry must be paid to the wife. On the basis of this theory, it is said that heresy in this case is an example of separation between a man and a woman before the intercourse and in a case other than death, so it is considered as a separation leading to divorce, with half of the dowry being established. Many jurists believe in this theory, such as Sheikh Tusi in the book Mabsoot by Allama Helli, Rules and Summary by Almaram, Mohaqeq Helli in Sharia, the first martyr in Lamaa.

**Second theory:** The entire dowry must be paid to the wife. Some scholars, such as Shahid Thani in the books Masalak and Sharh Lamah, Allama Majlisi in the book Malaz al-Akhyar, and Mohaghegh Sabzevari in Kefaya, have maintained this issue.

Third theory: If the husband's heresy is innate, the entire dowry must be paid to the wife. Some scholars have suggested: If the husband's heresy is innate heresy, all the dowry will be imposed on him, but if the husband's heresy is national apostasy, some remark that half of the dowry should be paid to the wife, and in this case some should pay the full dowry.

The wife becomes the owner of the dowry by the marriage contract; now if her dowry is a specific object, the husband must grant the same object to the wife, but if the dowry is a general thing, such a dowry is established on the husband as a debt. Many of the jurists have remarked that if intercourse is done before the dowry is paid, the dowry is established to be the responsibility of the man as a debt. Like Sheikh Mofid in Moghanae, Sheikh Tusi in Nihaya and the first martyr and the second martyr, etc.

However, by referring to the narrations and focusing on the ideas made by the jurists, it becomes clear that the dowry, if general and not paid, is fixed on the man's duty from the moment of marriage - even before the intercourse. An explicit aim of intercourse is aimed at removing any misgiving as the dowry may be negated by intercourse. Mohaghegh Helli has referred to this considering the origin of this misgiving in some of the narrations.

Because the dowry is established on the husband, the quality of its payment to the wife is of three types in terms of payment time:

- **Immediate dowry:** A dowry received in full and immediately. The wife has the right to consider all the dowry immediate and ask for it from her husband, in which case the wife is legally entitled to demand the dowry after the marriage is concluded, and the husband is obligated to pay the dowry. As well, the wife can reject to obey the husband and the marital relationship before she receives the dowry. If the dowry is made immediate and urgent, in this case, the man faces situations regarding the ability to pay this debt and the inability to pay it:

**a. When the wife demands her dowry, and the husband is able to pay it and he is so-called "muser":** In this case, the man is required to pay his debt and it is not allowed to delay it. Now, if he

delays to pay it, the ruler will imprison him and oblige him to pay, and if he fails to pay it, the dowry shall be paid to the wife from his property.

**b. When the wife demands her dowry, and the husband is unable to pay it and is so-called "Musar":** In this case, too, the ruler first imprisons the husband and frees him if he is proved to be incapable, and the wife must wait until the husband becomes able to pay the dowry, unless the husband is able to work and earn money, in which case he is required to work and pay his debt, i.e., dowry.

**Time-based dowry:** It is a dowry the husband must pay within a period of time after the marriage is concluded. Time-based dowry is of two types:

**a. In the contract, the time of paying the dowry is not specified and its timing is fully vague:** In this case, some jurists, such as Ayah- AlKursi al-Hakim, has considered such a dowry invalid and consider the wife worthy of the fixed marriage portion, whereas many other jurists consider such a dowry to be valid, with the wife claiming the dowry after a while.

**b. In the contract, the time of payment of the dowry, is specified albeit briefly:** In this case, if the due time looms and the husband is able to pay the dowry, he is required to do so, while if he is unable to pay, the wife must wait until the husband can afford it. In the immediate debt, there are two theories over whether it is necessary to reclaim it from the creditor when the timing for debt looms or not?

Some, such as Sheikh Tusi and Ibn Idris Helli, consider the creditor's demand necessary, while some others do not consider the demand necessary, regarding the quality of time-based payment as a kind of demand.

However, is it necessary for the husband to earn money and afford to gain money or not? It is a function of the contract concluded between the couple. If the wife stipulates that the husband must afford to pay the dowry, the husband must afford to do so, and if she fails to stipulate that, the husband shall have to pay if he acquires property by inheritance or the like and the demand by the wife. However, if such a condition has not been stipulated at all between the couple and now the wife has demanded for the dowry, the obligation to pay the dowry shall be negated, implying that the husband shall have to pay the amount of dowry that he can afford.

**-Part of the dowry should be immediate and the other part be delayed:** The ruling over this type is also made according to the previous two types. According to this ruling, it becomes obvious that restricting the payment of dowry at the demand or affordability has no jurisprudential impacts; this is because if the dowry is at the request, the dowry is in the status of immediate dowry, upon the wife's request, with the same two previous cases being also considered here; and if the dowry payment is based on affordability, it is conditional on the ability of the husband, and he must pay it to the wife on whatever amount of dowry he can afford. There are two theories raised in the past as to whether the obligation to pay the dowry after affordability is made, even though it involves a certain amount of dowry required by the wife again.

### **Halving the property and current case laws**

According to the decision made by the Supreme Judicial Council in 1983, a directive was issued by the National Document Registration Department to the marriage Notaries Public stating that some conditions or terms should be communicated to the parties during the marriage, which is mainly in the interests of women. They shall act upon them if they accept those terms. One of these conditions reads: If the husband divorces the wife without any reason and without any fault happening on her part, he shall be obliged to transfer half of his property, which he acquired during the marriage, to the wife free of charge, as the court implies.

#### **• The concept of condition and its types**

The meaning of condition: The term condition has various meanings, including: "Condition is something outside the conditional truth from its lacking comes out lack of conditionality and from its existence comes out no required conditional existence; for example, in a divorce, matrimony is a condition and whenever there is no matrimony, divorce can have no meaning; however, from the existence of marriage, divorce is not fulfilled" (Faiz, 1998, 114). From a legal point of view, condition conveys two themes; first, an affair that the occurrence or effect of a particular legal cause or event has

dependence on it. For instance, Article 190 Civil Laws stating the basic conditions for the validity of a transaction. The second theme is an agreement condition which, based on to its special nature, is the subject of the consent of the parties (Katozian, 1989, 122), e.g., the conditions during marriage stipulated in official marriage letters.

**Types of conditions:** According to jurisprudential sources, conditions are divided into three categories. The condition of quality: "It concerns the quality or quantity of the subject of the contract", e.g., having an educational degree for a couple in a marriage contract; the condition of the result: "The realization of something outside serving as a condition." In other words, the wife lays a condition that if the husband fails to pay the alimony, the husband forfeits the right to guard the children"; the condition of the act: "To act or omission that is imposed on one of the parties or on another person". As if the wife lays a condition that the husband pay a pension to her parents (Bojnourdi, 1996, vol. 2, 412). Referring to Article 234, Civil law also cites these three conditions in accordance with jurisprudence sources. Conditions are divided into two types, valid and invalid when concluding a contract; Invalid conditions are also divided into two categories: 1- Invalid conditions that corrupt the contract, 2- Invalid conditions that have no impacts on the contract. The conditions for the validity of the conditions in the contract are: "the feasibility of the condition being fulfilled, having a rational interest and benefit, its legitimacy, and the fact that the condition is not contrary to the requirements set forth in the contract, and also the condition does not bring about ignorance to the parties." (Bojnourdi, 1995, vol. 2, 438-412).

Articles 232 and 233 of the Civil Law also refer to the conditions for the validity of these conditions. The absence of the first three conditions also annuls the contract. However, the absence of the last two does nullify the contract while invalidating the condition. Regarding the unknown condition, ignorance of which leads to ignorance of the compensation, given that the prevailing opinion is that the marriage contract is non-compensable, such a condition is not fulfilled in the marriage contract. As well, concerning the case of a condition contrary to the contract requirements, since each contract has its own features and effects distinguishing it from other contracts, these effects shall not be the same in terms of importance and dependence on the nature of the contract; therefore, the requirements of the contract have been divided into the following two categories:

**The essence of the contract requirement:** The requirement on the essence of the contract denotes what the contract is concluded for and is the main objective of the contract (Bojnourdi, 1995, vol. 2, 471) Article 233 states: a statement of a ruling is a condition that is contrary to the requirements of the nature of the contract. That is, on the one hand, the essence of the contract is made composed, and on the other hand, by inserting a condition, a barrier is created on the way of realizing the intrinsic effect of the contract, where the consequence of this situation is the contract not being fulfilled (Shahidi, 2002, 86).

**Requirement of the contract reference:** An effect that does not arise from the nature of the contract and since it is not concomitant with the nature of the contract, it is possible to prevent the production and occurrence of its effect by inserting a conflicting condition. Put it differently, the requirement of referring to a contract is: "It is a matter of secondary importance, which whenever the contract is concluded absolutely and unconditionally, the contract requires that" (Bojnourdi, 1995, vol. 2, 471).

In any contract, including a marriage contract, there is sometimes disagreement among jurists as to what features are required by the nature of the contract. What is prohibited is creation of a condition contrary to the requirements of the nature of the contract, not a requirement to apply the contract, and in essence, in a permanent marriage, none of the financial conditions can be contrary to the requirements of the nature of the contract (Movahedian, 2005, 70).

- **Conditions for fulfilling the condition of transfer up to halving the property**

According to paragraph a of the provisions of the contract set forth in the official marriage contracts, if the divorce is not requested by the wife, and according to the court, the divorce application is not due to violation of the wife's duties or her immorality and misconduct, the husband is obliged to transfer his property without any considerations to the wife which he has acquired during his marriage. This condition is of act type, because the husband is obliged to transfer some of his property to the wife under some

conditions (Habibi Tabar, 2001, 269). Thus, the conditions for the realization of the wife's right to take up to half of the husband's property are as follows:

✓ **Requesting for the divorce**

The couple must file for divorce.

✓ **Lack of the wife's influence on the husband's request for divorce**

If the wife's misconduct and immorality have encouraged the husband to request for divorce, the halving condition shall not be fulfilled. For example, if the husband receives a court ruling that the wife is not allowed to marry, or if he claims in the divorce petition alleging that the wife violated her spouse's duties, the court must investigate this claim. Of course, the jurisprudential principle of "correctness" implies the correctness of the wife's actions, and the principle of "doubts" keeps her away from the guilt of violating the duties of a spouse. Therefore, the court shall investigate this issue in the case the husband claims it to have happened. Thus, applying the laws that specify the duties of the couple, the jurisprudential principles, community customs and family customs make decisions on this matter.

✓ **Occurrence of divorce**

The condition for the transfer of half of the property does not explicitly refer to the time the husband's properties are to be transferred, however, it is inferred from the condition provisions that the court must specify the obligation in this connection while issuing a certificate of the impossibility of reconciliation. Asking for the the transfer condition up to half pf the property is provided that divorce is demanded on the part of the husband. Now the question is: Should the wife file a petition for the condition to be fulfilled if the husband demands divorce so that both are considered together? Or shall the court consider the wife's request during the divorce?

To answer this question, there are two time limits. Prior to the enactment of the Divorce Reform Law in 1992, the first method would be applied, and a divorced wife could demand in a petition half of the property by filing a petition. This procedure was useful on the one hand and problematic on the other. The benefit of claiming the condition after the divorce process was performed was that as the divorce took place, the husband had to transfer up to half of his property to the wife; thus, the court investigation and the issued ruling became applicable, while investigating the condition while issuing the certificate of impossibility of reconciliation shall be in vain in case the husband withdraws from the divorce. Another benefit was that proceeding of the halving case would require the court to be informed of all the husband's property during the common life, and it certainly would take a long time; this is while a separate proceeding over halving would not preclude the divorce and the wife's indecision. To explain this, one can suggest a simultaneous proceeding of two divorce petitions and the wife's financial rights has led the divorce petition, which has significant social effects, to be affected by other demands. Also, according to the condition, the husband's property during the divorce must be set as the basis of calculation and unless the divorce is performed, it is impossible to terminate the marital life. The disadvantage of this procedure is that it provides the possibility and opportunity for the husband to transfer the property. In this case, the wife is obliged to prove the husband's property at the time the divorce is executed (and not the current property), which is a very thorny issue. The Law on Divorce Regulations Reform, note 3 has subjected the implementation of the divorce ruling to the payment of all financial dues to the wife; thus, the court also considers the wife's claims during the divorce proceedings. The prevailing procedure is to consider both litigation and specification of a ruling (Jafari, 2006, p. 5, 30). The judicial procedure is based on the necessity of the wife's claim, and if the wife does not demand for her financial dues, including half of the property, during the divorce petition, the court has no obligation to issue a ruling on it. Advisory Theory No. 3813 / 7-9 / 6/84 of the Legal Department of the Judiciary states in this regard reads: "If the wife has claimed the said dues, the court must decide on them, and if, without claiming the said dues, it was issuing a certificate of impossibility of reconciliation, the court of appeal can only investigate the objection to the certificate of impossibility of reconciliation, however in any case until the financial dues are not paid to the wife, it shall not be possible to enforce the divorce ruling and register it" (Rezaei, 2005, pp. 120, 39).



✓ **The property acquired at the time of marriage with the wife:**

Another condition for the condition to be realized is that the property acquired by the husband during the matrimonial relation with the wife is subject to judicial review while issuing a judicial ruling and does not extend to the property that the husband had had before the marriage (the marriage begins from the onset of a joint life not from the date of marriage) or the property acquired after marriage. Also, executing the condition of halving the property does not extend to the inherited property of the husband, because the property resulting from the inheritance is not referred to as "property acquired during the marriage" (Rezaei, 2005, p. 120). The question posed here is: How will the situation look like should there is a time gap between the date of marriage and the date of beginning the matrimonial relation?

What ensues from this condition is that property acquired during this time interval is not included in the said condition, because by "property acquired during the marital period", it is not meant the property acquired at that time; rather, it refers to the property acquired from the beginning of the joint life. Theory No. 1271/7/2/3/84 of the General Directorate of Legal Affairs for the legislation by the Judiciary is also critical in this regard. In response to this question, it is said that: Is this condition reliable from the time of marriage or from the date of starting the joint life? Answer: "... According to Article 119 of the Civil Code, the parties to a marriage contract are bound by the provisions of the contract and these conditions are subject to the manner in which the provisions of that condition are set forth." Concerning the condition in question, by the marriage days, it is meant days in which the couple have lived together, so if there is a gap between the date of marriage and the beginning of a joint life, the condition is from the date of starting the life, not from the date of the contract. Also, a husband who has had cash or other financial possessions before the marriage took place or claims he had held before the marriage from legal persons or had converted them to another property during the matrimonial relations, the application of halving the property will be void, this is because the property had belonged to the man prior to the marriage and he cannot be assumed to have acquired it during the marriage. This process does not create a right for the man to pay to the woman (Deputy of Judicial Education and Research, 2008).

### Conclusion

The drawbacks to the condition of halving are as follows:

**a: One of the major drawbacks of this condition is that it specifies the maximum duty of the husband:** without its minimum being known. It is the duty of the court to determine the amount of property to which the husband's duty to provide the wife's rights has been assigned. Since there is no precise criterion here, the court may not provide the protective aspect of the matter as it should in determining the amount of a woman's rights, or it may be affected by factors creating a small amount. Therefore, it is appropriate to consider a rule in this connection, or at least to determine this contractual obligation (Safaei and Emami, 2005, 65).

**b: The condition prevailing over the property available during the divorce:** The availability of property at the time of divorce is a necessary condition for executing the halving condition. Thus, the property that the husband acquired during the marriage with the wife but were absent during the divorce process and were consumed or donated, stolen or sold cannot be considered positive property of the husband during the divorce (Deputy of Education of the Judiciary, 2009, vol. 2, 92). As well, what is inferred from the condition is the transfer of the property, and having said this, the dues encumbered on the husband must also be taken into account. Therefore, calculating the property to be owned by the wife is done after deducting the debts from the positive properties held by the husband. It should be noted that the wife's dowry and alimony will also be deducted from the husband's property as a debt. Therefore, the question is: Should the alimony of Uddah days in a reversible divorce be incorporated in the court ruling? To answer that, one should say that on the one hand, because the condition in the marriage implies the amount of the man's property during the divorce and the alimony of the Uddah days begins after the divorce, so its amount should not be calculated in the husband's property in the divorce. On the other hand, according to Note 3 of the Unified Article of the Law on Amending the Regulations Related to Divorce, approved by the Guardian Council in 1992, the implementation of the divorce ruling and its registration is subject to the payment of the wife's sharia- and legal-based dues, including dowry,

alimony, fixed portion, etc. except for cases the wife gives consent or the husband is found to have been incapable of meeting the condition. Therefore, although the Uddah days begin after divorce, it is considered that the alimony of Uddah days is one of the remaining dues for women (Dejkhah, 2007, p. 35).

**c: Polygamy:** Another issue not dealt with in this condition is the issue of polygamy. That is, if a man has two wives and intends to divorce one of them, if his wife has the conditions contained in this paragraph and according to the law, takes half of the man's property, a major right of the other man's wife, who may have contributed to the latter's property, is lost; this is another drawback of this condition polygamy entails.

**d: Ambiguity and uncertainty of the subject of the condition is another drawback of this condition:** Because the husband's amount of property is not known at the time of the laying the condition (usually during the marriage) and the couple is ignorant of the amount of property that they will acquire in the future (Movahedian, 2005, 72).

Will such an unknown condition have legal validity? Different theories have been expressed on such unknown provisions and their validity in general. Some law professors maintain that with regard to Article 232 civil law derived from Imamy jurisprudence and is the result of the well-established efforts by jurists, the conditions which are infeasible to be met or entail no benefits or rationale will be invalid. Also, according to the ruling of Article 233, the conditions which are contrary to the requirements of the nature of the contract or are in an unknown and vague manner are invalid. In this way, other conditions, though unknown, are not invalid and do not harm the main contract because they have a secondary aspect and follow the contract. Put it differently, the incorporation of all the terms of the contract set forth in Article 190 Civil Law and the detailed knowledge mentioned in Article 216 of the same law are not necessary for the fulfillment, validity and reliability of the conditions during the contract (Emami, 1978, vol. 1, 272). The other group maintain that the condition, although having a secondary and subordinate aspect in the contract, must have all its legal conditions like the contract; otherwise, the terms of the contract will bear no legal value and validity. Therefore, the unknown condition, like the unknown contract, is void, and for this reason, there is no difference between the contract and its implicit condition (Katozian, 1989, vol. 3, 165). Accordingly, the Uddah should be specified according to Article 190. The subject of the contract must also be certain, the subject of the condition in the contract must also be definite, and the condition of transferring up to half of the property is void because it lacks a definite subject (Habibi Tabar, 2001, 266). In civil law, corrupt conditions are divided into two types, one is invalid conditions that do not invalidate the contract and the other is conditions that are both invalid and invalid. But the conditions that are invalid but do not invalidate the contract are: (Article 232 Civil Law)

a: Conditions that are impossible to be met, i.e., it is not possible to be realized.

b: Conditions bearing no benefit.

However, the conditions that are both invalid and invalidate the contract are: (Article 232 Civil Law)

a: Conditions that are contrary to the requirements of the contract.

a: Conditions that are unknown in such a way ignorance of which leads to ignorance of others.

The same rulings apply in the case of marriage, but the legislator, considering the importance of this contract, has addressed this issue separately in Article 1119 (Habibi Tabar, 2001, 266).

In Imamy jurisprudence, there is a conflict of opinion, but it seems that the famous idea of the Imamy jurists concerning the condition during the marriage is consistent with the first idea and they do not consider the conditions during the marriage invalid. Some have suggested: The same argument cited to prove the validity of the contract is the same argument to prove the validity of the conditions in the contract because these conditions are seen as integral parts to the parties to the contract and as other parts of the contract are binding, this part should also be enforceable (Bojnourdi, 1995, vol. 2, 393).

Regarding the fact that the condition of transfer up to half of the property is not unknown and that the amount of the husband's obligation is not known, one can state: such a condition is neither against the law and Sharia, nor does it harm public order and good morals, nor is it a condition that causes ignorance; rather it is a condition that can be met and can provide some permanent marriage rights at the time of

divorce at the will of the man. Therefore, the validity of such a condition can be accepted (Safaei and Emami, 2005, 66).

Based on the studies performed, measures can be taken in this regard, including:

- 1- Holding joint meetings among special judges of family lawsuits in order to develop unified procedures while implementing the condition and issues related to it;
- 2- Seriously confronting with those who formally transfer their property to others intending to evade payment of the dues. The condition of halving the property, although established with the financial support of the wife, has some drawbacks and ambiguities as mentioned. It is hoped that resolving these ambiguities would be given more attention by lawmakers so that women can easily and confidently achieve their rights.

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