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# Effect of free will on the creation of new impacts on the long-term temporary marriage

*Efecto del libre albedrío en la creación de nuevos impactos en el matrimonio temporal a largo plazo*

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***ABSTRACT***

The principle of free will stipulates that the contract, in terms of ordering the legal consequences and determining the type and nature of the agreement between the parties, should not conflict with certain rules. Given that the overwhelming majority of jurists and lawyers have considered the principle of free will as the origin of Article 10 of the Civil Code, as well as the rule of law of the subsidiary, but there is no consensus among them on the meanings and definitions of the principle of free will, in this paper, the impact of free will on the creation of new impacts on the long-term temporary marriage contract is examined.

**Keywords**: Free will, temporary marriage, contract law, agreement.

***RESUMEN***

El principio del libre albedrío estipula que el contrato, en términos de ordenar las consecuencias legales y determinar el tipo y la naturaleza del acuerdo entre las partes, no debe entrar en conflicto con ciertas reglas. Dado que la abrumadora mayoría de los juristas y abogados han considerado el principio del libre albedrío como el origen del artículo 10 del Código Civil, así como el estado de derecho de la subsidiaria, pero no hay consenso entre ellos sobre los significados y definiciones del principio del libre albedrío, en este documento, se examina el impacto del libre albedrío en la creación de nuevos impactos en el contrato de matrimonio temporal a largo plazo.

**Palabras clave**: Libre albedrío, matrimonio temporal, derecho contractual, acuerdo.

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## *INTRODUCTION*

In general, in all legal systems, the (free) will of individuals plays a central and essential role in the realization of legal acts as contracts are assumed to be rooted in the free will of individuals. To respect and guarantee individuals' free will, relations among the members of the society must be based on the principle of freedom of will. Therefore, nothing ought to be imposed on an individual unless s/he wishes so and the said obligation conforms to the law of nature. In other words, free will constitutes the basis for the rights and obligations of the individual (Ekstrom: 2018).

The law, therefore, is a phenomenon at the service of the free will of individuals and its task is to reduce and/or eliminate the potential collision of the will of different individuals/parties. Also, in Islamic jurisprudence, the free will of individuals is an important and indispensable component of legal commitments and contracts. The principle of free will is one of the most important principles of law that did not exist before the Middle Ages, at the time when contracts were signed more as a matter of formality and in a specific and peculiar form characteristic of the era. This principle then became increasingly important thanks to advances in various fields such as religion, politics and economics and, in the contemporary period, and even before the 17th century, the principle of free will became an established and sanctioned rule in the majority, if not all, of human societies.

The principle of free will then found its way into the sanctity of the French Civil Code, Article 1134, under the title of "privity of contract". It was also recognized in the Iranian law (the legal system) following the adoption of the first volume of the Civil Code, which was, nonetheless, in common practice and enforced as a trade and cultural norm long before the passing of the formal Civil Code due to its long history in Islamic jurisprudence and thought. The effect of free will on the long-term temporary marriage contract is discussed in this article (Clark et al.: 2017, pp. 193-211; Sartorio: 2016).

## *METHODS*

The word 'Nikah mut' ah' (the temporary marriage contract) means 'to enjoy, indulge or revel in something', and, in Islamic jurisprudence, whatever that can be harnessed to please oneself is technically a 'mut' ah' (Mousavi Ardebili: 2001, p. 21). "Nikah Mut' ah is a marriage for a fixed term, a clear return and mutual obligations" (Mofid: 1990, p. 19). In his definition of this type of marriage, Allameh Helli states, "Nikah mut'ah is 'discontinuous' matrimony, which means that a man marries a woman for a certain period, such as a day or a month or a year or so" (Helli: 2002, p. 227). There is no time limit to the commitment (Mut' ah), meaning the contract can last a lifetime or a day. In fact, according to the jurisprudents who champion plurality and inclusiveness, Nikah Mut' ah can be very long (say 100 years), to include even the assumption that the parties know they will not outlast the contract, or it can last for less than a minute (Thani: 1990, p. 449; Arinin et al.: 2019, pp. 137-156).

"Freedom of will, the way it is understood in today's modern social mentality, did not exist in former times and has come to acquire its contemporary perception only during the past few centuries. The recognition of this principle as the basis of contracts is the result of the inevitable progress of human civilization, of the social and economic developments, and the necessities that have arisen as a consequence of complex social relations (Haeri: 1994, p. 11)." Individualism, as a philosophical, political, and economic precept, peaked in the 18th century, with its newly found focus on the individuality of humans and the rights of man (in contrast to the 'old world' pre-Middle Ages centrality of the rights of the Divine/God), thereby enshrining the principle of free will as the basis of obligations and rights as well as the determination of "contractual effects". The unacceptable and illegitimate principle of the "imposition" of will, with its disregard to humanity's inherently free nature and essence, is in contrast to the principle of free will (or freedom of will). Therefore, due to the legal effects of obligations and contracts, which are considered binding, and since any legal contract derives from, and

presumes free will, Nikah mut'ah, or any contract in general, should not be construed as 'imposed' in any way (Amid-Zanjani: 1995, p. 498; Galimullina et al.: 2019, pp. 80-92).

Free will can, regardless of the provisions of the law, bind the person and make him/her observe the commitment. Morals can also aid this wisdom. Keeping one's promise is now considered our collective (social) and individual duty, commitment and responsibility and has, in turn, strengthened the belief in (the sanctity of) free will. An ethical human being finds it unthinkable to break a promise, especially when what is wanted is just and legitimate.

Also from an economic perspective, it is now widely believed that to make it possible for people's talents to grow and flourish, everything must be left to their initiative and free will and/as it benefits the society when the state only supervises transactions and ensures/safeguards freedom. The interference of the law in private covenants is a necessary evil, to be avoided at all costs, and freedom, which is the essence of humanity and the goal of all moral and social rules, must not be restrained by various rules (Katouzian: 2012, p. 382). In this vein, some theorists hold that individuals' involvement in financial transactions and affairs is subject to the principle (and centrality) of free will, meaning that anyone is entitled to their property, can reap its profit and/or give it to another person, and the other person can, in turn, accept or reject what is given to them, for transferring a property item to another person's property without his consent requires a privilege that is contrary to individual freedom. Transfers, therefore, materialize following the agreement between the conveyor and the conveyor (Imami: 1995, p. 158).

In contemporary Iran, freedom of will was recognized following global developments in legal theories, practices, and processes. The history of Iran's contemporary law starts with the establishment of the first Iranian constitution and its subsequent amendment (the Constitution was adopted in 1945 and amended in 1946). In drafting the constitution and amending it, the lawmakers were largely inspired by the European law, especially the Belgian law/legal system. The principle of freedom of will was formally incorporated into the Iranian law since the adoption of Article 10 of the Civil Code, but as the principle of free will is deeply rooted in Islamic jurisprudence and the regulators of this article based it on the sources and texts of the Islamic jurisprudence, particularly the Imamieh jurisprudence, it is, therefore, wrong to assume that this principle came to exist only after the passage of the Civil Code in the Iranian legal system.

It is a fact that freedom of will has been incorporated into the Iranian Civil Code from the sources of Islamic jurisprudence because freedom of will and its substantial role in jurisprudence (Fiqh) have long been sanctioned by the jurists in the field of the Islamic jurisprudence and the jurisprudence has cited it frequently and considered it a precondition for contract validity. Mustafa Ahmad Zarqa has elaborated this principle in detail in his seminal Al-madkhal al-fiqhī al-'ām̄m (Rahmani: 2005, p. 142; Rafiei Moghaddam: 2011, pp. 46-47).

## *RESULTS*

Contemporary jurists refer to the principle of contract freedom to prove the legitimacy and validity of indefinite contracts, e.g. insurance and division contracts. However, freedom of will should not be regarded as an absolute and ultimate principle. The reason is that in the past two centuries, a critical view of human history and sociology, socialist sociology, in particular, has diminished the former prestige and status of the ancient regime humanism. The modern state has been obliged to intervene in private contracts to ensure justice. The number of 'authoritative' rules and laws has increased considerably and many of the specific conventions of contracts, that were formerly used solely to complete the will and facilitate its implementation, changed their nature and function and freedom was, thus, restricted.

However, social and economic requirements and circumstances make lawyers still respect the principle of contractual freedom as a way to protect the public interest (Katouzian: 2012, p. 382). Therefore, the application of this principle is subject to non-compliance with the following (Rahmani: 2005, p. 142):

**A. Not being against the law**

Article 10 of the Civil Code states: “Unless (the contract) is contrary to the explicit statement of the law, it shall enter into force.” Article 1288 reads as follows: "The provisions of a document shall be valid if it is not contrary to the law." Articles 959 and 960 of the Civil Code are cases in point that will be dealt with later in this article.

**B. Not being opposed to public order**

Article 975 states: "The court shall not be able to enforce in due time any alien law or private contract ... which is considered contrary to the public order ...”

**C. Not being against ‘good ethics’**

Article 975 reads as follows: "The court shall not be able to enforce in due time any alien law or private contract which is contrary to good ethics ..." In this regard, Article 217 of the Civil Code refers to the legitimacy of the transaction: “It does not need to be specified, but if specified it must be legitimate or the transaction is void.”

**D. Observance of the basic requirements**

Article 190 of the Civil Code states: “The following are essential for the accuracy and legitimacy of any transaction: 1. the intention of the parties and their consent, 2. the ‘benignity’ (the goodwill) of the parties, 3. Specific mention of the traded goods, 4. The legitimacy of the transaction.” Any breach in/of the above terms restricts freedom of will and a failure to adhere to the results in the illegitimacy of the transaction.

Thus, as stated: "The law is responsible for the maintenance of social order, determines the limits to individual freedoms and forbids any affair that infringes upon other people’s freedoms. Since the law is strictly necessary for the maintenance of social order, individuals can enjoy, exercise, or refrain from doing anything that is not subject to legal countermeasures, thus the axiom “unless forbidden by law, everything is permitted. This principle has not been subject to any legal provision, however, given the above points, it follows the exigencies of rational rules and the logic and norms of society. This principle not only allows individuals not to be punished for taking any action that is not prohibited by law, but also observes and protects laws as guarantors of social order and prevents some from violating it in the name of *their* freedom. Freedoms without which people cannot live in a society are called *individual freedoms* (Imami: 1995, p. 158).*”*

As stated, one’s free will is limited only if/when his/her hypothetical action conflicts with another law. Article 959 of the Civil Code states: "No one shall, in any case, deprive himself, in whole or in part, of the right to exercise their civil rights." Article 960 also states: "No one shall deprive themselves of their right to freedom or give up their freedom in a way that is contrary to law or good ethics." It is, therefore, necessary to discuss whether in the long-term temporary marriage a woman can make a condition that she be the only spouse/wife and the man/husband should not marry another wife later. To answer this question, first, we need to determine the intent to produce a legal effect and to distinguish it from *the intent* in criminal law, as well as the status of will in the jurisprudence and law enshrined in Articles 959 and 960.

Regarding ‘the intent to produce a legal effect’, the intent that introduces a legal effect and constitutes the condition for the realization of the said effect is of two types: First - the intent that has the attribute of creativity and its creative force is directly related to the legal effect and that legal effect is created by *that* intent. This intent has been referred to by the jurisprudents in the old days as the intent of ‘Insa’ (composition). Second - the intent that the legislator makes the subject of a legal effect, without the intent being of a creative nature. The intent in the acts that constitute a crime is an example of such an intent. This type of intent is a condition for the commission of the crime and the order of punishment upon the offender’s deed, but that intent is not the intent of composition and the perpetrator of the intent does nothing to the credit. Here, the great difference in the concept of the intent between the criminal law and civil law can be seen (Jafari Langroodi: 2008, p. 120; Badran & Turnbull: 2019, pp. 241-256).

According to the theory of esoteric will, the esoteric will of individuals is the criterion for intentionality and the oral/verbal reproduction of the intent is also valid because it is usually indicative of the real, *ulterior* intent. As long as the perpetrator of the intent does not provide an external and visible indication (of the intent), whether it is a promise or an action, it does not affect whatsoever. In the marriage contract, the 'contractors' conclude some conditions that must be interpreted in light of the exterior indication and the serious intent of the parties. As for the concomitant, inherent and essential vagueness of verbal statements, according to Article 224 of the Civil Code, the meaning of the terms shall be interpreted according to current customs. That is why couples/parties understand and intend the same concept that is common in society and is mutually comprehensible by most of its members. Once the intent of the producer of a legal effect, and whether it can create a legal effect, becomes known, the key question is what is the impact of the free will on the long-term temporary marriage contract? In response, it should be noted that in the temporary (marriage) contract, time duration does not, in and of itself, change the nature of the contract, and in fact, time duration is not a converter of nature and what is essential is the attempt to find the inner will/intent of the contractors (parties). In fact, in such cases, it is necessary to interpret the contract according to the real will of the parties (Akbari: 2016, pp. 1-8).

## *DISCUSSION*

Some argue that if they agree on the condition of a certain action, such a condition is valid because the husband concedes his right.

Now that a distinction is made between the condition of action and the condition of the outcome, if a party commits an action that violates the condition, what guarantees the execution of such an action? Simply put, what guarantees the fulfillment of such a condition if the husband marries despite the wife's condition?

Three theories have been proposed in this regard (Rah-Peyk: 2014, pp. 78-80; Margalit: 2018, pp. 89-107):

A. The theory of permissibility. According to this theory, it is permissible if a party violates the condition he has agreed to and performs the legal action that s/he has obliged himself to abandon (Imami: 1995, p. 158). Because although he is considered a transgressor for failing to comply with the obligation and violating a binding oath, the transaction would not be discredited or invalidated and there would be no conflict between the two because the very transaction/contract itself is/was void.

B. The theory of nullity. According to this theory, the meaning, and the purpose, of 'the obligation to abandon the legal act' is to neutralize the said legal act (Cartwright: 2016), and the parties did not intend or want a merely formal and nominal sort of commitment that condones the breach of the principle of obligation. According to some of the provisions of the Civil Code, such as Article 454, the infringement of the condition of non-occupation of the property, as well as the condition of the abandonment of rights, the elimination of the right to the said property and the actions taken are all ineffective, void and invalid.

C. The theory of ineffectuality. The theory of ineffectuality considers the legal act performed invalid, ineffectual and subject to the position and opinion of the involved party by making a reference to the transactional nature of contracts and applying the principle of ineffectuality to the issue in question (Mohaqeq: 2009).

The first theory seems to apply better considering current marriage rules and their quasi-divine nature. On the question of the terms and conditions of the discontinuous long-term marriage contract and the consequences of these contracts, the author, and the legal community in general, believe that if these 'denial of rights' agreements are universal and related to the condition of the outcome, they are void and invalid. On the other hand, the renowned jurists consider a condition to be valid if the denial is partial and related to the condition of the action. Disagreements can happen in cases where the denial is a partial and outcome-oriented

condition, for solving which different approaches can be considered. However, in light of the foregoing arguments, the present author does not consider this condition to be valid (Aghajanian et al.: 2018).

## *CONCLUSION*

Temporary marriage is approved by the jurisprudents of Imamiyah (Shiites) and legal scholars who believe that there in no time restriction on the temporary marriage although it is conventionally extended so long that neither party will practically survive to see the end of its term. The principle of freedom of will is also approved provided that it is not contrary to the law, good ethics and the public order and that the essential conditions of a clean transaction are respected and met. The duration and effects of the long-term marriage contract and similar agreements shall be stated clearly.

When/if these agreements/contracts commit the denial of universal rights and contain outcome-oriented conditions, based on the consensus of jurists, lawmakers, and legal scholars, they become void. On the other hand, prominent legal scholars and theorists consider it a valid condition if the denial of rights occurs only partially and is an action-oriented condition. Disagreements occur in cases where the denial of rights is outcome-oriented and partial, in which case the problem can be approached from different foundations and principles. However, in light of the foregoing arguments, the writer does not consider this condition to be valid.

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