Juridical and Legal Challenges of the Clause on Tansif (Splitting Half) of Man's Property in Wedlock

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Abstract

One of the important clauses while doing nikah which was introduced in the marriage contracts after the Islamic Revolution to support women and which usually husbands accept and sign is the clause to transfer maximum half of his existing property to his wife in case he steps forward for divorce. In the marriage contract, it comes: "in addition to nikah, the husband agrees that whenever divorce is without the wife's application and according to the court's recognition, divorce application is not because of the wife's violation of her duties or her ill-behavior, the husband has to transfer half of his existing property or his earned property in the matrimonial lifetime, or a sum equal to that property to his wife according to the court sentence; and that property or sum of money is non-refundable". From this statement, it could be understood that man's commitment to transfer half of his property is under such conditions that firstly, divorce should not be applied by the woman, and secondly, divorce application should not be because of woman's violation of matrimonial duties or so-called rights rising from wife's nushuz. By fulfillment of these conditions, the husband has to transfer up to half of his property that he has earned during the matrimonial life to the wife according to the court order. The transferable part could be the very property of the husband or its equal sum (equivalent or price).

About the above clause, generally some points have to be considered. First, we will clarify the descriptions of the clause of Tansif (splitting half of man's property), and then along with explaining and evaluating legal challenges, we will deal with its practical insufficiencies.

Keywords: nikah, tansif clause, wedlock provisions, financial rights of the spouses.

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Introduction
On the one hand, putting clauses during signing contracts including nikah has an old background in Islamic jurisprudence; and the scholars have determined the instructions for the clauses during wedlock agreement, or they have separately studied them. Following the jurisprudents, civil law also allows the two parties of nikah to place any clause which is not against the requirements of nikah during signing its contract.

On the other hand, one of the rules that exist in the matrimonial relationships between spouses in the west is the commonality of the spouses' properties, and this rule has caused that refinement and management of the common property between spouses face various difficulties.

With the objective of supporting the woman's right and giving her a share in the family's property, which is usually the common product of woman's work at home and husband's work outside, and by respecting the juridical principle of woman's independence in keeping her personal property, the idea of giving woman a share in the earned property during matrimonial lifetime was introduced. However, because the western system of property commonality did not have any background in the Islamic jurisprudence and Iranian traditions, it was tried to place the borrowed institution of common property under the form of jurisprudence and as a clause during nikah in the wedlock agreement. In this way, according to the directive of the Judicial High Council in 1983, a circular was sent by the Instruments and Landed Property Registration Department to the marriage registry bureaus including a rule that twelve clauses had to be included in the wedlock agreements (Mehrpour, 2007, p. 44). One of these clauses was free owning of half of husband's property which is generally known as "tansif clause" and states that: "in addition to nikah, the husband agrees that whenever divorce is without the wife's application and according to the court's recognition, divorce application is not because of the wife's violation of her duties or her ill-behavior, the husband has to transfer up to half of his existing property or his earned property in the matrimonial lifetime, or a sum equal to that property to his wife according to the court order; and that property or sum of money is non-refundable"

Although it has been a long time since this clause entered our legal system, still the conditions of this clause have not been evaluated, its legal situation has not been correctly studied to decide whether it is correct or incorrect, and a lot of hidden and unsolved problems are observed in this clause. This survey tries to illustrate these issues from the jurisprudence and legal perspectives.

1. Features of Tansif

Like any other clause, tansif has features. Every one of these features is important in terms of its perspective towards the clause especially in relation to its execution and has to be evaluated. Features such as legal nature of the clause whether it is an action or consequence clause, its necessity or permit, whether its necessity or permit is a right or a sentence, its independence or whether it is a function of nikah, whether it is consensual or a formality, and its suspension are important issues which will be evaluated.

1.1. Juridical Nature of Tansif Clause

Is the clause of tansif of property a clause of consequence or one of action? To answer this question, we first briefly define the clause of action and that of consequence; then, we compare the definitions with the clause of tansif.

Clause of action is one that doing or not doing of the legal and clause-related issue is conditioned on one of the parties or on a third person. The clause of consequence also is that occurrence of a legal issue (consequent of a legal action or the legal action itself) in the world
of validity is achieved by the accepters of the clause and that consequence is achieved by the very clause. (Safaei, 1998, p. 88; Mohaghegh Damad, vol.2, 2010, p. 41)

Now, considering the definition of these two clauses and the articles of tansif clause which announce "...husband is committed to transfer up to half of his property......to the wife" and transfer is an action that the husband is committed to do after divorce occurs and he should do it by order of the court, it should be mentioned that this clause, is a positive legal action clause. (Safaei, Family Laws in Brief, 2014, p. 75)

1.2. Description of the Rightful Requirement of Tansif Clause
Is tansif clause necessary or is it possible that every one of the parties terminates this clause or reverts from it whenever he or she wishes? Necessity of tansif is clear, because this clause comes in the doing of nikah and it is one of the required clauses; then, it should be mentioned that as a required function of doing nikah, this clause too becomes necessary and is not revertible. (R. K. Katuzian, General Rules of Contracts, vol. 3, p. 125 afterwards)

1.3. Independence and Consequentiality of Tansif Clause
The question that arises is that what is the type of tansif clause? Is it one of the consequential types or does it have an independent identity from nikah? We say in reply that the mentioned clause in terms of fulfillment (occurrence) is a consequent of nikah, but in terms of its durability (survival)it is not a consequent of nikah. In other words, in the time of termination of wedlock by divorce, the clause does not terminate, but remains effective and the consequents agreed upon by the parties of nikah in the time of signing the agreement come to occur. However, it has to be considered that the tansif clause is different from the above-mentioned two clauses because those clauses find their validity and their independence becomes clarified in case divorce occurs (it means that they have had no following-up in terms of survival) but the clause of tansif has follow-up in terms of occurrence, it means that if nikah is invalid the tansif clause is also invalid, and if nikah is valid, until the occurrence of divorce, the same relationship is valid. However, in this regard that it finds its validity after dissolution of nikah and lives on independently is similar to those two clauses. As a result, it has to be stated that the tansif clause is a clause integrated consisting of consequential as well as independent features.

1.4. Consensual Nature (Purposefulness) of Tansif Clause
In the present Iranian law, the basis is on consensual nature of legal actions; and existence of common purpose and basic principles of correctness of contracts is sufficient for creation of any legal identity; hence, no other formalities are required. (Shahidi, 2003, p. 84) In Imamia jurisprudence too, this principle has popularly been accepted. (Khuee, vol.2, p. 70) Considering the fact that it comes in the text: "...he should transfer by the order of the court...half of his existing property which he has earned during matrimonial life with her..." this doubt maybe arise that the tansif clause includes formalities, because it cannot occur without the order from the court.

However, this subject is unfinished, because formalities are the conditions for correctness of legal actions, it means that before they occur, that legal action does not take place (Mohaghegh Damad, 2011, p. 190). In the discussed assumption, the action clause has been ordered and only doing it has been postponed to fulfillment of formalities and preparation of the prerequisites. As a result, it has to be said that the condition is consensual. It means that through collection of the basic conditions for correctness of the contract and occurrence of requirement and acceptance, there is no need for special formalities for the event to occur, but execution of this clause requires fulfillment of prerequisites like bringing up lawsuit, passing sentence on determination of the amount of properties that have to go the wife, etc.
1.5. Suspension of the Tansif Clause

By signing the wedlock agreement, formation of the agreement and consequently its conditions, too, get added to it, but fulfillment of the consequents of tansif clause (the clause origin) depends on issues that are as follows: 1. Occurrence of divorce by application of the husband. 2. Existence of husband’s property earned after marriage (of course, it has to be considered that existence of property is the condition for commitment. It means that it is not a verbal suspension although it is considered as a type of suspension). 3. Sentence of the court on determining the amount of property that has to go to the wife (this amount could be from the smallest amount up to 50% of husband’s property according to the court’s decision). It is understood from the above introductive part that the wife, after winning the mentioned suspended right, becomes entitled to receive the very property (if the court recognizes her right to receive a common share from husband’s property) or a due amount (if the court passes a sentence for paying similar amount or its price) from her husband’s property.

2. Challenges of the Tansif Clause of Property

One of the important challenges tansif clause of husband’s property is facing is its obscurity because one of the conditions of correctness of the clauses mentioned in the statements of the jurisprudents is its non-obscurity, an issue which is mainly agreed by jurisprudents. (Khuee, 1994, vol.1, 153)

The tansif clause of property which comes in the article A of the recorded articles in the wedlock agreements is obscure and unclear in two aspects. One aspect is that it predicts “transfer up to half of the property”; it means that the husband is not definitely committed to transfer half of his property to his wife, but what is mentioned in this clause is “up to half” of the property, not the total “half” of it. In fact, it is this perspective that will determine what quantity of husband’s property will be transferred to his wife; this means that practically what is transferred to the wife could be less than half. Anyway, the amount of property that has to be transferred is not clear in the time of nikah. (Safaee, 2000, 57)

Another obscure aspect of tansif clause is its property, since the property in the time of divorce is not clear and from this perspective too, the clause is obscure. Now, it has to be studied whether obscure clause is invalid or not.

2.1. Existence of Obscure Clause in the Issue of Tansif of Property

In the remunerative financial contracts, whenever obscurity about the clause leads to ignorance of one of the sides, Imamiajur is prudents believe that it will lead to invalidity of the clause and contract; for example, if someone sells his house to someone else with a fixed price and they put this condition that the buyer will pay the price to the seller after death of his father, both the condition and the contract are invalid because such a condition harms the principles of the contract and leads to invalidation of the contract (Sobhani, 2002, 70).

In the discussion of permanent nikah, although the relationship between obedience of wife and dowry in terms of the right to imprisonment (article 1085 civil law) is mentioned to be like that of substitute in business (article 377 of civil law), however, mostly a series of orders and effects of general rules in contracts in nikahare not correct, although the relationship of remunerative and substitute is more observable in the discontinuous nikah because the main objective in the contemporary nikahis giving the right to take sexual pleasure, therefore, duration and dowry should be determined in the temporary nikah and non-determination of dowry by virtue of article 1095 of civil law leads to invalidity of nikah. Therefore if in the contemporary nikah they place a condition that leads to obscurity of duration of nikah, that condition is invalid and it invalidates the contemporary nika has well. Also, a condition against requisites of nikah also is invalid and invalidates it (Safaee, 2000, 59). Article 233 of civil law also refers to such invalid clauses and invalidating nature of them. However, if
ignorance about the clause does not leak into the contract and does not lead to obscurity of
the substitutes, can such a clause basically be considered correct or not?

2.2. Leakage of Ignorance to the Contract

In fact, all discussion is summarized in this aspect that whether conditions of correctness of
the clauses in civil law are only limited to those cases that are mentioned in the articles 232
and 233 of civil law under types of clauses, or the basic conditions of correctness of contract
recorded in article 190 of civil law also have to be considered about the clauses; in fact, it has
to be observed that whether the real face of the “clause” and its specific position has changed
its nature or it includes its basic nature and follows general rules of contracts.

Dr. Katuzian believes that consequentiality of the clause makes no changes in its basic
nature; and therefore, the recorded conditions in the article 190 of civil law including the
clarity of the subject of commitment should also be considered about clauses as well, in fact,
from section 3 of article 233 of civil law which talks about invalid and invalidating clauses
and says: “obscure clause whose obscurity leads to ignorance of the sides”, it cannot be
deducted that it is against the invalidation of the obscure clause, although it does not leak into
the two sides. This is because fulfilling a commitment whose subject is obscure is impossible
and this is so clear that it is felt that a specific order is required about that (Katuzian, 1997,
vol.3, 166).

On the contrary, some other lawyers believe that because article 232 of civil law is about
such clauses that only possibility, usefulness and legitimacy of them are the conditions for
their correctness, lack of other general conditions of contracts cannot be proof for invalidity
of the clause. Under article 10 of civil law and the principle of autonomy, in the cases of
worthlessness, obscurity and illegitimacy of the clause origin, the main contract and its
clauses have to be considered as correct (Imami, 1995, vol.1, 272).

Late Seyed Muhammad Kazim Tabatabaee Yazdi believes that there is no reason for validity
of knowledge in the clause, although it is considered as part of the substitutes; unless
ignorance is in such a way that does not lead to knowledge. In fact, the condition of a minor
and consequential issue and ignorance in it does not leak to the principle of the contract, and
everything that is the proof of validity in clarity of the subjects, does not cover it

It seems that in case ignorance is not harmful to correctness of the contract and is in fact
based on easygoingness, knowledge about the clause is not necessary, as some of the
jurisprudents have mentioned it in explaining conditions of the right clauses (Bojnourdi,
1998, vol.3, 279). Therefore, considering the fact that basically nikah is a non-financial
agreement and its financial effects are consequential to the principle of nikah, it can be said
that financial commitments in the form of conditions alongside nikah, although not clarified
in details, do not invalidate the correctness of the clause because the clauses alongside nikah
are suggested for more support of women’s rights; it’s an agreement in which the main
purposes of the two sides are not earning financial gains and economic benefit through that.

Late Seyed Muhammad Hassan Bojnourdi writes at last: if ignorance of the clause does not
leak into the basics of the agreement, no proof can be presented for invalidity of the clause
(Bojnourdi, ibid, 280).

The sixth principle, there is already a clause measurable, if so, if the operation is not harmful
and one of the operations mentioned above, the operation will be invalid, but the operation
which is not valid, it is not considered invalid, and the operation is valid, the...
Late author of Javaher too believes the criterion of correctness of clauses is non-leakage of obscurity of the clause to ignorance in the goods or the price\(^5\) (Najafi, 1981, vol. 23, 199). In fact, he differentiates between the obscure clause that leads to knowledge and the clause that does not lead to knowledge. He regards invalidity of the first type as criticizing and states that there is no reason for it in tradition and in religion (ibid).

Generally, it can be said that considering the perspectives of some jurisprudents and considering the fact that the civil law does not consider obscurity of the clause a proof for invalidity and especially considering the fact that permanent nikah is not considered an exchanging contract so that ignorance of the clause can lead to ignorance of the subjects and lead to the main contract, the tansif clause can be accepted despite its obscurity. Of course, if ignorance about the subject was the absolute condition and never led to knowledge, its correctness could not be accepted; because such a clause would seem irrational and would be among the clauses that according to article 232 of civil law would be considered as invalid. However, ignorance about the clause of transferring up to half of property finally leads to knowledge, therefore, late Seyed Muhammad Kazim Tabatabaee who does not consider validity of knowledge about the clause close to the reason, writes in the context: “لا يتأثر جهل هذا الأداة بحرية عدم وصول إلى العلم بعد ذلك.

It means that: “only those obscure clauses are invalid which never lead to knowledge.” (TabatabaeeYazdi, ibid, 116)

In addition, since the existing property of husband in the time of divorce is identifiable and the court determines the amount of transferable property, it has to be said that this obscure clause finally leads to knowledge therefore it is correct (Imami, 1995, vol.1, 276).

2.3. Not Mentioning Other Factors Leading to Divorce

Another one of the problems mentioned about tansif clause is that only the wife’s violation of duties or her ill-behavior is mentioned as the basis for divorce, and other cases that might appear in the wife and could make the husband divorce her are not mentioned, for example, the wife’s catching of infectious disease like HIV, etc. where the husband has no alternative except divorce. Is there tansif in such cases too? This point is to be considered and it seems that according to commonality of the property, the tansif clause cannot be executed in such cases.

2.4. Difference between Tansif Clause and Remuneration

Another point in this discussion is comparing tansif clause with remuneration and nahleh (giving gifts). In this regard, it must be mentioned that there are many differences between tansif clause, remuneration and giving nahleh (the subject of sections A and B in note 6 of the common article of the reformation act of divorce rules passed on 19. 11. 1992 in Expediency Discernment Council) the following differences are observed:

1. Giving of remuneration and nahleh by the order of law, whereas tansif is done when husband has accepted it; and in fact, it is contractual.

2. Remuneration is for the works of wife at husband’s house which legitimately were not her duties, whereas the commitment of tansif has no relationship with the working of woman and in any case, the court makes husband transfer up to half of his property to her.
3. Remuneration is not related to the existing property and has to be legally paid anyway, whereas execution of the tansif clause depends on existing of property gained in the matrimonial period. Of course, the common point between these two commitments is that the husband becomes committed to transferring half of his property and paying of remuneration and nahleh when he himself divorces the wife and wife does not apply for divorce and also husband’s application for divorce is not as a result of wife’s violation of her duties (Research Institute of Education Department, 2003, vol.2, 231).

There is no doubt that the condition for transfer of up to half of property with remuneration and nahleh are mutually exclusive; it means that the clause about transferring up to half of property is prior to remuneration and remuneration is prior to nahleh. This point comes in note 6 of the Single Article of reformation act related to divorce: “after divorce, in case the woman demands remuneration for the works that were not religiously her duties, the court initially tries to fulfill her demand through reconciliation and in case reconciliation is impossible, if there was any clause in the contract or out of it about the financial issues, it acts according to it; otherwise, whenever divorce is not by wife’s application, and neither is it a consequence of her violating her matrimonial duties or her ill-behavior, it is acted as the following…”

This issue, i.e. mutually exclusiveness of tansif clause with remuneration and nahleh and limiting remuneration only to the case of divorce has been criticized by some writers. It is with this deduction that remuneration of the performed works under the general principles (article 336 of civil law) is demandable and clauses in the time of nikah should not have any contradiction with it (Ghasem Zadeh, 2005, 53).

However, it seems that this objection is baseless because initially, it cannot be said that article 336 of civil law is one of the imperative principles so that there cannot be any agreement against it or put any condition against it. Secondly, what comes about remuneration of wife and makes it dependant on divorce is not private condition or contract, but it is the very legal will in the form of the Single Article of reformation of divorce rules. Therefore, it can be said that because Single Article is considered as a specific rule in relation to family law, it is prior to the general concept of the article 336 of civil law; also the Single Article on reformation of divorce rules shows the latest will of the legislator.

Of course, the act of accession of a note to the article 336 of civil law presented in 1928 which was finally passed in the 13, January 2007 meeting of the Expediency Discernment Council and is in fact considered another step for stabilizing financial rights of women can be mentioned: “Note_ If the wife has done the works that are not her religious duties and traditionally are paid works, by the order of husband or without donation purpose, and this is proved for the court, the court calculates remuneration of the done works and orders its payment”.

With the new conditions, it has to be studied that despite note 6 of the Single Article in the reformation of divorce rules, why did the legislator decide to have this note accession under article 336 of civil law? Did it want to reemphasize this same concept or in fact by temporary invalidation of note 6, it wanted to help women more in achieving their financial rights?

A look at the legislation procedure of the accession note helps us reach the answer for the above question. Initially, according to the directive of Islamic Consultative Assembly, it was decided that the accession note comes under article 948 of civil law under the inheritance affairs of husband and wife which, of course, faced identity objection of Guardians Council in their 5, August 2002 meeting. The text of the verdict passed by the Guardians Council is as follows: “predication of the note of Single Article to cases where working of wife is ordered
by husband without wife’s purpose of donation, but husband’s order is clear about the work being free of charge or is customarily free of charge, is considered as against the religious rules.”

The Guardians Council believed that this note had predicted three conditions for occurrence of husband’s debt:
1. Order of husband about issues that were not wife’s duties.
2. Husband does not have purpose of donation
3. The action has remuneration.

Whereas for confirmation of the husband’s debt, there is a fourth condition as well and that condition is that husband’s ordering to work should not have the emersion and precision that customarily shows he is ordering her to do the work free of charge and that he is not going to pay anything in return; under this condition, husband’s orders have emersion that it is free of charge; in fact, if we want to look in this regard, the text of article 336 of civil law also is illegitimate. It seems that the reason for passing article 336 of civil law in the year 1928 was that the main and well-known fatwa among the jurisprudents of that time like that of author of Orweh was that imperator’s purpose and immersion of his saying has nothing to do with his debt and wife’s entitlement to remuneration; and the civil law too, in 1928, was compiled on the basis of this perspective; whereas, the contemporary jurisprudents such as Ayatullah Imam Khomeini, Khuee and Golpaygani (RH) all have added the fourth condition with different statements and the Guardians Council too, according to this opinion, has made the forth condition necessary (Research and Education Institute, 2005, vol.2, 271).

Anyway, since the Islamic Consultative Assembly did not agree to exert the reformations suggested by the Guardians Council, this bill was taken to Expediency Discernment Council and this time, it was passed under article 336 of civil law, with this deduction that receiving remuneration in return to wife’s work at home does not depend on husband’s death so that it can be placed under the articles about wife’s inheritance.

2.5. Invalidation or Not Invalidation of Contents of Note 6 of the Single Article

Now it has to be observed that whether really the accession note to the article 336 of civil law is invalidating the contents of note 6 of Single Article to the extent which is recognized to be against it or not? Because the accession note to article 336 of civil law shows the latest will of the legislator, therefore, it can be said that the legislator implicitly by accession of this note, invalidated contents of note 6 of Single Article in the contrary sections.

Therefore, in the new conditions, it can be said that the clause of tansif of the property is not incompatible with the wife’s remuneration for house work. In fact, according to the not 6 of the Single Article, in order to allocate remuneration to the wife, there are eight necessary conditions:
1. Divorce should not be by her application
2. Reconciliation should be impossible
3. There shouldn’t be a clause during the contract or external necessary contract about financial issues
4. Wife should not have violated her matrimonial duties
5. Husband’s application for divorce should not be as a result of wife’s ill-behavior
6. Husband’s order should be proved for the court
7. The purpose of lack of donation should be apparent in the actions of the wife
8. Husband’s order for doing the works should be apparent
It is while for receiving remuneration under the contents of article 336 of civil law and also under the accession note, existence of only three conditions (husband’s order, lack of purpose of donation by the wife and having remuneration for the action) are sufficient.

If we do not accept the implicit invalidation perspective, we have to say that accession of the above note to article 336 of civil law was a useless and unfruitful work, because it will not bring more benefit than was expected in the note 6 of Single Article. It is in addition to the fact that the perspective of more implicit invalidation is in line with provision of interests of women, and that receiving of remuneration will no longer depend on the lack of private clause related to financial affairs. In other words, the wife can simultaneously demand for remuneration of her housework as well as tansif of property in the framework of the agreed clause alongside nikah contract. What can strengthen this idea is that there is no clear juridical or legal reason in this regard that if divorce application is made by the wife, she should be deprived from receiving remuneration (Hedayat Nia, 2007, vol.3, 213).

It is because juridical basis of the sentence to pay remuneration is the basis of “respect to Muslim’s action” or according to some, it is “the belief of scholars” and these issues are not limited to any specific assumption. They are not specified to women’s services either. It is because of this that the civil legislator mentions it under article 336 of civil law. The studies show that some courts, even before approval of the accession note to article 336 and regardless of the note 6 of the Single Article in the petition for remuneration, passed sentences by referring to the contents of article 336 of civil law, regardless of whether the petition for remuneration was in the matrimonial lifetime or in the time of petition for divorce. Even in the cases where the wife applies for divorce, the court has sentenced for payment of remuneration by referring to article 336 of civil law. In one of these sentences, it comes: “about the petition of Mrs……..against………………on demand for divorce and remuneration of the inhabited house and housework for 12 years according to the experts’ verdict………………considering the contents of the case and approving existence of contract of permanent wedlock and…………….. the court does not recognize the demand of the plaintiff because of unproved distress and sin (osrand haraj) and by attributing to article 1133 of civil law and the certain religious principle ‘اطلق بيد من اخذ بالساق’ orders rejection of the plaintiff’s complain; and about remuneration, considering confession of the husband about the wife’s work in his house and non-approval of intention for donation… the demand of the plaintiff is recognized and approved by attributing to articles 336 and 337 of civil law, it orders proscription of the defendant and payment of 920,000 Rials as remuneration of rental share of the plaintiff from the common house since 16, May 1999 until 6, November 2000 with the monthly amount of 120,000 Rials, and payment of the sum of 9,800,000 Rials for remuneration of the performed works by the wife during the matrimonial lifetime to the plaintiff.”

It has to be mentioned that in the verdict of the court of appeal, the verdict of the primary court about remuneration was approved, but the verdict of the court about disapproval of distress and sin was reversed. In some part of the verdict of the court of appeal, it comes: “…considering the fact that distress and sin of the defendant’s appeal in continuation of the wedlock is obvious for the court, the demand of the plaintiff is recognized and therefore the non-consensus attestation is issued and by attributing to article 1130 of civil law, the verdict is passed to make husband divorce her, and in case compulsion is not possible, the plaintiff can ask the court for permission. The passed sentence is conclusive.”

As it is observed in the contents of the sentence, the applicant of divorce is the wife and considering note 6 of Single Article, the demand for divorce by the wife deprives

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6Petition No.1711-1712 Branch 5 of the General Court of Qum
7Petition No. 111286-2, Jan, 2002, the Appeal Court of Qum Province
her from demanding remuneration. However by attributing to article 336 of civil law, the court orders for payment of remuneration and the appeal court, too, approves this sentence. In some other cases of the wife’s demand for remuneration, by attributing to article 336 of the civil law, the court has passed the sentence in favor of the plaintiff.\(^8\) These sentences show that because of hard conditions and the existing problems in the note 6 even before passing of accession note to article 336, the judges preferred to use article 336 of civil law and sentence in favor of the wife’s demand (Hedayat Nia, 2007, vol. 3, 214) let alone in the new conditions that considering the previously mentioned materials, this position has been strengthened.

Conclusion

The clause to transfer up to half of husband’s property to the wife is one type of action clause; because in addition to the nikah agreement, the husband becomes committed to transfer up to half of his earned property during his matrimonial period to his wife. In addition to that, tansif clause is a right that is consequential for happening and independent for survival; also this clause is consensual and there are no specific formalities required for its formation and it is suspended. In reply to the objection of obscurity of the clause, it must be said that: in the jurisprudence and the civil law, there is no proof for invalidity of an obscure clause ora contract dependent on obscure clause, especially when the clause is identifiable in the time of execution. In the Iranian civil law as well, clearness of the clause has not been mentioned as one of the general conditions of correctness of the clause so that ignorance about the clause leads to its invalidity. On the other hand, such a clause is not totally obscure and does not lead to deceit; because it is identifiable by the court in future. This clause is not against constitution, religion and morality, but it is a possible clause that can restore rights of the permanent wife to some extent during divorce, and sometimes it can prevent occurrence of divorces decided hastily and baselessly. Nevertheless, it is advised that for removing the obscurity from the clause of tansif of property, the exact amount of the husbands due property to pay is determined.

\(^8\)Petition No. 956-4, Sep, 1999, Branch 5 of the General Court of Qum
References