“The non-rescindable definite contracts in Islamic Sharia and Iranian law”

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Abstract

Rescission is a legal action that is done by mutual consent of contract parties and causes dissolution of previous contract. Rescission is specified to irrevocable contracts. Overall, rescission does not apply to revocable contracts as well as those contracts which may be revoked with inclination and request by either of parties of contracts such as marriage and endowment. Whereas marriage possesses praying nature thus the general rules of contracts are enforced about marriage within limits of religious permission. Nature of endowment is to keep the original endowed object and releasing of the relevant interests. Thus term of option for revocation does not apply to it. As a result, rescission will not be enforced for that contract.

Keywords: Rescission, Rescission exceptions, Definite Contracts, Marriage, Endowment.
Introduction

The rescission is one of the legal activities which are concluded according to mutual agreement of parties over contract similar to other activities. Despite of all caution and care the individuals employ in creating financial and legal relations upon conclusion of contracts sometimes parties may repent from execution of contract and show no interest to continue it for some reasons; while, the primary and first rule of contract is the requisite for loyalty to the promise and there is no possibility for dissolving contract except in the cases of presence of legal causes with mutual consent from parties. Despite of principle of free will and contractual freedom; sometimes, rescission may be exposed to some barriers called rescission exceptions.

There are some doubts about possibility for employing rescission for some contracts and the experts do not agree in it unanimously. In contrast, they agree totally in lack of possibility to adapt rescission in some of contracts.

Seyed Hassan Emami believes that rescission may be found in all of irrevocable contracts except marriage that is one of non-financial activities and endowment that includes social aspect. [1]

Also, Katoozian refers to this issue that although rescission is specified to contract but it does not follow general rules in other contracts and its nature may require rescission not to be implemented in some contracts such as contract of guarantee, marriage, and endowment. [2]

In any case, with respect to above-said backgrounds, it seems analysis on non-rescindable cases in Iranian legal system has been less noticed in world of authors.

It has been tried in this article to review reason for lack of using trend of rescission in both contracts (marriage and endowment).

Absence of rescission trend in marriage contract

Marriage is one of the contracts for which rescission will not be enforced. With respect to consensus and the given traditions about marriage, this contract may not be rescinded. The legislator does not assume marriage only as private relationship among two parties but it is a social phenomenon that expediency of society is based on its relative survival and duration and this depends on public order. [3]

The well-known jurists consider marriage as a term with the related apparent concept i.e. contract. Whereas clarity of marriage is evident this legal institute has not defined in Civil Code but lawyers have been proposed various definitions about marriage.

A group assumes followership for Islamic Jurisprudents and the given definitions by jurists in marriage as a relationship among female and male to form family. Marriage is a legal
relation that results from contract among woman and man thereby they can be benefitted from each other sexually and they assume marriage as specific legal status that creates spousal relationship among wife and husband. [4]

Some people imply that marriage is a legal and emotional relationship that results from contract among woman and man and give them right to live together and the right of sexual utilization is the distinct symbol of such a relation. [5]

Some others also consider marriage as mutual agreement of woman and man for sexual utilization. [6]

IRI Civil Code has not defined marriage but in Article 1062 of this code it has been asserted in requisite for offer and acceptance. Similarly, in various cases such as Articles 1050 and 1051 it has called it as a contract and expressed contractual nature for it. Also it has mentioned exclusive rules of contracts regarding marriage as well such as normative sequence of offer and acceptance and sound consent etc. and at the same time it has been also emphasized on marriage contract without clarifying the subject only with respect to nature of marriage and lack of generalization of all regulations about contracts.

In fact, Civil Code has not looked at marriage as a mere contract. Although in two Articles 1103 and 1104 it has emphasized in requisite for good relationship and mutual assistance of spouses in consolidation of family foundation and training of children but it has not posited any explicit statement about the reality and nature of marriage. What clear is that basically it has not put the effects of this contract at disposal of contract parties and this important issue has created specific legal status through prediction of preemptory rules that are growingly increased in their range where the contract parties can only consider their own within legal framework. And they are not entitled to disturb the legal order predicted before about marriage. [7] And it refers to a type of request that implies meta-contractual aspects of it by proposing some constraints such as legal-emotional relations and or phrases such as ethical-religious link and or holy treaty.

Also apparently marriage has been introduced in Islamic jurisprudent (Feqh) as a contract but it has praying nature where if it is noticed it may convert apparent dimension into praying aspect as well.

Allameh Helli explicitly introduces marriage as praying. [8]

Mohaghegh-eKaraki assumes marriage not only as preliminary prayers but also as worshipping per se. [9]

Shahid-eSani considers marriage as basis of praying. [10]

Sheikh-eAmeli has used term ‘constituents of prayer’ about marriage. [11]
Makarem-eShirazi argues that the marriage has been introduced as praying because this contract has been assumed as blessing in Islamic Sharia; in other words, the Islamic legislator may intervene in various dimension of this contract to the extent new essence has formed for it and no one could achieve the relevant rules and effects except by referring to the Islamic Sharia. So referring to norm of rational group in this regard may not resolve this issue even though the paradigm of Islamic Sharia is not taken into account therefore one should only refer to Islamic Sharia for each of these cases. However, this procedure also applies the same regarding other praying cases. [12]

The results inferred from this doctrine are comprehensible:

Firstly, the general rules of contracts about marriage may be executable within the limits of religious permission.

Secondly, wherever the religious preemptory injunctions prevail albeit in financial contracts such marriage it has been implied as praying.

According to attitude of Seyed-eYazdi, religious preference of an activity is not concomitant to praying nature of the given activity but the given activity may be deemed as praying with divinely reward if it is done with intention for proximity to God. The marriage may be commendable but it may be assumed as praying only with intention for proximity to God in order to consider some divine reward for the given activity. [13]

The marriage is assumed as praying according to consensus of Islamic Jurists and the contractual option does not apply to marriage because it is considered as praying and based on well-known comment from Shia jurists, condition of option will annul the given contract.

Although marriage is a type of contract and it should include some basic terms like other contracts, its effects will be determined by law and governance plays no important role in this regard. With respect to meta-contractual nature of marriage we implied that the general rules of contract may be enforced regarding marriage within the religious permissions.

It seems that with respect to principle of requirement in contract and specific status of marriage that makes it distinct from other contracts, the main group of Islamic jurist believes that the stability and duration of this contract should be preserved as possible and they assume revocation and termination of marriage subject to presence of narrative evidence and proof that signifies permission from religious legislator and they do not consider any position for rational and logical justifications and social and human and reasoning based on expediency, deduction, and preference in them and therefore they look for narrative evidence and confirmation to assume right of revocation of marriage for male or female and also emphasize in verbal denotation of Islamic traditions and narratives instead of philosophy and expediencies of them.
Thus the general rules of contracts may be implemented in marriage to the extent that they are adapted to its specific nature.

Hence, marriage nature has caused the legislator to resort to specific tools to resolve it. But, due to preservation of individual rights and for providing sound will for two spouses, legislator has declared marriage as revocable contract in some cases such as physical defects, fraudulence, and breach of the predetermined characteristics. It has been mentioned about the basic conditions of marriage that the mistake in character of marriage party will be effective in authenticity of this contract if it is physical; in other words, the given person is married to someone who was not intended by that person while error in characteristics of spouse will not impact on its effectiveness although it is the main motive and drive for the contract. Civil Code has not considered the mistake in characteristics of marriage party as defects of will but at same time it has not overlook it as well since someone who incurs loss due to this measure will be entitled to terminate the marriage. [14]

Marriage contract may be dissolved in two forms:

Involuntary or coercive dissolution: The spouses have no option or will to dissolve the marriage but some measure is made by either of spouses or third party that results in dissolution of marriage.

The Involuntary or coercive dissolution cases include apostasy, sworn malediction, extrinsic fostering, and transsexualism.

Voluntary dissolution: It means marriage is dissolved by will of both of spouses or either of them. Voluntary dissolution is also classified into three groups: Revocation, divorce, and dispense with remaining term of (temporary marriage).

Therefore, the methods of marriage dissolution have been classified because of their specific nature and according to fatwa from well-known Islamic jurists rescission does not apply to marriage. The consensus is also based on this issue. However, a weak comment has been attributed to some of jurists who believe in using rescission for marriage. But Mohaghegh-eKhoei (RAH) expresses: “We did not find someone told this comment” [15].

But now this question may be raised that regardless of consensus comment, is there any other reason for non-application of rescission in marriage or not?

Some experts have mentioned that whereas option does not apply to marriage thus marriage may not be rescinded. So one can assume this juristic rule as basis that “Any contract to which option applies, rescission will do as well.” (کل عقدی که خیاری را دارد، از اقاله نمی‌کند)

Also regarding marriage, this claim was agreed unanimously that option does not apply to it. [16]
Mohaghegh-eKhoei has presented two reasons for this paradigm and one reason is also inferred from statements of Mohaghegh-eSani (RAH) in book of جامع المقاصد (Sum of destinations). The main utterance of Mohaghegh-eSani that is mentioned in Book of جامع المقاصد (vol. 12) is that marriage is not a barter contract while subject of existing option applies to barter contract. [17]

We have a lot of Islamic narratives and traditions from which the religious preference of marriage is inferred per se while the marriage is permissible therefore marriage is a type of praying. Thus in fact it lacks nature of barter contract for which one can assume any option. In other words, returning and option do not make sense for what it deemed for the sake of God. Therefore option does not apply to praying activities.

Marriage portion (مهریه) is not considered as condition and basis in marriage and if the rate of marriage portion has been determined in this contract, no one assumes marriage portion as consideration for capital. If marriage portion is deemed as consideration for capital therefore this contract will not be authentic where there is no marriage portion in contract. However the case is not so and marriage contract is also correct without marriage portion. Thus, whereas marriage is deemed as type of praying therefore option does not apply to it. [18]

But Mohaghegh-eKhoei has posited two other reasons. Based on first reason, the option is considered for the contract where necessity for a contract is a type of conditional irrevocability. But if there is mandatory irrevocability, assuming option will not be the case while the existing requirement in marriage is of mandatory irrevocability. [19]

It can be noted that as none of contract parties has right to determine mandatory permission, the conditional permission is put at disposal of on someone has right for it. Therefore we will have also both conditional and mandatory irrevocability, a fortiori. According to religious legislator, irrevocability for marriage is mandatory irrevocability. Namely, marriage is never helpful without considering conditions and specific tools for it. [20]

Wherever irrevocability is type of conditional irrevocability, option also applies to it and where option is employed, rescission will apply to it as well. Option applies to the case where irrevocability is of conditional irrevocability since the mandatory condition may not be changed without permission from legislator. Therefore, irrevocability of marriage is of mandatory irrevocability thus option will not apply to it and as it mentioned where option is not applicable to a contract, rescission will not apply to it as well.

It is inferred from statement of the late Bojnoordi (RAH) that wherever irrevocability is of conditional type, rescission is also applicable to it. [21]
As a result, rescission is not applicable to marriage based on religious paradigm since legislator has considered specific conditions for dissolution of marriage due to its nature so that terms of dissolution will not be satisfied without realization of those conditions. (لا إطلاق: Divorce is not applicable except in this way)

To dissolve marriage contract, even the used statement should be definitely specified and any statement may not be adequate for dissolution.

**Non-application of rescission in endowment contract**

Endowment is one of most superior and viable symbols of benevolence and charity to people and service to other human beings and assistance to social expediency and regulation of cultural, social, and economic affairs. In endowment, the original property or estate remains and the relevant interests and benefits are consumed in charitable activities. It is a good deed that plays great role in organization of individual and social life. Endowment has been defined in books of Islamic jurisprudence as follows: Surrender of original property and consuming of its interests based on endower’s intention. Of course, it is necessary in endowment not to sell the possessed property and not to be mortgaged and or subject to ownership conveyances.

Arabic term ‘وقف’ (endowment) literally means stopping, staying, and residence. [22]

If no definite time is determined for use of endowed property upon execution of this good deed that is considered as endowment in fact ownership powers and activities will be stopped about this type of property. [23]

IRI Civil Code that is excerpted from Shiite religion and in which it has followed from statements and comments of well-known jurists for most of legal issues and topics has defined about endowment in Article 55 as follows: “An Endowment consists in the surrender of a property, and the devotion of its profits to some purpose.”

The surrender of property means that its owner exclude that property from his/ her ownership forever and devotes the benefits of that property to use for charitable and benevolent activities that result in God’s consent and or allocates it to certain social class and after devotion of endowment the endower does not have any right to possess the given property and endowment is intended to provide benefits to be used for the sake of God’s consent and social charitable activities. [24]

Regarding endowment, the conditions which lead to authenticity or abortion of endowment namely creating positive rules and also those one followed by obligatory rules may be divided into several classes. According to consensus from all Islamic denominations, endowment includes four cornerstones: Pronouncement, endower, object of endowment, and beneficiary of endowment.
According to Sharia and law, each of these four cornerstones shall be implemented under certain religious and legal conditions so that the endowment is realized properly.

Realization of endowment is subject to originality of endowment property, potential for benefit, possessory and deliverability of object of endowment. Namely, all of these cases intervene and involve in nature of endowment. On the other hand, any type of relief work is not acceptable from Islamic view but endowment is proper if it is based on specific conditions. Endowment for anything is assumed as proper if the legitimate benefit may be extracted from that object and at the same time the original object is preserved. These conditions signify this fact that endowment is type of investment. The original capital should remain intact and its revenues will be used to meet the reasonable needs. Unfortunately, many people may consider endowment is a property to provide certain requirements that removed after meeting of those needs. However, the legislator’s assumes it inversely and intends to preserve the original property and not to waste it only in order to benefit from its interests and outcome.

We may achieve the nature of endowment through inquiry in conditions which have been mentioned by Islamic jurists about proper and appropriate endowment. In other words, we find and perceive that Islamic Sharia tends to realize the essences in which the foremost effect is to meet requirements and to remove problems of Islamic community with permanent constraint forever. Thus, it is tended to establish the organization with the fixed capital in which it is followed by some benefits and profitability in addition to the fixed capital. These conditions indicate endowment nature that is intended by Islam and Muslim jurists. [25]

The end of endowment includes some features other contract lack them

The endowment comes to an end by realization of following conditions:

1. Expiry of goal and subject of endowment
2. Wastage of original endowment object
3. Extinction of beneficiary of endowment

Rescission is not applicable to endowment since assuming rescission for endowment means returning ownership of the original object to endower while legal structure of endowment is in such a way that it exclusively forms by exclusion of property from ownership of endower- but permanently-. In this sense, one can believe that rescission is against requirement for endowment. It should be mentioned about non-applicability of rescission in endowment that whereas term of option is not applicable to endowment thus rescission will not apply to endowment according to general rule as well.

Various reasons are mentioned for annulment the condition for revocation of endowment so we will deal with foremost ones:
1- The unilateral nature of endowment contract: Khansari considers the unilateral nature of endowment contract as the condition for revocation of endowment and argues that whereas the unilateral contracts do not survive thus there is no option applicable to them. Since option needs to the belonging object therefore if endowment is assumed as a unilateral contract so option is not applicable to it. [26]

Imam Khomeini (RAH) is one of Islamic jurists who have resorted to this reasoning. In addition to his detailed explanation, he implies that option is not applicable to endowment since it is a unilateral contract while nature of endowment is confinement of original property and releasing the relevant benefits. There is no difference among special and general endowments in this regard since in both of them endowment does not need to acceptance and if we say special endowment and or the endowment absolutely needs to acceptance such acceptance does not lead the endowment to be a contract among endower and the beneficiary of endowment but this acceptance is proposed because there is no possibly for ownership of benefit without acceptance by coercion. However, we may say possession of benefit in endowment is the same as ownership of object in coercive inheritance. In any case, if we say endowment needs to acceptance or not, the endowment is a unilateral contract and it does not survive; therefore, the option condition is not applicable to it. But if we agree endowment as a contract and of those contract which survive normally and legally as a result option is not applicable to it. [27]

Ibn-e-Edris, Abu Jafar Mohammad Ibn-e Mansur Helli was the first one who started critique about juristic issues said:

One of the conditions for authenticity of endowment is that term of option is not applicable to it; namely, endower does not determine any right to himself for revocation of contract and if he did so the endowment is annulled. This comment is the proper one among Shiite jurists.

According to attitude of Ibn-e-Edris, the proper comment which was taken by Shiite jurists is in that term of option causes annulment of endowment. [28]

2- Mutual incompatibility of endowment to suspension: It may be implied that the condition of option for revocation of endowment may lead to suspension of endowment as it requires and doubtlessly suspension in contract caused annulment. Author of book of جواهر الكلام (Jewels of words) writes about reasons for annulment of such a condition as follows: ‘But, condition for revocation of endowment (if requires) is the suspension of contract. Thus such a condition is null and void because it leads to suspension.’ [29]

3- Contradiction to requirement of contract: One of the reasons for annulment of term of option is revocation of endowment under necessary circumstances in contradiction of this condition with requirement of contract. It is perfectly obvious that the contradictory condition to requirement of contract will be deemed as null and void according to attitude of rational experts and holy Sharia. Owner of theory of annulment of option term have
deduced this condition contradicts to requirement of contract. Thus, endowment is null and void since it is accompanied to corrupted condition.

Sheikh-eToosi has assumed condition for revocation option as opposed to nature of endowment and considered any type of condition contradicted to natural requirement of contract or unilateral contract as cause of annulment for contract. [30]

Therefore with respect to the aforesaid issues as well as by analysis on other statements and relevant Islamic traditions and narratives, the authenticity of attitude of Ibn-eEdris will be revealed well. And according to this rule from which it was inferred in previous topics with respect to analysis of jurists that 'کل عقد یجری فیه الخیار، تجری فیه الاقاله' (Any contract to which option term is applicable, rescission will apply to it as well), which includes opposite concept and as a result wherever the option is not applicable then rescission will not apply too. So that given what it mentioned, term of option is not applicable to endowment therefore it will not be rescindable like marriage as well.

The Sharia legislator implies wherever revocation is of conditional type, the option will be also applicable to it and where the option applies to it, the rescission is applicable as well. It is a matter of fact that the option is applicable where the revocation is of conditional type and whereas revocation of endowment is of conditional type due to its specific nature thus option will not apply to it and if option is not applicable then rescission will not apply to it as well.
References


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