Study of Subreption Option in Marriage Contract in Iranian Civil Law

Ali Haghjoo and Omid Ghassemi

Department of law Science, Ahvaz Branch, Islamic Azad University, Ahvaz, Iran.

**ABSTRACT**

Subreption in marriage is hiding the defects or flaws of one of the couples with fraudulent practices or introducing him/her with perfect attributes that he/she is lacking. This issue is one of the most important topics associated with marriage that was investigated in this study. Research results revealed that the material and spiritual elements of subreption must be considered in the judgment of subreption. Also the results showed that in accordance with Article 647 of the Islamic penal code: "If any one of the couples deceives his/her partner with fake affairs such as having higher education, favorable financial status, social status, specific occupation and position, being single and the like before their the marriage and the marriage takes place based on any one of them, the perpetrator shall be sentenced to imprisonment from six months to two years." According to the jurisprudential theories, silence about the defects may not lead to the cancellation option. Also the results showed that if a third person colludes with one side of the marriage in subreption, in accordance with Article 1128 of the civil code the marriage can be terminated. In relation to the claim for compensation, the results also showed that whenever marriage is due to subreption, the deceived person can claim for compensation from the deceiver in accordance with the rules of civil liability.

**INTRODUCTION**

One of the most important topics on the subject of marriage are the applicable options of marriage that have been much discussed both in jurisprudence and in law and different views have been presented on different aspects of it. The second chapter of Iranian civil law is devoted to cancellation of the marriage contract and some rules are allocated to it. Complexities of social relations in the modern era with the rapid developments in various fields of life have had a direct impact on families and their different related issues such as: alimony, termination, custody of children, divorce etc. In this regard, many issues concerning marriage and marriage options are faced with the silence of the law and also no opinion has been provided by jurisprudence or in some cases contradictory opinions have been suggested that were discussed in this research.

In accordance with Article 438 of the civil law, subreption is the action that leads to the deception of the correspondent. In terms of jurisprudence, subreption is a kind of misrepresentation to suggest that something is perfect or hiding what causes a defective look Researcher Helli, Religious laws of Islam.

Subreption elements:
A) Material element: material element consists of functions that can be accomplished through writing, speech or other tricky tasks such as providing fake evidences which can be recognized by customs. Perhaps ethics is intolerant of the slightest lie or exaggeration, but the fact is that the law is less stringent in this case and does not consider any lying or untrue statement as the reason for using options. For example, exaggerating about a girl in her being an artist or her being chaste is quite a widespread and common matter in proposing rituals. But tradition does not regard this exaggeration as subreption and so the man cannot use the subreption option in this case [8].

Also custom has not the same arbitration in this context in all times and places. For example, in a course in the past, it was subreption for the girls to redden their faces or use makeup, but today such things are common.
B) Moral element: The moral element means that the carried out actions should be intentional and accompanied with bad intentions that is the individual has the intention to deceive the other one. Surely, civil law has no decree in this context but it seems that the concept of deception does not realize except when done deliberately.

**Key words:** subreption, marriage contract, civil law, jurisprudential theory, third-party.
The more precise meaning of subreption in marriage is set forward in Article 438 of civil law which states that subreption is hiding the defects or flaws in one of couples or introducing them with a character of perfection that he/she is lacking. So that the man untruly introduces himself as someone with a great wealth or a high position or gives a false certification to feign himself as a bachelor or a doctor and hence make the other one accept his proposition to marry him or the woman untruly introduces herself as being talented in music, sewing or cooking or being a virgin and in this manner makes the man marry to her, but after marriage it becomes evident that the person lacks the intended characteristics or she/he has had a flaw that she/he were hiding with his/her deceptive action [7]. In this case, the deceived one has the right to cancel the marriage. But if the man or woman has been aware of the absence of a particular feature before marriage, but married to that person then the right to cancellation is void. Because its existential philosophy is to prevent from losses and in the latter assumption the exercise of the right of cancellation is not possible based on the principle of action. In the civil rights, subreption is basically not among the defects of consent and that is why it would not cause the invalidation or lack of validity of the marriage. Anyone who has been cheated can cancel the marriage to prevent from furthur losses. Unless the mistake due to subreption is to the extent that it makes the will defected which makes the marriage void according to the law. Mistakes about the character of the person to marry renders the marriage void when the cheated person marries with anyone other than whom she/he intended to marry. But the wrong qualities of spouse, even if important are not effective in the validity and authenticity of the marriage. So, if due to disguisement or other deceptive practices, a man who wants to marry a girl, marries another person, then this marriage is void because subreption has been effective enough so that what has happened in the outside world has been different with the intention of that man [5]. There are two opinions among the jurisprudents. Some jurisprudents argue that there is no subreption option in marriage. The other group says that subreption leads to cancellation option. According to the ideas of these groups, there are some hadiths in this case, but because these hadiths conflict with the previous hadiths, they are both void and the intellectual rule requires the subreption option to be exercised. So if after the marriage, it turns out that the husband is unemployed, then we must see whether unemployment can be considered as a flaw or not. If it is deemed as a flaw, even if the couple is content without it (salary), it is also considered as subreption [4]. In the case of virginity requirement, the legal department of the Judiciary has stated in its document no. 76.7.21-4124.7 that: “About a couple married with a virginity requirement, if it becomes known after the marriage the wife had had sexual intercourse before marriage, even if the hymen is intact and available and of the ring- type, the man shall have the right of cancellation, because the purpose of virginity is primarily to show the status of intercourse. So firstly, if defloration is done reluctantly and due to rape; it will be ineffective in this matter and the husband will have right to cancel the marriage. Secondly, if defloration has occurred due to disease or falling from height etc. with the unawareness of the girls or her family, these conditions have no effect on the rights of the husband to cancel the marriage” [1].

Enforcement Conditions of Subreption:
Subreption can terminate the marriage if it has these two conditions:
1 – It causes deceit for the partners of the marriage: Namely, it is obvious that if it is not for the subreption, the other partner of marriage will not be willing to compromise. So if a man wants to be married to a girl and she falsely ascribes some attributes of excellence to herself to strengthen the men in his decision, then subreption has not been realized, because the man had intended to marry her before that and therefore no deception has occurred.
2- The subreption maker is a marriage party: In cases where subreption leads to mistakes in marriage, the marriage is already void. Because if the will weakness results in cancellation of marriage, it does not matter which side of the marriage or a third party causes the flaw by his/her deception.

Civil law has accepted the same opinion about the reluctance and states in Article 203: "Reluctancy prevents the transaction from occuring, although it is due to a foreign person other than the parties.” But subreption with the meaning mentioned in the civil law for the options, is not a defect of the will. The legislator has determined its punishment as giving the right of cancellation to the relevant party of the contract and thereby wanted to compensate the caused losses. So, one should compensate for losses who has caused them. If a third party commits the subreption, according to the fault he has committed and the losses he has incurred, the party to the contract cannot be condemned by the cancellation of the contract. Article 439 of civil law also agrees with this notion apparently because it states: "If the vendor commits subreption, the customer will have the right to terminate the sale and this is also true for the vendor towards a certain price in case of the customer’s subreption” However, it should be known that for realization of subreption, the deceptive practices should be done by a person party to the transaction and as soon as he notices this, the subreption has been done, because the causation has been created between the losses caused and the works done. [5] It seems that in addition to the above issues, getting married in this way (deception) should also be added in order to terminate it. So if the fraudulent and deceptive operation is conducted, but does not lead to a contract, there will be no right to terminate rationally and logically and perhaps because of its obviousness, some have not mentioned it among
the components or elements of subreption in marriage. Finally, in addition to civil sanctions (the right to terminate and claim losses based on civil liability and lack of entitlement to dowry or refunding it) the legislator has prescribed some criminal sanctions to prevent the subreption. According to Article 647 of the Islamic penal code: "If any one of the couples deceives his/her partner with fake affairs such as having higher education, favorable financial status, social status, specific occupation and position, being single and the like before their marriage and the marriage takes place based on any one of them, the perpetrator shall be sentenced to imprisonment from six months to two years." According to this article only the couples will be sentenced to the mentioned punishment in case of subreption and if a third party commits subreption, he can be prosecuted because of assisting in such a crime.

Theories of Defect Silence in Subreption:
A question that arises is that if there is a handicap in one of the parties (except for handicaps in Articles 1122 and 1123 of civil law) and its owner does remain silent about the handicap, that is say nothing about his/her handicap positively or negatively, is this considered as subreption? Langroodi (1999) considers absolute silence about the handicap as subreption and says: “Silence about the handicap of wife or husband is also regarded as subreption and it may be verbal or caused by omission”. Emami [2] does not consider the silence about the handicaps as the cause of cancellation option. According to them, "Whenever there is a defect in one of fiancés that is not considered as defects causing cancellation option and the other partner or the critic persons do not express their criticism of the marriage, this is not categorized as subreption.

Also whenever one of the fiancés or the person causing the marriage to happen visualizes a perfection characteristic in the other person, but remains silent with the knowledge of the existence of the mentioned characteristic and awareness about his/her partner’s imagination [2] that is separable. Safai [7] believes that if there is a critical defect for example, the spouse has an artificial eye or leg and with the awareness of that defect, the marriage may hardly occur, as some jurisprudents have emphasized, the silence about it can be considered as subreption. In fact, the deceptive practice that is considered as subreption may be a positive or a negative action and must be based on customs and habits in such a way that leads to deception and willingness to the marriage [7]. The latter opinion seems to be more rational. So whenever there is a defect in one of the parties which cannot be neglected normally and habitually, the right to terminate is reserved for the other party and otherwise, i.e. if there is a defect which can be habitually neglected and the other party of the marriage remains silent about it, the other party shall have no right to terminate, anymore. A jurisprudential opinion: Imam Khomeini suggests that silence about the defects does not cause the cancellation option.

Subreption by a third party:
Whenever subreption is made by a third person, as a parent or a matchmaker mentions some untrue qualities for the husband to encourage the other person to marriage, will the deceived person have the right of cancellation? Civil law is silent about this. Some law professors have suggested that subreption of the third party can lead to the right of cancellation. But this opinion can be criticized because: 1- Marriage termination has exceptional aspects and it should not be extended to the suspicious cases. 2 - According to Article 439, it is understood that subreption can lead to the right of cancellation only when it is conducted by one of the parties to the contract. 3- It is inferred from Article 1128 of civil law that if subreption is in such a way that the alleged attribute is not explicitly or implicitly stipulated in the contract and has not mutually agreed upon, or the parties are not sensitive to its existence, there will be no right of cancellation. Thus, if a third party has cited a perfect quality for one of the marriage parties or had concealed her/his defects fraudulently without his/her knowledge or fault and thereby succeeded in drawing the consent of the other party for marriage, the marriage cannot be deemed as terminable. 4- Termination of marriage due to subreption of a third party may be detrimental for the other spouse; therefore it is not fair to see that the spouse who has not committed deception and is not guilty suffers marriage termination losses due to subreption of a third-party person. 5- The interests of family and society require that the marriage cancellation cases should be limited as much as possible. Based on the foregoing discussion, it is concluded that if the third party has colluded with a party to the marriage in subreption, the marriage can be terminated. Because in accordance with Article 1128 it can be said that the certain attribute that one of the spouses is considered as qualified with it untruly has been implicitly entered into this realm and the occurrence of marriage was based upon it. So if there is no collusion between the third party and a party to the marriage, there will be no right of cancellation due to the above-mentioned reasons [7].

Claiming Compensations:
Whenever a marriage is caused by subreption, according to the rules of civil liability, the deceived can claim compensations from the subreption committer, whether subreption committer is one of the spouses or a third party member or the spouse of the deceived uses the right of cancellation or not. So, whenever the husband gets married to a non-virgin woman due to subreption and may not or cannot use the right of cancellation, he can take the differences between dowries of virgin and non-virgin from the subreption committer as the
compensation and if he has not paid the dowry and the subreption committer is the wife, he can deduct the balance from the dower and pay the rest to the woman. Suppose that a husband has been deceived by the woman and the marriage has been occurred due to subreption and they had intercourse, then the man becomes aware of the subreption and terminates the marriage. Can he get back the dowry he has paid her or refuse to pay it to her in case he has not paid it to her yet? We know that after the intercourse, the wife becomes entitled to the whole contract or the contract is basically receiving at a ces. After the termination of this marriage due to subreption, the husband can withdraw the woman's dowry as his own compensation or if he has not paid it yet, he can refuse to pay it (according to the clearing rule). Some of Imamiye jurisprudents have also agreed to this and some have claimed the least dowries for the women in this case. Some suggest that the least thing that can be called a property is given to the woman and the rest is returned to the husband. This is the famous opinion of Imamiye jurisprudents which is based on the argument that vaginal intercourse is respected and should not be carried out with no dowry and because the text has been provided with reference to the subreption committer, it should also be respected but since the text is contrary to the original orders, it should be ensured that the implementation would suffice [7]. Katoozian [5] also argues that in determining the spiritual losses, all the emotional and physical damages and pleasures should be taken into account and the court must consider all the circumstances and situations of the case to determine the amount, quality and the method of compensation. Also about the dowry "because the man is supposed to take the responsibility of the dowry to maintain the marital relations, so what he pays is the loss incurred by subreption and can be repaid by the subreption committer [5].

The relationship between subreption option and violation of the attribute condition:

Subreption option has not been mentioned in the civil law, but in the jurisprudence, subreption or deceiving are some causes of termination of the marriage and using provisions of Article 1128 of civil law, some masters like Emami and Shayegan have inferred the existence of subreption option for the deceived spouse. According to this article "Whenever one of the parties should have certain traits and after marriage it turns out that the mentioned person has not had the intended describing, the other party will have the right to terminate the marriage, although the above description has been stipulated in contract or the contract is basically formed on it. The rule of the mentioned article relates to the option of condition violation, that is whenever the couples require an attribute for their partner explicitly or implicitly, the lack of that attributes in him/her results in the right of cancellation for the other partner. But because in subreption, one of the two parties pretend to have an attribute intended by the other party and deceives him/her in this way; The result of his/her fraudulent practices is that a partner incorrectly believes that his/her future spouse has the intended characteristics. So whenever it becomes known that his/her notion was false and her/his spouse lacks the mentioned description on which the compromise was based, he/she shall be entitled to terminate the marriage. In other words, in subreption assumption, the spouse lacks the mentioned description on which the compromise was based and in this respect, it is like the violation of attribute condition. So the legal documentations of subreption option and violation of the attribute condition are the same and both options are created around Article 1128.

REFERENCES