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CRITICAL STUDY OF THE THEORY OF SETTLEMENT CONTRACT'S FORMALITY IN COMPULSORY REGISTRATION CASES IN IRAN'S LAW

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ABSTRACT

In paragraph 2 of the article 47, the real property law realizes compulsory the registration of settlement contract that is commonly enumerated amongst the consensual contracts and it stipulates in article 48 that the sanction for such a compulsion is the "unacceptability" of the ordinary settlement contracts. As for the way such unacceptability is defined and interpreted, there are numerous discrepancies between the jurists. Some present reasons supporting the formality of such contracts and believe that no contract is essentially formed in case of not registering the settlement contract and the other transactions whose registration is compulsory. The present article makes use of a descriptive-analytical method and performs searches in library resources to criticize, investigate and assess the aforementioned perspectives. The result of the investigation indicated that considering of a formality nature the contracts whose registration is compulsory, including the contracts of settlement, though appearing consistent with the visage of the articles of real property law, is distant from the other jurisprudential and legal foundations of Iran's laws hence it seems that the formal registration of these contracts has been specified as the only condition for settlement contracts to take effect.

Keywords: *Contract of Settlement, Formal Deed, Ordinary Deed, Compulsory Registration, Styled Contract.*

INTRODUCTION

From the perspective of the civil law, there is no need for any formalities for a settlement contract to be formed; but, real property law adopts different approaches thereto. Corresponding to article 47 of the real property law, "the registration of the following deeds is compulsory in spots wherein there are instruments and landed property registration departments and the ministry of justice knows it expedient:

1) The entire contracts and transactions pertaining to the objective immovable properties and their interests that have not being recorded in notary public offices;
2) Contracts of settlements, deed of gifts and deed of partnership."

As it can be observed, the beginning part of the article 46 explicitly reminds of the voluntary registration of the documents and deeds and the article 47, as well, proposes the optional nature of the document registration stated in the above two by exemplifying the cases for spots that are not included by the expediencies of the ministry of justice or there are not any notary public offices in them. Therefore, the freedom of will and contractual freedom and deed arrangement freedom have been explicitly stated. However, the examples of optional registration are practically very few with the development of the instruments and landed property registration departments and it is included by double exception (excluding the majority from what has been

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excluded) that is considered incorrect by the majority of the canonical scholars. In supplementing the verdict stated in the foresaid article, article 48 of the real property law expresses that "the deed supposed to be registered corresponding to abovementioned articles but has not been registered cannot be accepted in any of the offices and courts". Regarding the extent of the sanction mentioned in article 48 of the real property law, there are many disputes between the jurists the origin of which has to be sought in demonstrative or confirmatory nature of informal deeds' unacceptability. Amongst these notions, the perspective granting the formality of the compulsorily registerable contracts is more prevalent and, thus, the present study only evaluates and investigates this same perspective. To do so, the foresaid perspective will be seminally explicated and it will be next criticized and investigated.

Paragraph One: Explication of the Theory

The proponents of the formality of the transactions the registration of which is compulsory, such as the sales of the registered properties or contracts of settlements and deeds of gift, announce that the civil law puts forth the substantive conditions of the contracts in articles 190 and 339. However, there are regulations of the imperative form added to the substantive regulations in real property law following the lead of the civil law and assuming the real property law rule-maker's knowledge of the civil law. Thus, despite the consensual nature of the contracts and contractual freedom and the expediencies of the volitional accuracy and governance and the influential of the internal will, the real property law has enacted the general civil regulations and added formalities thereto (Katouziyan, ٢٠٠٦, p.37). The followings can be pointed out amongst the reasons that have been mentioned for this perspective:

A) The statutory provisions of article 22 of the real property law speak of an imperative axiom against the government, courts, third parties and even owners and the nullification of the objection right in article 24 of the real property law is indicative of the possibility to prove its opposite by any person for any reason (Asgharzadeh Bonab, 2012, p.52). In other words, the exclusive ownership as considered by the government and the court is the formal ownership and any informal possession of the registered properties and the compulsory examples of the transaction registration is hence considered unacceptable by the government and the courts.

B) Contents of the article 10 of the civil law, indicating the contractual freedom and the necessity and accuracy of transactions, have been suspended on their lack of opposition to the imperative rules and there are opposite imperative rules in the conveyance of the registered properties or such transactions as settlement and gift the registration of which has been rendered compulsory. Therefore, any agreement against the aforementioned imperative axiom cannot take place or be actualized (Katouziyan, 2009, p.73).

C) The exact wording of the articles 46 to 48 of the real property law forms the legal foundation of the compulsory registration of real properties' transaction deeds and considering these texts, any expression of ideas opposite to them is a contradictory exegesis. The prohibition of accepting the informal deeds, as stated in article 48 of the real property law, is not solely obligational rather it possesses a situational effect. Thus, implying the prohibited cases' invalidation and, in this sense, the invalidity of the ordinary deeds and informal proofs has no effect on their occurrence and no role in the justification of their occurrence (Amini, 2009, p.224).

D) The general spirit of the real property laws as well as the philosophy and objective of all the real property laws is preserving ownership and guarding the owner' rights and public order of the transactions and their fortifications. Based thereon, any interpretation in conflict with the legislator's objectives and the underlying cause of the law enactment is an incorrect and unacceptable interpretation. That is because the public order of the transaction that is per se an example of the country's legal order and the specific subject of the imperative regulations stipulated in real property laws entails observance and attentiveness and valuation of the formal deeds and requires unacceptability and giving effect and value to the informal deeds and transactions and the nonadherence thereto disrupts the judicial and economical order of the country (Forati, 2013, p.106).

E) The procedural unity verdict no. 43, issued at 08/01/1972, by the country's Supreme Court indicates the impossibility of the ordinary deeds' contradiction of formal deeds. This verdict is the accurate and reasonable interpretation of the contents specified in article 117 of the real property law and indicates that the ordinary deeds cannot be by itself offered to a court hence it cannot be considered as a proof and the thing that is not per se a proof cannot be accepted and it is not the case that is firstly accepted and then rejected in the course of trial (Ibid).

F) Requiring the administrative and judicial authorities to the acceptance and putting into effect the contents of the formal deeds of the registered properties' transaction in article 73 of the real property law and prohibiting them from not authenticating and putting them into effect and prescription of general and disciplinary punishments and civil liabilities for the perpetrators of the crimes and transgressions specified therein is indicative of the unacceptability and prohibition of authenticating the contracts and deeds in conflict therewith; and, non-substantiation of the formal deeds might be actualized through validating the informal contracts or deeds.

G) The requirements for the occurrence and actualization of a contract and transaction endorsed before the notary public and in the course of composing a formal deed are contents of articles 46 and 47 and 48 of the real property law signifying the necessity for substantiation and justification before the notary public and summation of the substantiation and justification within a formal deed. "Composition" of a deed through "declaring the news of" a contract's occurrence is not usual and reasonable (Ibid, p.109). Also, if the deed is found only of a justificatory nature, the use of "deed arrangement" is not correct because the various articles of the real property law, including articles 1 and 18 of the law on the public notary offices, explicitly distinguish the "composition" and "registration". Furthermore, what is the purpose of expressing "the entire transactional contracts"? If it was the goal, the legislator could have put the stress on "deeds" or the terms "the entire" and "all types of deeds" should have been highlighted. In other words, according to the specific characteristics of deeds possessing the ability of concomitant summing the substantiations and justifications of a legal action, it has to be stated that the unacceptability of the transactions that have to be compulsorily registered formally (like settlement, donation, sale of registered immovable properties and others of the like) could have been included by the substantiation and justification aspects as a subsequence of which the contract of interest could not essentially come about in the realm of law.

It has to be stated in summary that the proponents of the perspective believe that the formalities of signing transactions that are to be formally registered are necessities added to the substantive pillars of these contracts and no legal entity comes to existence without their actualization and there is no need for justification assuming no creation of any legal entity. Therefore, the entire informal deeds, including the ones included by article 10 of the civil law, cannot be in conflict with the formal deeds and the unacceptability introduced in article 48 incorporates both the justification and substantiation aspects as a consequence of which proving using other proofs is also rendered prohibited and refuted.

In other words, the compulsoriness of registering transactions has been documented in article 22 of real property law, of course not explicitly but based on requiring implication, for such a reason that no lawsuit against the formal ownership can be accepted and the instruments of conveyance are against article 22 if they take place and are actualized ordinarily; that is because their occurrence and actualization is accompanied by certain effects and results which are not enforceable unless the public notary offices' books and journals are changed in their entries. On the other hand, the compulsoriness mentioned above can be documented based on articles 46 to 48 of the real property law as well as some other articles expressing the methods of conveyance and the way of deeds composition and registration.

Now, the question is that whether the legislator has predicted the exceptional cases of the abovementioned articles or has he prescribed the documented methods of conveyance or ownership transferring of a formally registered or pseudo-registered deed or not? Conveyance is sometimes voluntary and volitional and it can be inferred from or actualized by the contracts and transactions necessitating the transferring of certain deeds and the legislator has stipulated and underlined it in articles 46 and 47 by stating "the entire contracts and transactions" and all the contracts and transactions are not only extend beyond the conveyance contracts but also encompass non-conveyance contracts such as the styled and promissory contracts as well as everything that is pertinent to the objective properties, interests and rights, either registered or pseudo-registered. Besides, the contracts and transactions embrace preemption right and preemptive division and others of the like or even separation and isolation and these two have their own specific laws and it is even repeatedly underlined in articles 33 and 34 regarding the deeds of transactions for which restitution right, conditional conveyance and mortgage conveyance have been reserved. It is even the case that the conditional sales have been excluded from being characterized by a civil law nature and they are pinpointed as being of the mortgage type (Katouziyan, 2001, p.315). And, because it is stipulated that writ of execution can be exclusively issued by the public notary offices, it becomes clear that its registration and composition is at the sole discretion of these offices otherwise the issuance of a writ of execution for a deed that is not drafted and registered in a public notary office is improbable. As for the promissory contracts, besides their being essentially included by the general topic of the above provision, the thing that is the introduction to a formal conveyance deed or a styled contract has to also be considered obligatory, formal and compulsory in regard of the shared necessary introduction. Thus, not only the sales and settlements and rents but also the mortgages and installment sales and civil partnerships and agency and so forth are to be compulsorily registered hence only acceptable through formal deeds.

The transferring and conveyance are also sometimes involuntary and compulsory which is of two types: the transferring is sometimes notary and judicial that is not outside the inclusion circle

of the voluntary conveyances in which the notary or judicial authorities signs the contract in lieu of the owner and it is also sometimes as ordered by law that directly sentences the invalidation of certain documents and deeds like the invalidity of selling endowed properties in which case the owners' deeds are invalidated and the ownership deeds are directly issued to the names of the individuals intended by the legislator and the law's verdict sometimes requires the conveyance of deeds such as the governmental ownership plans and/or military projects or the ownership of the urban lands and this is very much like the executive conveyance examples pending over the composition of deeds. As for inheritance, when the legislator accepts the hereditary succession regarding the landed properties and confirms the possibility to register the property to the name of the inheritors and issuance of ownership deeds for their share amounts of the property and does not require the registration of the property under the name of the (deceased) legator, he will surely come to accept the ownerships after the registration of the landed property and the issuance of deeds.

Now that it is known that conveyance requires its instruments and the ownership transfer requires its reasons and factors of change, it has to be reminded that the conveyance is first of all not inferred from its justification proofs and secondly the entire contracts and transactions included by the aforementioned articles should be formal. The legislator's intention is deduced if articles 46, 47 and 48 of real property law are compared with the article 9 of the same law. Article 9 of real property law knows it necessary for everyone to register landed property's conveyance and this is the inherent and preliminary of the landed properties and instruments registration department that personally takes measures in line with doing so and the agreement or disagreement of the owners cannot prevent it from fulfilling its duty. The owner's lack of taking actions in line with registering the conveyance of property deed will be followed by consequences for him or her in which case the property will be registered as having an anonymous owner or s/he will be sentenced to the payment of heavy pecuniary punishments and/or s/he will be inhibited from entering any transaction before getting done the registration operation. And, finally, the outcomes of property registration have been summarized and exemplified in article 22. The registration of property features objective and subjective values and ownership in its general sense is considered authentic and formal by the government. Now, can it be expressed that the legislator has fallen short of issuing verdicts regarding the conveyance, transfer instruments or factors giving rise to change, omission and invalidation of ownership? If the articles 46 and 47 are envisaged solely justificatory and only serving the justification; what would be the case for the transfer instruments? Why the "justificatory reason" of the conveyance, and that in a formal and compulsory manner, has been expressed before first determining the whereabouts of the conveyor? This is while the legislator has made the conveyance and its instruments before property registration clear and the occurrence and substantiation and the ordinary proofs thereof have also been expressed and certain obligations have also been approved and the way each can be put into effect have also been specified and the notary public office's method of intervention in the process of the preliminary registration operation has also been stipulated, could have he left unnoticed or ignored the "conveyance instrument" after the registration of property as well as the conveyance justification proof after the property registration? As it can be observed, before the determination of the justificatory proofs' situation, the instruments' status has to be clarified; moreover, the discussion does not exclusively pertain to sales, settlements and conveyance contracts and the issue also incorporates

the promissory or styled contracts, as well, and it encompasses "any deed pertinent to registered and pseudo-registered specific properties, their interests and rights" which is found ambiguous and worthy of summarization. It is iteratively stipulated in articles 33, 34 and 35 that there are special regulations for the separation, isolation and division in regard of mortgage and conditional contracts with the restitution right and so forth claimable from a public notary office. Such issues as conveyance and change in the entries of public notary offices, the outcomes of property registration and the credibility and persistence and continuation of formal ownership have also been proposed. The conveyance instruments can cause conveyance and the change reasons can bring about changes and the justificatory proofs do not have such efficiency. Thus, articles 46 and 47 pertain to this same issue. And, the justificatory proofs' issue comes next to the possibility of substantiation. The discussions on justificatory proofs and formal, ordinary, compulsory and optional nature of justificatory proofs are worthless unless the substantiation is authorized in a compulsory and formal manner. The collection of real property law clearly elucidates that the legislator's focus of attention is on substantiation followed by justification (Forati, 2013, p.124). On the other hand, assuming that the legislator has fallen short of proposing substantiation and he has only willed the justificatory discussions, can't the legislator's confession, testimony and vow and knowledge be considered as proofs of justification? In other words, in case that the law has only paid attention to the justificatory aspect and not the substantive aspect, there is still this ambiguity and shortcoming that why he has only dealt with deeds and only rejected the ordinary deeds. Why and for what reason should not the ordinary written deeds endorsed by the parties, possibly with their handwriting, be accepted wherein confession has been granted? And, if he only intended the justificatory proofs, why has not he enacted and forged the necessity of decisive and exclusive and final reasons? Why has he only predicted formal and compulsory reasons? Should he be always seeking for the discovery of corruption and violation? And, should he always be exposed to invalidation and the appearance and entrance of oppositions?

The answer to all these questions can only be found through knowing of a formality nature the transactions that are to be compulsorily registered (such as settlement, donation and sales of landed properties). Hence, it has to be stated that the legislator intends expression of conveyance instruments in his declaration of the formal and compulsory nature of these contracts and transactions and he is not seeking to explicate the justificatory proofs because formal and compulsory confession and testimony are meaningless in this sense hence barring the subject from exerting its effect. Deed is the only reason amongst the other proofs that features the special privileges of concomitant justification and substantiation. So, it is stated that the deeds are valuable upon the occurrence of discrepancy as compared to the other proofs in that they are composed by the contract or transaction parties with their own hands and voluntarily or by the guidance and supervision and endorsement of a formal authority and before the occurrence of debate and serve the prevention of conflicts and predict solutions and sanctions for the contingent cases.

Paragraph Two: Criticizing and Evaluating the Theory

The reasons posited regarding this theory are rejected by the opponents who have opined objections thereto, including the following: in this theory, the consensual nature of the contracts and the jurisprudential and legal authenticity and history of the civil law have been ignored and the consensual contracts are deemed of a formality nature; adding a condition for the

actualization of the legal nature is against the generalities and entails an explicit text of the law (Shahidi, ۲۰۰۸, p.61).

On the other hand, the article 48 of the real property law, in its appearance, only disapproves ordinary deeds while the necessary condition for considering them as being of a formality nature is invalidation of the ordinary transactions and deeds and no such a concept can be perceived from article 48. Therefore, transactions with no arrangement of formal deeds are not invalid considering the expediencies of the civil law; because invalidation requires a specific text of law (Ibid). Moreover, the proofs regarding the ultimatum nature of the other justificatory proofs, as well, like the confession by the intellectuals, are absolute. The confession is accompanied by certain outcomes and the confession of a person who has uttered the actualization of a transaction cannot be considered devoid of effect (Ja'afary Langrudi, 1999, p.89).

Obedience to the objectives of the registration law legislator and satisfaction of the numerous requirements intended by the legislator and the community does not entail knowing the registration as a prerequisite to the occurrence and actualization of transactions and the objectives and requirements cannot be accomplished without because the society's practical procedure and the necessities of collective life are going on quite contrarily to this perspective (Salehi, 1996, p. 63).

However, it cannot be denied that the theory maximally matches the registration law and the results obtained thereof are correct from the perspective of landed properties' registration perspective. But, it is not as eloquent in interpretation and analysis of the real property law and the specifications of articles 46 and 47 are particularly considered unclear and implicit. As it was mentioned, the analysis only pertain to the registered properties and examples of article 46 in which case it has to be envisioned imperfect and the compulsory examples of article 47 are similar to examples of article 46 since the date the compulsory nature was annexed hence it was named pseudo-registered herein. In regard of these examples, the "scarcity of the reasons" and "the absence of special effects resulting from registration of a landed properties" in their composed deeds have to be reminded again and the remaining examples do not differ so much with the ones exemplified in article 46 and they are rather similar.

CONCLUSION

From the perspective of the civil law, contracts of settlements are enumerated amongst the consensual agreements but the articles 46 and 47 know compulsory the formal registration of these contracts along with such other contracts as deeds of gift, partnership contracts, sales of registered immovable properties and so forth. Paragraph 2 of article 47 pertains to the compulsory registration of settlement contracts, deeds of gift and partnership. Besides the foresaid cases, it is also pertinent to the "unregistered immovable properties" and "movable properties" rights. That is because if the verdict presented in paragraph 2 is attributed to the verdict issued in paragraph 1 of article 47, it is first of all contradictory to the general and overall appearance of paragraph 1and it has to be stated secondly that the legislator has repeated the same verdict which is a redundant and useless action and it was better if the aforementioned article stated "the entire contracts and transactions pertaining to the superstructure or interests of immovable properties that have not been registered in public notary offices, especially contracts of settlements, deeds of gifts and partnership". With such an interpretation, the paragraph two of article 47 will be no longer needed. But, now that it is expressed in two

separate paragraphs, paragraph 2 of article 47 can be correctly interpreted with knowing it inclusive of the prior text and movable properties. In other words, the subjects of contracts of settlement and deeds of gifts can include movable and immovable properties and the latter additionally includes the registered and unregistered properties.

As for the aforementioned transactions' documents compulsory registration sanction, article 48 of the real property law states that "the deed that had to be and is not yet registered corresponding to the abovementioned cases cannot be accepted in any of the offices and courts". The reason why the legislator has not accepted only the informal deeds is that, firstly, the real property law is superior to the civil law and the third volume of the civil law had not been approved in regard of the claim justification proofs up to 1935 and the justificatory proofs did not practically exist except the ones the real property law legislator had dealt with and stipulated. Thus, there had not been any other substantive and indispensable law authorizing and specifying the substantiation proofs so that there could have been any doubt the repelling of which be envisaged obligatory by real property registration legislator; so, if there were any doubtful grounds, they would have been resolved. Second of all, the summation of signifier and signification is only possible in a deed. There is no chance for them to be summed up in other proofs (confession, testimonial, vow and so forth). Therefore, the legislator had found the ordinary deeds as doubtful hence rejected. However, there has come about many debates between the jurists regarding the extents of the sanction put forth in article 48 of the registration law the origins of which should be sought in the discussions on whether the "ordinary deeds' unacceptability" is justificatory or substantive in nature. The proponents of the formality nature of the transactions that have to be compulsorily registered, like sales of registered properties or settlement contracts and deeds of gifts, assert that real property law has stipulated the general civil statutes and added formalities to them, despite the consensual nature of the contracts, contractual freedom and expediencies of authenticity and governance of volition and internal will influence. Because the legal presumption of article 22 of real property law is an imperative axiom against the government, court, third party and even owners and the revocation of objection right in article 24 of the real property law is indicative of the possibility of proving against it by anyone for any reason. Put differently, the formal ownership is the exclusive form of proprietorship as accepted by the government and the courts and any informal ownership of the registered properties and compulsorily registered transaction cases are viewed as unaccepted by the government and the courts. Also, the exact wording of the articles 46 and 48 of the real property law specifies that the legal foundation of necessitating the compulsory registration of the deeds is the transaction of the registered real properties and any expression of idea against the texts of these two articles is exegesis in opposition to the exact wording of the articles. Prohibition of accepting informal deeds as stated in article 48 of the real property law is not solely obligational and it possesses a situational effect. Thus, implying the prohibition case and, in this sense, the prohibition of accepting the ordinary deeds and informal proofs does not bring about any effect on the occurrence and plays no role in occurrence justification. The general spirit of the real property law and the philosophy and objective of the registration regulation are preservation of ownership and safeguarding the owners' rights and public order of transactions and solidification of them. Based thereon, any interpretation against the legislator's goals and the underlying cause of law enactment is deemed as an incorrect and unacceptable interpretation because the public order of the transactions which is an example of the country's

legal order and hence especially dealt with in the imperative laws of the registration law requires the observation and accreditation and staying attentive to the formal deeds and is in compliance with not accepting and paying attention and giving effect to the informal deeds and transactions; moreover, the lack of adherence to this order brings about disruption in the country's legal order and economical order. Requiring the administrative and judicial authorities to the accept and put into effect the contents of the formal deeds of the registered properties' transactions as specified in article 73 of the real property law and inhibiting them from not identifying the formal deeds and not putting them into effect and the enactment of the general and disciplinary punishments and civil liability for the perpetrators of the crimes and transgressions inserted therein are all reflective of the unacceptability of the deeds other than the abovementioned ones and lack of their taking any effect; furthermore, the lack of putting the formal deeds into effect might be actualized via putting the informal deeds and contracts into effect.

In opposition to these reasons, it has to be stated that the creation of legal nature is not essentially in need of formalities and the authenticity principle rules in case of doubts. The basics of every transaction are the very fourfold pillar mentioned in article 190 of the civil law and the justification of every condition and/or additional pillar or hindrances depends on the specifying legal text and such exceptions have not been proved regarding the transactions that are to be compulsorily registered, like contracts of settlements. So, formal deed has no role in the occurrence and actualization of the contracts and transactions of the registered properties. Article 48 of the real property law, as well, has not invalidated the transactions based on ordinary deeds rather it has only prohibited the acceptation of the ordinary deeds and such a lack of acceptance is directed at deed not transaction. Thus, the aforesaid article does not bar the acceptation of the ordinary deeds as a justification of ownership. But, the prohibition only includes the ordinary deed as a reason for justification and it does not include the other proofs. So, it is possible to also prove via other proofs as it is also opined by the Guardians Council that there is no limitation in use of such proofs as testimonial and confession against formal deeds and applying them against formal deeds in courts serving the justification of transaction occurrence is not faulty.

In other words, registration formalities play no role in the occurrence and actualization of contracts and it is the only condition that is not objectified for the actualization of contract and ownership transfer effect unless the condition (composition of a formal deed) is met. Such an interpretation is not only conforming to the jurisprudential and legal histories but it also corresponds to such titles as conditional sale or mere sale. Based thereon, the procedural unity verdict no.672 issued at 10/04/2004 by Supreme Court, does not signify the lack of contract occurrence rather it is interpreted as non-actualization and lack of effect of the contract. Thus, unlike the theory proposing the formality nature of the contracts the registration of which is compulsory, this theory speaks of substantiation actualization in which the result and effect are not actualized and the formalities have no influence on the substantiation.

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