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THE JUDGE'S POWER TO AMEND OR REVOKE THE CONDITIONS ASSOCIATED WITH THE MARRIAGE CONTRACT

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Abstract: The contract is the law of contracting parties. This rule is considered a key to the authority of the contracting parties in concluding the contract by setting the condition associated with it. No one else has the right to amend it, whether by adding, subtracting, or deleting from its clauses. This right is based on their individual will on the basis of the contract, and that marriage is considered one of the contracts in which there are two parties and they have The right to set the associated conditions stipulated by the Iraqi legislator in principle, except that every rule has an exception when there is a need for an exception, so the legislator gave the judge the right to amend the conditions in terms of deletion and amendment when implementing them is burdensome for the person stipulated, or there is a temporary impediment to implementing them.

Keywords: Judge, amendment, condition, marriage contract.

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Introduction

In accordance with the binding force of the contract, the personal status judge may not amend or terminate the marriage contract and the conditions associated with it. However, the legislator, for certain considerations and for the public interest, granted the judge in some exceptional cases the authority to amend or terminate the contract. Before talking about the judge's discretionary power, the concept of veto must be defined. And amending the conditions, as the legislator did not define the concept of rescinding a contract or condition, but it seems close to some concepts such as the concept of rescission. However, if rescinding a contract is similar to the case of rescission, including that rescinding a contract is related to a valid contract and leads to its termination, then they differ in terms of The reason is that annulment - as we will explain later - is a penalty resulting from the failure of one of the contracting parties in the marriage contract to carry out his obligations represented by the condition associated with it, while annulment of the contract is enabling the contracting spouse to terminate the marriage contract unilaterally. As for the purpose of amending the contract is to review some of the provisions and return Considering some elements of the contract by deleting a condition, adding another condition, or amending the obligations of the contracting parties or the conditions for their implementation.

The problem at hand is: What is the extent of the personal status judge's authority to grant a favorable review to the person stipulated in the marriage contract? Does he have the right to amend the conditions in terms of increase, decrease and amendment?

Therefore, we decided to divide the study into two sections. We devote the first section to clarifying the limits of the judge's authority to amend or revoke the associated condition. As for the

second section, we discuss the judge's authority to amend or revoke the condition in emergency cases.

The first topic

The limits of the judge's authority to amend or revoke the condition associated with the marriage contract

In principle, the personal status judge must adhere to the condition associated with the marriage contract as long as it is clear. Therefore, he may not deviate from the condition in a way that contradicts it under the pretext of interpreting the will of the contracting parties. It is not permissible for the judge to deviate from his ruling and amend the condition associated with the contract, especially if the terms of the condition are clear. Based on the legal rule that says (there is no justification for ijtihad in the source of the text), and there is no lesson for significance in exchange for clarity (1). Therefore, it is necessary to know the limits of the judge's authority to amend or revoke the condition when there is a reason that requires revocation or amendment, because the contract is the law of the contracting parties, and it may not be revoked or amended except by agreement of the two parties or for reasons determined by the law. If this is the general rule in contract theory, it also finds application with regard to amending or revoking the condition associated with the marriage contract. However, the judge has powers to amend or revoke the condition, and in order to achieve that, he has certain matters in which it is necessary to know the limits of the judge's authority, and here we discuss the judge's power to grant the debtor a favorable view of the condition. Therefore, we will divide this section into two questions. We devote the first to clarifying the judge's power to grant The concessionary view of the debtor is subject to the condition. As for the second requirement, we discuss the conditions and characteristics of granting the concessionary view by the judge, according to the following details:

The first requirement

The judge's power to grant the debtor a conditional consideration is a concession

The agreed-upon term and the legal term do not raise many problems from an applied standpoint, unlike the judicial term, which is called the concessionary view. Therefore, we will discuss the concessionary view in both Islamic jurisprudence and law, according to the following details: -

First: Definition of the facilitation view in Islamic jurisprudence:

The view of facilitation, or what is known in some legislation as the judicial deadline, is one of the rules organized by Islamic Sharia and decided upon by Islamic jurisprudence, so that Sharia is considered its historical origin, as it was the first to organize it and lay down its principles, and this happened more than fourteen centuries ago through texts The Qur'an and the Sunnah of the Prophet (2)

Where the view of ease is mentioned in the Holy Qur'an in the Almighty's saying: {And if he is in difficulty, then look for something easy. And if you give in charity, that is better for you, if you only knew}(3), and its meaning is that if the debtor is in difficulty, then you must give him respite until a time of ease. And if you believe it, that is Give alms to the insolvent by way of release (it is better for you if you knew), meaning it is good, so do it.(4)

Reference to the view of ease was mentioned in the noble prophetic hadiths, and among these hadiths is what was narrated that Abu Qatada, looking for a debtor of his, hid from him and then finding him, he said, "I am insolvent." He said: "For I heard the Messenger of God, may God's prayers and peace be upon him and his family, say: Who is pleased with him?" That God would save him from distress on the Day of Resurrection, so that he might relieve someone in difficulty or make amends on his behalf (5).

The evidence in this Prophetic hadith is clear on the legitimacy of working with a flexible approach and giving the insolvent debtor enough time to help him fulfill the obligation placed on him, and that the Messenger of God (PBUH) told us that in this work there is salvation from the distress and difficulties of the Day of Resurrection (6)

Second: Definition of the facilitation view in law:

The judicial deadline is one of the cases on which the judge relies to intervene in contracts by amending, and we find that most legislation stipulates a judicial deadline, and what concerns us here is the role that the legislator granted to the judge in this area, which is to amend the term agreed upon in the marriage contract, and to implement the condition associated with it. In departure from the principle of the authority of the will that dominates contractual relations, as long as the legislator takes the principle of the authority of the will within the limits of the law, public order and etiquette, the will of the two parties in the marriage contract and the condition associated with it is for them a law that must be respected and implemented, and therefore it is not permissible for any of the contracting parties to unilaterally By revoking the condition or amending it, rather they may do so by agreement, or for a reason determined by the law as an exception to (the rule of binding force in the contract). The legislator has given The judge has a positive role in granting a judicial deadline and amending the contract and its terms according to a recognized discretionary authority.

The general rule in the field of contracts and their conditions, and specifically in their implementation, is that as soon as the deadlines for implementing these obligations come, the contracting parties must implement them. However, the situation of one of the contracting parties may not be easy, so the legislator allowed the judge discretionary power to grant the debtor a judicial deadline to fulfill his obligation, and the judge may find himself not obligated. By granting the debtor that grace period, in the event that the debtor breaches the condition by fulfilling his obligation, the judge has broad discretion in light of the circumstances related to the case and in a way that serves the interests of the parties, to grant the debtor a deadline to fulfill his obligation. Likewise, if it becomes clear to the judge that the interest of the stipulated creditor is not affected as a result of this deadline, then the judge may grant the debtor a deadline to implement what remainder of his obligation (7), but this authority has limits. The judge may find himself not convinced to grant the debtor a deadline to fulfill the associated condition, and that is in cases, the most important of which is if it becomes clear from the circumstances and circumstances of the case that it is futile to grant him a grace period, because even if he grants the debtor a grace period to fulfill, he cannot fulfill it when That term.

The discretionary view is known in the law as the judicial deadline, and it is defined as the judicial deadline that may be granted to the debtor, under certain conditions, to fulfill his obligation that was difficult for him to fulfill, or it is the situation in which the judge considers the debtor to have a reasonable deadline to fulfill his obligation if his situation requires it (8).

It is also known as the grace period that the judge grants to the debtor who has bad luck if there are exceptional circumstances that call for clemency and alleviation of the harshness of the law upon him. If the deadline for commitment has come and the debtor is in difficulty due to exceptional circumstances and hopes that they will go away, the judge may consider it easy by granting him a deadline or deadlines, perhaps God may He gives him relief after his distress, on the condition that the creditor does not suffer serious harm as a result. This is one of the cases on which the judge relies to intervene in amending the contract and giving the debtor an additional period so that he can fulfill his obligation (9), which is the implementation of the condition associated with the marriage contract. If the husband violates In implementing the condition associated with the contract, the judge, after confirming that he is unable to fulfill the condition at the present time, and needs a deadline to implement his conditions, may grant him - then - a judicial period to prevent continuing to violate the implementation of the condition associated with the contract. An example of this is in a marriage contract if When concluding the contract, the wife stipulated that the husband be committed to the expenses of completing her university studies - since the wife was accepted into one of the private colleges - and when the university year of the second stage came, the husband, who was working in a factory selling imported clothes, became left-handed due to the issuance of a government decision to stop importing clothes temporarily, and the husband needed a grant. A period so that he can implement the condition. There is no objection to granting him a reasonable period if the wife has filed a lawsuit requesting the annulment of the marriage contract because the husband did not implement the condition associated with the marriage contract.

The second requirement

Conditions and characteristics of the judge's authority to grant discretionary discretion

The judge's discretionary power to grant a judicial deadline has conditions and characteristics, which I will mention in the following detail:

First: The legal conditions for the judicial deadline: For a judge to use his authority to grant a judicial deadline, the following conditions must be met:

1- The absence of a legal text that prevents granting a concessional review: - If the legislator grants the judge the authority to grant a concessional review, then the judge's exercise of this authority is only an implementation of a legal text imposed on him by the legislator. However, if the legislator does not grant the judge the authority to grant a deadline to the debtor, then it is not permissible The judge may grant the debtor a grace period similar to that stipulated in Article (178) of the Iraqi Civil Code. It is permissible to agree that the contract will be annulled on its own without the need for a judicial ruling in the event of failure to fulfill the obligations arising from it. This agreement is not exempt from excuses unless The contracting parties explicitly agreed that it is not necessary. In this case, the judge may not grant a deadline for payment (10), because the legislator prevented him from granting a deadline.

2- That the debtor's condition requires granting him a concessionary consideration: (11) and that the circumstances he is going through are what prevented him from fulfilling the conditions associated with the contract.

3- The creditor will not suffer serious harm from granting the concessionary view:(12).

4- The duration of the judicial period must be a reasonable period, that is, the judge may not grant the debtor - with the condition associated with the marriage contract - a long period to fulfill the condition, but rather the period is assumed to be reasonable and sufficient to achieve the goal of granting it. (13)

Second: Characteristics of the Maysara view (the judicial deadline): The judicial deadline has several characteristics, which are:

1- The judicial deadline is an exception to the general rule in payment stipulated in Article 394/2, which stipulates that (if the debt is not deferred, or its maturity has come, it must be paid immediately), meaning payment must be made immediately, so the authority granted to the judge Postponing the date of fulfillment of the condition agreed upon between the contracting parties when concluding the marriage contract despite the will of the creditor is considered an exception to the general rule of fulfillment. Likewise, Article (297) (14) of the Iraqi Civil Code stipulates that (if it becomes clear from the obligation that the debtor will not fulfill it except... When it is possible or feasible, the court sets an appropriate date for the due date, taking into account the debtor's current and future resources and assuming the diligence of a man keen to fulfill his obligation.

2- The judicial deadline from the public order; This is because the debtor is granted by the condition a judicial deadline and a favorable consideration in order to preserve the public interest, which makes it part of the public order. That is, the parties cannot rule out the possibility of the judge's intervention in granting this judicial deadline (15), and therefore any agreement on this between the parties in the contract is considered invalid.

3- It is permissible to rule within the judicial deadline without the need for a request from the debtor (the one on whom it is stipulated), meaning that granting this deadline falls within the discretionary authority of the judge of the matter, as he may see that the debtor's delay in fulfilling his obligation was due to his bad luck, as he encountered harsh circumstances that did not help him to fulfill his obligation. Fulfilling the condition within the specified period, even if there is a condition imposed by the contracting parties that makes the contract void On its own, this condition does not take away the discretionary power of the judge to grant a favorable review or order annulment.

It becomes clear that the Maysara view is a departure from two basic rules. The first is a rule; Fulfilling the obligation immediately upon its due date, and the second rule: Not dividing the fulfillment, i.e. violating the facilitation view, is considered an exception to these two rules, and with the permission of the legislator (16).

The problem at hand is: What is the extent of the personal status judge's authority to grant a favorable review to the person stipulated in the marriage contract?

To answer this problem, we must know the extent to which legal legislation allows the judge to grant the debtor a judicial deadline.

Here we find that the Iraqi legislator has given the judge the authority to grant the debtor a judicial deadline (a concessionary consideration) for the stipulator, whether the husband or wife, to achieve reciprocal justice based on the general rule stipulated in Article (177) of the Iraqi Civil Code, the first paragraph of which stipulates that "the court may consider... The debtor for a term, and it may also reject the request for annulment, if what the debtor has not fulfilled is small in relation to the obligation as a whole, and the judge's authority to grant a concessionary consideration instead of annulment is a wide discretionary authority, and the assumption here is the existence of a term agreed upon in advance between the contracting parties in the event The arrival of the agreed-upon period without either of them fulfilling his obligation gives the other party the right to request the annulment of the agreement between them, and that the judge responsible for hearing disputes has verified the fulfillment of all legally stipulated conditions for annulment (which we will explain later when we discuss the effects of breach of the condition associated with the contract). Then it is proven. He has discretionary authority, so he has the right to make the decision he deems appropriate by choosing the solution he deems appropriate from among several solutions, either accepting or rejecting the annulment, or setting a deadline for the debtor to fulfill the condition associated with the marriage contract, or granting compensation to the stipulator while exempting the debtor from implementation. (We will postpone the discussion in This issue will be discussed - God willing - in the next chapter. By using the judge's authority to grant the debtor a new deadline, the judge will have intervened within the scope of the contract by amending the period of implementation agreed upon in the contract. (17)

In this regard, the Iraqi Court of Cassation stated in its decision (18), that (as long as it was verified that the damages were minor and could be avoided, the court should have tended to apply the ruling in (a) of Article 177 Civil and its ruling to annul the contract to which the party was bound if it was not correct).

In application of this, the Iraqi Court of Cassation also ruled that (the court should reject the request for annulment and give the debtor a period of time for implementation) (19), and since the rules of civil law are considered general rules and the reference in cases where there is no text in the Personal Status Law can be relied upon and allowed by the Personal Status Judge By granting a judicial deadline to the aggrieved party if the conditions for granting it are met.

In the French Civil Code, Article (1244), the first paragraph, stipulates that "The judge, taking into account the situation of the debtor and assessing the needs of the creditor, may postpone the payment of the deferred amounts or cancel them within a period of two years, and the judge may, by a special and reasoned decision, rule to impose interest on the deferred amounts." The maturity is at a low rate not less than the legal interest, and the settlement amounts are first deducted from the capital. In addition, these procedures can be conditional upon the debtor's completion of work that would facilitate or guarantee the payment of the debt. The provisions of this article do not apply to alimony debts."

We believe that the judicial grace period is granted to the debtor when his creditor requests annulment of the contract due to a failure to implement the contractual obligation, which is represented by the condition associated with the marriage contract. It is preferable to call it the judicial grace period and not the discretionary view, so that it is within the judge's authority to grant the grace period after a request for annulment is brought before him, provided that The Iraqi legislator allocates special articles in the Personal Status Law to this judicial deadline (20), which relate to the conditions associated with the marriage contract in the event that the debtor is in good faith but needs a deadline or deadlines to implement his contractual obligation, such as a husband who, upon concluding the contract, agreed to the wife's condition that he register an apartment or apartment in her name. It took place five years after concluding the contract and the husband agreed to the condition because he was

affluent and capable at the time. However, when the husband fulfilled his obligation to the condition associated with the contract, he lost his business, and he needs a reasonable period to be able to fulfill the condition associated with the marriage contract. We see that there is no objection to the judge granting the husband A reasonable period to implement his obligation if the wife requests annulment of the contract due to its breach of the condition associated with the marriage contract.

The second topic: The judge's power to amend or revoke the condition in cases of emergency circumstances

Contracts in general, and the conditions associated with a marriage contract in particular, are subject to a general rule, which is the obligation of the parties to implement the obligations contained therein, and the inability of one of the contracting parties to withdraw from it of his own unilateral will, as it is binding on both parties, and they must fulfill the obligations resulting from it. Not only this, but both parties Marriage contract: Neither of them individually can amend the contract or the condition associated with it, whether by increase or decrease, except by their agreement to do so or based on a text in the law that is binding on them, which means that the obligations contained in the contract are equal to the obligations imposed by the law. This equality was approved by the law itself when it obligated the parties to implement their contractual obligations.

To study the judge's authority to amend the contract under the theory of emergency circumstances, we must first investigate the concept of the theory. This is because the theory of emergency circumstances has varying definitions and viewpoints from both Sharia and legal jurists, and also the existence of a distinction between the theory of emergency circumstances and force majeure, which we will explain in the following detail: -

The first requirement: The theory of emergency circumstances in Islamic jurisprudence

Islamic law knew the theory of emergency circumstances before positive law knew it, because Islamic law is based on justice, which is considered one of its basic pillars. If the principles of justice conflict with the binding force to implement the condition associated with the contract due to circumstances that exceed the human capacity of the contracting party, then the application of It has fair, practical solutions without going into detail in formulating the issues that were presented to them for treatment and submitting forms therein (21).

Islamic Shari'a jurists have dealt with contingent excuses by saying: "Everything that cannot be fulfilled unless the contract is fulfilled unless it causes damage to himself or what proves to him the right to annul it." It was also said in explaining its meaning that it is "everything that is an incidental matter that harms the person or property of the contracting party." The contract remains, and it is not extinguished without rescission. (22) But what is noted in the previous two texts is that they restricted the extinction of the excuse and its rescission to rescission, but the excuse can be removed by modifying the contractual obligations or reducing the burden resulting from it to a reasonable extent, because what is intended is to repel the damage from the contract if it is rescinded by one of the These means, there is no need to cancel it in order to preserve the stability of transactions between people, so it was necessary to rectify it, so it was said in explaining the meaning of the theory that it is (everything that is incidental or emergency by which one of the contracting parties harms himself or his property, if he proceeds with the implementation of the contract, he is granted the right to cancel it. or modify it(23)

Accordingly, the theory of emergency circumstances in Islamic jurisprudence is based on necessity, justice, and benevolence. Islamic jurisprudence has based this on basic principles mentioned in the Holy Qur'an, including the Almighty's saying: {Allah desires for you ease and does not desire for you hardship}(24), and His Almighty's saying {And what He has placed upon you in religion a hardship.} (25) In addition to that, God Almighty says: {Indeed, God commands justice and goodness}(26), so it seems that the principles of justice are the core of the theory of emergency circumstances. If they conflict with the principle of the binding force of the contract, the last principle is sacrificed to ward off harm from harm. One of the contractors (27).

The second requirement / the theory of emergency circumstances in law:

Emergency circumstances emerged in the law as one of the indicators of curbing the principle of the power of will, the basis of which was not to prejudice the contract that was concluded in a valid manner (28), and what is meant by emergency circumstance in legal terminology; It is the unexpected emergency incident, such as a war, epidemic or earthquake (29), and the theory of emergency conditions is the modernity The state does not allow the launch to intervene to adjust the rules of the contract if How was its implementation affected due to unexpected events that led to difficulty implementing One of the contracting parties is bound by it; This is based on the principle of binding force of the contract, and a good example is a group Group of countries that refuse to recognize the principle of emergency circumstances theory The French Civil Code, which was in opposition to it before the issuance of the 2016 decree, was later recognized.

From the point of view of legal jurisprudence, emergency situations refer to every general incident that occurs after concluding the contract and before its complete implementation, and which is not expected to occur during the contract, and which could not have been expected or prevented (30), which creates an imbalance in the contract between the two parties, as it makes the debtor's fulfillment By making his obligation onerous, it leads him to a huge loss that exceeds the usual limit, which requires the intervention of the judge and a request from the debtor to rebalance the interests of the two parties to restore the onerous obligation to a reasonable extent. Any agreement stipulating otherwise is considered invalid (31).

To demonstrate this, we will examine the theory of emergency circumstances in the marriage contract, and then we will refer to the conditions for applying the theory of emergency circumstances, according to the following details:

The theory of emergency circumstances in the marriage contract:-

The legislator allows the personal status judge to amend the conditions associated with the marriage contract in the event of exceptional incidents based on the general provisions contained in civil laws. This is done by submitting a request to the judiciary aimed at restoring the obligation to a reasonable extent. The judge may order a suspension of implementation of the condition until the emergency incident disappears if it is Temporarily (32).

The husband may request that the condition be amended due to the difficulty of implementing it in person, and the judge has discretionary power to grant his request or award compensation to the wife, as if the wife stipulated that her husband build a house and suddenly the prices of building materials skyrocketed due to a war occurring in the husband's country with another country, and this was The increase will go away later, and the judge will order the burdensome obligation to be suspended or modified, until that difficult period passes. On this basis, non-compliance with the condition is due to an objective, not a subjective, reason, because it is something unexpected. In this case, the husband has the right to ask the judge to exempt him from the condition or to modify his commitment to a reasonable extent, that is, when the implementation of the condition agreed upon in the marriage contract becomes impossible for him. Whoever adheres to it due to an emergency circumstance has the right to resort to the judiciary to request an exemption from its implementation or modification due to the emergency circumstances that prevented the concrete implementation of the condition. In assessing the emergency event, the discretionary authority of the court is due.

Accordingly, if the legislator included a text obligating the two parties to the contract to resort to the judiciary in order to amend or nullify the condition in the event that it is impossible to fulfill it for a foreign reason, it is obligatory for them and for the judge to look into that matter. When we search in the folds of the Iraqi Personal Status Law, we find that it came devoid of a text obligating them to do so. (33). When deciding on a request to amend or terminate the condition associated with the marriage contract, the judge must take into account achieving a balance between the interests of the contracting parties on the one hand, and the interest of society on the other hand. The judge must also take into account the extent of the seriousness of the harm caused as a result of not fulfilling the condition. For example, if The wife stipulated that her husband would not expel her from her country or from the place she was in. In the event that the husband is an employee and an epidemic occurs (which has not reached the extent of a pandemic) in the husband's circle and an administrative

decision is issued to transfer all employees to another unwanted area, the husband may find himself forced to leave. The wife's country to another country. In the event that the husband violates this agreed upon condition, this may lead to the separation of marital life between the spouses, at least for the period of work, which will be prolonged throughout the period of the husband's absence from his wife. This may also lead to divorce and its negative effects on the children and society. . Then the husband has two options: either he can protect his family and children from loss by respecting the condition, or he can bear the loss of his source of livelihood. Or he violates the condition and preserves his source of livelihood, which may result in divorce (34).

Restricting the contracting parties to the terms of the contract according to the purpose for which it was prepared is based on the principle (the contract is the law of the contracting parties). The principle of amending or revoking contracts and their clauses depends on the agreement of the two parties to the contract. Whenever circumstances change and the terms of the contract become inconsistent with the intent of the contract, in this case the judge has the authority to decide. Amending or revoking the terms of the contract.

We conclude from the above that it is not permissible for the judge to exercise his sole discretion in amending or annulling the contract, because the matter depends on the will of the contracting parties, and this is the basis of contractual obligations, and therefore the judge's primary task revolves around determining the nature of the contract and he does not have the right to increase or decrease anyone's obligations. Contracting parties, unless there is a provision stipulating that, as in emergency cases and contracts of adhesion (35), the judge's authority to amend or revoke the contract is limited in accordance with the law.

The judge also has the right - even if there is no emergency circumstance - to amend the contract or exempt from some obligations in the event of arbitrary conditions, and the judge has broad authority in his assessment of arbitrary conditions.

We find that some legislation has gone in this direction, and has given the judge the right to amend or revoke the condition associated with the marriage contract. In deciding to amend the condition associated with the marriage contract, the judge takes into consideration - as we mentioned above - the extent of the seriousness of the harm caused as a result of not fulfilling it. If the harm that The husband is inflicted with greater harm than the wife, so paying the husband's harm takes precedence over the wife's harm (36).

The Imami and Hanbali doctrine is considered one of the doctrines that has expanded the scope of conditions the most, and accordingly most of the personal status legislation has taken this expansion, as the effective Iraqi Personal Status Law stipulates in Article 6, third paragraph of it, that "The legitimate conditions that are stipulated within the marriage contract are considered obligatory." Fulfilling them)) What is noticeable from the phrases of the text is that it came with a general principle and did not distinguish between legitimate conditions that are considered from other conditions that are not considered, so the judge must refer to Islamic jurisprudence - especially the Imami school of thought and the Hanbali school of thought - in separating between legitimate conditions from others (This does not mean that the right holder has absolute authority to use his right, that is, the right is not taken absolutely, otherwise the stipulator becomes arbitrary in using the right, and this brings great harm to the stipulator and to the family as well, because the purpose of setting the condition in the first place is the benefit that It may be for the husband, the wife, or both, and harm is not the intent of the condition (37).

The expansion of the conditions must be limited to taking into account public order and the legal provisions drawn up by the Holy Law, as well as the correct social customs, and it is in the interest of the contracting parties for the stability of the family in particular and society in general. Therefore, it is necessary to avoid stipulations that lead to injustice against the woman and her children, or that harm the interests of the husband. Out of respect for the jurisprudential rules established in Islamic jurisprudence in this regard, such as the rule (no harm, no harm) and the rule (necessity is estimated according to its extent), as well as the rule (no harm is warded off by something that leads to harm greater than it or similar to it) (38)." as if the husband stipulated that He does not

spend on her, does not clothe her, does not give her her child, or stipulates that he should not have intercourse with her.

In fact, fulfilling the conditions and covenants must be to achieve an intended benefit for the spouses in good faith, and to help achieve family stability and harmony in society. Therefore, failure to fulfill the conditions may lead to instability between the spouses, and it must be a condition that there is no obstinacy when non-fulfillment or interest appears. For the stipulated person, it is impossible to fulfill it because there is an interest for the family in general, provided that this does not conflict with the objectives of Sharia law.

Accordingly, it is assumed that the spouses will not be stubborn in adhering to the conditions in the event that there is a common interest for the family, such as if she stipulates that he should provide for her child and clothe him. Therefore, they must reconsider such conditions. Because marital life must continue as a company whose capital is love, cooperation and harmony, the stipulator must waive his condition if necessary.

But matters may become somewhat complicated in the event that there is no agreement between the spouses to amend the compelling conditions in the marriage contract, and as is known in the field of contracts, unexpected incidents often occur that may be general (emergency circumstances) or specific (force majeure) - how much We have indicated previously - it leads to a breach of the obligations arising from the contract, including the conditions agreed upon in the marriage contract. A questioner may ask that if the husband demands obedience from his wife - which is ruled by the Holy Law, and he considers the wife disobedient if she refuses to obey her husband - is he allowed to demand that in If there is a condition associated with the husband's contract that stipulates that the wife not be expelled from her country.?

When the legitimate ruler obliged the wife to obey her husband, this was based on affection, mercy, and the husband's lack of abuse in using his rights. Therefore, we find that the effective Iraqi Personal Status Law (39) has specified cases in which the wife is not disobedient (40).

According to our opinion, the wife's requirement that her husband not to transfer her from her country does not contradict the husband's right to obedience, because it does not invalidate this right at all, especially since the wife takes precautions by setting this condition in order to remain close to her parents and family to protect herself from the husband's abuse.

Accordingly, the Court of Cassation in the Kurdistan Region proceeded and ruled to invalidate the husband's lawsuit in Mutawa'a after the wife was forced to leave the home due to her husband's refusal to have her daughters with her in the same marital home despite the existence of a condition - associated with the marriage contract upon its conclusion - stipulating this (41).

Accordingly, the limits of the judge's authority to amend or revoke the condition associated with the marriage contract are evident in the event that the implementation of the condition agreed upon in the marriage contract becomes impossible for the person stipulated, and the reason for not fulfilling the condition is due to emergency circumstances or force majeure, or if the conditions are arbitrary, so The judiciary is resorted to asking it to exempt it or amend the condition, and the judge has discretionary authority to decide on the matter. However, there are controls that the judge must take into account when amending the contract due to emergency circumstances, which are: -

First: Balancing the interests of both parties (42), so that adopting the theory does not lead to harm to the husband or harm to the wife, but rather the interest of both parties must be taken into account as much as possible when ruling according to it.

Second: Taking into consideration the circumstances surrounding the matter. Here the judge must take into account the extent to which the emergency circumstance affects the person upon whom the condition was stipulated and take into account all the circumstances surrounding it, whether the stipulator is the husband or the wife.

Third: Reducing the obligation to a reasonable extent (he may reduce the contractual obligations or increase the corresponding obligations, and in this ruling, as we indicated, he takes into account the interests of both parties to the contract (husband and wife).

The phrase "reducing the onerous obligation to a reasonable extent by the judge due to the

occurrence of emergency circumstances" was stated in this way with regard to Iraqi law and comparative laws. In contrast to that, the French legislator used the word "reducing." This difference may lead some to say that the use of the word "reducing" that the legislator mentioned in the French language is not It fulfills the meaning of the amendment, because it only reduces the judge's discretionary power and only gives him the authority to narrow the amendment without having the authority to increase the obligation corresponding to the onerous obligation, and since the reduction may not be the appropriate means to restore balance to the dysfunctional contract. (43)

As for the position regarding French civil law, the French civil legislator did not know the theory of emergency circumstances until the issuance of a decree (February 10, 2016), and the French judiciary was also opposed to it. It prohibited the judge from interfering in restoring the balance between the two parties to the contract when unexpected circumstances occurred out of faith. From it, ensuring contractual security is more important than achieving justice, as the judge may not introduce new conditions into the contract and replace them with the conditions previously agreed upon by both parties, as it is neither acceptable nor permissible for there to be a judicial amendment or review of the contract due to lack of expectation, and the judge's role is excluded in some cases. areas, and hence the scope of his intervention was limited.

So the judge has the right to intervene in all conditions, whether associated with the marriage contract or the so-called conditional commitment, and restore balance to achieve more equality in the contract, which was lacking. Thus, as Mr. Cadet said, "The contract judge is no longer a passive spectator of the contractual dispute. If he becomes an alleged prisoner of the principle of independence of will that requires him to respect the terms of the agreement and prevents him from modifying the content until the balance between the parties is restored, this is an injustice" (44).

As for the French judiciary, we find that the theory of emergency circumstances did not take its place in the French civil judiciary, as it was not recognized in the cases before it. In contrast, we find that the French administrative judiciary has adopted this theory in many of its rulings (45) and in all cases, that is, whether it decides The judge may review the terms of the contract or terminate it, including the conditions associated with the marriage contract. He has broad discretion in determining the fate of the marriage contract and its conditions in both cases, as he alone determines the time from which the terms of the contract apply to restore balance between the contracting parties (in the event that he decides to review the terms of the contract), or which is the end of the contract and its terms (if he decides to terminate the contract). We can imagine that the judge's ruling will have a retroactive effect in both cases.(46).

Conclusion:

After completing the study of the research topic, we reached the most important results and proposals:

1- The judge has the right to review the terms of the contract in general, and the marriage contract in particular.

2- The judge has the right to amend the conditions associated with the marriage contract.

3- The judge can give a period for implementing the associated conditions.

4- The judge has no right to disturb the balance of the contract, nor the favor of one contracting party towards another.

Suggestions:

1- The legislator must give a broader scope in his authority to consider and amend the conditions associated with the contract.

2- We suggest that the legislator must consider the urgent need to add some texts concerned with codifying the conditions associated with the marriage contract.

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(2) Bou Daoud Khalifa, Bouziane Al-Saeed, The role of the judge in restoring the financial balance of the contract, a memorandum submitted to obtain an academic master's degree, specializing in business law, Faculty of Law and Political Science, Mohamed Boudiaf University, Al-Musliya, 2018, 2017, p. 44.

(3) Al-Baqarah/280

(4) Tafsir of the two Imams Al-Jalalayn, Jalal al-Din al-Suyuti and Jalal al-Din al-Mahli, Rihab Al-Jazair Library, verified and copied by Sheikh Muhammad al-Sadiq al-Qamhawi, p. 40.

(5) Narrated by Muslim, previous reference, p. 1563

(6) The Farmers' Guide by Muhammad Ali al-Bakri al-Siddiqi (/164/7)

(7)Ali Filali, previous reference, pp. 433-434

(8) Zeina Saghi, previous source, p. 71

(9) Quoted from: Akram Mahmoud Hussein Akram Mahmoud Hussein and Ismail Ibrahim Muhammad, the positive role of the judge in the judicial deadline, College of Law, University of Mosul, research published in the Journal of the College of Law for Legal and Political Sciences Kirkuk, Volume 7, 2018, p. 20

(10) See Dr. Samir Abdel Sayed Tanago, The Basic Principles in the Theory of the Contract and the Provisions of Commitment, 2nd edition, Manshaat Al-Ma'arif, 1995, p. 340. See also: Abdel Moneim Al-Badawi, The General Theory of Obligations, Sources of Commitment, Part 1, Alam Al Kutub, Cairo, 1988, p. 226

(11) Abdel Razzaq Al-Sanhouri, Al-Waseet, previous source, p. 690, Zeina Saghi and Nassima Makri, The Authority of the Judge to Amend the Contract, Memorandum for Obtaining a Master's Degree in Law, Abdel-Rahman University, Mira Bejaia, University Year, 2013-2014, pp. 72-73, see Also, Yassin Muhammad Al-Jubouri, Al-Mabsoot in Explanation of Civil Law (Provisions of Commitment), Al-Bayt University, College of Jurisprudential and Legal Studies, Dar Al-Thaqafa, p. 131.

(12) Zeina Saghi, previous source, pp. 72-73, and see also Fouad Mahmoud Awad, The Role of the Judge in Amending the Contract, New University Publishing House, Alexandria, 2004, p. 468.

(13) Dr. Jalil Al-Saadi, The Psychological Element in the Contract, A Study in Iraqi and English Law, Research Published in the Journal Published by the College of Law at the University of Baghdad, Volume 27, Issue, 2 Years, 2012, p. 49

(14) Bou Daoud Khalifa and Bouziane Al-Saeed, The Role of the Judge in Restoring the Financial Balance of the Contract, a memorandum submitted to obtain a master's degree, University of Mohamed Boudiaf, M'sila, Algeria, academic year, 2017-2018, pp. 44-45, and see also: - Nouria Tartag, The Authority of the Judge On granting the easy view, a research published in the Iljtihad Journal for Legal and Economic Studies / Tamangset University Center, Algeria, p. 127

(15) Corresponding to Article 346/2 and Article 272 of the Egyptian Civil Code, Article 430 of the UAE Civil Transactions Law, and Article (1244)/1 of the French Civil Code.

(16) Dr. Ismat Abdel Majeed, The Theory of Emergency Circumstances and the Role of the Judge in Implementing It, Ministry of Justice, Baghdad, 1993, p. 94. See also: Nouriya Tartak, previous source, p. 127

(17) Nabil Ismail Omar, The judge's discretionary authority in civil and commercial matters, 1st edition, New University House, 2008, p. 260, Abdel Hakam Fouda, Ending the binding force of a contract, 1993, p. 456, referred to in Nouria Tartak, The judge's authority to grant a discretionary review, Previous source, p. 128

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(19) Ashour Othman and Abdel Fattah Farida, The Principle of Will Authority between Tradition and Modernity, a memorandum for obtaining a Master's degree in Law, Abderrahmane Mira University, Bejaia, 2014, p. 66, Nabil Ismail Omar, The discretionary authority of the judge in civil and commercial matters, previous source, p. 266

(20) Decision No. 202/H/1968 dated 4/29/1968, published in the Judiciary Magazine, second issue, twenty-third year, p. 125

(21) Resolution 338 / First Civil / 76, 8/25/1976, Collection of Judicial Judgments, Issue 3, Ninth Year, 1976, p. 33

((The judicial deadline may be mixed with the suspension of implementation because the idea of suspending the implementation of the contract is an exceptional grant granted to the debtor in good faith who is late in fulfilling his contractual obligation due to a reason beyond his control, i.e. temporary force majeure. The judge allows the suspension of the implementation of his obligation until the impediment is removed. See: Dr. Hassan Ali Thanoun, The General Theory of Annulment in Islamic Jurisprudence and Civil Law, a comparative study, doctoral dissertation, Al Nahda Press, Egypt, 1946, p. 232.

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(23) Dr. Muhammad Mohieddin Ibrahim Muhammad Salim, The Theory of Emergency Circumstances between Civil Law and Islamic Jurisprudence, Ain Shams University Library, 1991, p. 12. See: Saeed Al-Sayyid Ali, The Theory of Emergency Circumstances in Administrative Contracts and Islamic Law, Dar Al-Kutub Al-Hadith, Alexandria, Egypt. , 2006, pp. 38-39, referred to by: - Belkacem Zahra, The Impact of Emergency Circumstances on the Contract, Graduation Thesis to Obtain a Master's Degree in Law, University Year 2013-2014, p. 6

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(26) Fadel Shaker Al-Naimi, The Theory of Emergency Circumstances between Sharia and Law, Master's Thesis, Dar Al-Jajiz Press, Baghdad, 1969, p. 24

(27) Al-Baqarah / 85

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(30) Dr. Muhammad Mohieddin Ibrahim, previous source, p. 12

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(32) Fadel Shaker Al-Naimi, The Theory of Emergency Circumstances between Sharia and Law, Master's Thesis, Al-Jahiz Press, Baghdad, 1969, p. 22; Abd al -Wahhab Muhammad Abd al -Wahhab al -Tarhar, the emergency conditions and its effect on implementing the contract of contract, with a complementary research for the current staff of the law in the law, Khartoum College, Faculty of Law, 2005 AD, p. 9.

(33) Hamdi Muhammad Ismail, previous source, p. 230

(34) Muhammad Sabri Al-Saadi, previous source, p. 302

(35) Previous source, p. 309

(36) See Dr. Muhammad Abdel-Rahim

(37) Saud Youssef, stipulation in the marriage contract, a memorandum for obtaining a master's degree, Faculty of Law, Kashar University, p. 20.

(38) Dr. Salam Abdel Zahra Al-Fatlawi, Dr. Nabil Mahdi Zuwayn, previous source, p. 50.

(39) Muhammad Abu Zahra, previous source, p. 157.

(40) Muhammad Ahmed Siraj, Muhammad Kamal al-Din Imam, Family Rulings in Islamic Sharia, University Press House, Alexandria, 1999, pp. 102 et seq.

(41) Munther Al-Fadl, The General Theory of Obligations - A Comparative Study between Islamic Jurisprudence and Positive Laws, c 01, Sources of Commitment, Dar Al-Thaqafa Library for Publishing and Distribution, Amman, Jordan, 1996, p. 281

(42) See Abdul Wahab Khallaf, Personal Status According to the Doctrine of Abu Hanifa, 2nd edition, 1990, p. 45.

(43) It is stated in the effective Iraqi Personal Status Law in Article 25, Paragraph 2, which stipulates that (the wife is not obligated to obey her husband, and she is not considered disobedient if

the husband is arbitrary in requesting compliance with the intention of harming her or restricting her, and it is considered a form of abuse and harm in particular. The following: A - The husband does not prepare for his wife a legal home that is appropriate to the social and economic situation of the spouses. B - If the prepared legal home is far from the wife's place of work, such that it is impossible to reconcile her domestic and job obligations. C - If the furniture prepared for the legal home is not suitable For the husband. D- If the wife is sick with a disease that prevents her from obeying the husband

(44) Dr. Salam Abdel Zahra Al-Fatlawi, Dr. Nabil Mahdi Zuwayn, previous source, p. 199.

(45) Decision issued by the Court of Cassation, Kurdistan Region, Decision No. 13/Personality/2011 Date of issuance of the decision 1/17/2011 "She stated that upon her marriage to the plaintiff, she stipulated that her daughters be with her, and the court had to bring the plaintiff and question him about this incident because the conditions did not violate the provisions of Sharia law. .. "We find that the court expressed the inclusion of the condition in the fact, and this means that it can be proven by all means of proof. This contradiction is due to the lack of clarity of the paragraph in a way that eliminates ambiguity.

(46) Khadija Fadel, Amending the Contract During Implementation, Contract and Liability Branch, a memorandum for obtaining a master's degree in law, Faculty of Law, University of Algiers, 2002, p. 104.

(47) Zeina Saghi, previous source, p. 52

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