

Civil Liability of Notaries in Iran's Law

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Abstract

In the past centuries there was no specific institution for documentation and due to this some people who were more literate would do documentation but they constantly evaded their responsibility and this would sometimes bring about complications; thus, in the present century the legislator founded an institution called “notary offices” in order to resolve these problems, and gave the responsibility to a person called “notary”, and based on this he/she codified specific regulations in order to create the civil liability resulting from the liability-causing actions of notaries, and only by attaining certain conditions and within the boundary of regulations, civil liability of notaries will be met.

Keywords: civil liability, notary, registration, document

1. Introduction

Intellectual needs and social necessities at once require the discussion of commitment and assignment in order to establish institutions and legal entities. In the past that the issues of notary and notary offices weren't proposed, the need for the issue of civil liability regarding those who helped in writing documents and acted according to religious orders, wasn't tangible; but simultaneously with the establishment of notary offices and legislation of laws related to them, the topic of notaries' liability was proposed as well. As the notary job is a very sensitive job and with high responsibility, it is necessary the incentive for choosing this study is to familiarize law students and notary job applicants with the civil liability of notaries. Thus, I aim to analyze theoretical and legal principles of civil liability of notaries and state the conditions of achieving civil liability and cases of exemption of notaries from civil liability. With the first look, the answer may be positive and it may be assumed that the notary is liable for documentation.

2. First Section-Concept, Background, Principles and Elements of Civil Liability

2.1 First Chapter-Concept and Background

2.1.1 First Topic-Concept

Civil liability refers to the commitment and obligation a person has for compensation of the harm induced on another person regardless of the fact whether the mentioned harm is due to the action of the liable person or the action of a person dependent on him/her or due to objects or real estate in his/her ownership or occupation (Note 1).

2.1.2 Second Topic-Background

The first law for registration of documents was approved in 1911 in 139 articles. Following that, in 1923 the real estate registration law was approved in 126 articles. After that, in the years 1925, 1927, 1928 and 1929 additions were added and eventually in 1931/12/26 the documents and real estate registration law was approved which is necessary to be implemented by the reforms done in subsequent years.

Regarding the notary offices also after establishment in 1937, laws such as:

- 1) The notary office regulations approved in 1938/2/14 with subsequent reforms and extensions.
- 2) The law of notary offices and notary association and office assistants approved in 1975/4/25.
- 3) The law of reforming part of the notary office law articles and notary association and office assistants (approved in 1975/4/25) approved in 1992.

4) Regulations of paragraph 4 of article 6 and footnote 2 of article 6 and cases 14, 17, 19, 20, 24, 28, 37, and 53 of notary office law and notary association and office assistants approved in 1975 have been approved in subsequent reforms and extensions that continue to be implemented.

2.2 Second Chapter-Civil Liability Principles of Notaries

2.2.1 First Topic-Theoretical Principles of Civil Liability of Notaries

An important point that should be noted in the fault of such persons that have special expertise and skills is the difference in its criterion to distinguish: in technical and specialized fields, the behavior of a normal human can't be accepted as the criterion to distinguish between false and right. Customary arbitration which is usually obtained by means of enthusiasm and by illumination is sometimes so incompatible with scientific and technical facts that their influence and prestige must be inevitably doubted; specifically a human who has been accustomed with scientific concepts and certain technical principles, can't be expected to be like normal people in his/her reactions (Note 2).

Legislator in article 22, GH.D.A.R.S.D. following "fault theory" has considered the condition to create the notary's liability to be fault and the aforementioned fault should also be due to the violation of notary job, and in fact the notary is assumed to have complete science of rules and regulations; thus, the fault above is not dependent on the personal features and behavior of the notary.

In contrast, the legislator in article 23 of the recently mentioned law by following the risk theory, has also given the responsibility of liability-causing measures of notary office employees to the notary. Despite this, by examining the article 12 GH.M.M we realize that the reason for legislation of article 12 of the recently mentioned law based on the risk theory, is to create an environment that the employer has provided for investment and attainment of profit; thus, the employer must assume the liability of risks that he/she creates for gaining greater profit. Yet it's not clear why such regulations are enacted for notaries who are neither merchants nor investors; why regulations governing notary offices such that the limitations of the notary job are even higher than those of normal state employees; thus, it is more logical to enact the theoretical foundation of civil liability of notaries merely based on fault theory as the state employees.

2.2.2 Second Topic-Legal Foundations of Notaries' Civil Liability

The first legal article which was officially approved regarding the civil liability of notaries was the article 81 of registration law approved in 1911 which stated: "whenever due to the fault of the agent, the registration of a document has become unreliable; the person referred to must pay the costs of registering that document besides the regulated punishment". In this article for registration of liability of registration agent, only the term "fault" has been used which includes carelessness, inattentiveness, lack of skills, and non-compliance with occupational systems.

After article 68 GH.S. was approved in 1931 which reports: "when a document is invalidated through the fault or negligence of the notary, the mentioned liable person is responsible for all the damage caused in addition to the regulated punishments", article 81 approved in 1911 lost its feasibility.

In this article, the legislator has stated the basis of notary's liability to be fault or negligence and the term fault refers to carelessness, inattentiveness, lack of skills, non-compliance with occupational systems, and the term negligence refers to forgetting, error, becoming unaware, and not knowing something (Note 3).

However, the common sense of negligence is also of the omission type and is synonymous with carelessness and in some cases, and the legislator has used negligence in the sense of carelessness (omission) (Note 4).

In the last part of the mentioned article we have: "the mentioned liable person must be responsible for all the damages caused". In fact, based on this the legislator intends to consider the notary to be responsible for all damages caused to persons both the stakeholders in document and also the third parties.

But the fault that exists in this legal article is the fact that the notary is responsible only for paying the damages resulting from invalidity of the document.

And also this article has commented only regarding the fault and negligence of the notary and has expressed no views regarding the employees and it seems that the aggrieved must have appealed to the general rules of liability.

The legislator by approving the law of the notary office and the association of notaries and office assistants in 1975/4/25 in articles 22 and 23 of GH.D.A.R.S.D. attempted to remove the problems and defects caused in article 68 GH.S. approved in 1931 in addition to including the civil liabilities of the notary in the recent law (Note 5): thus, in the article 22 GH.D.A.R.S.D. It has been regulated: "the notaries and office assistants that

commit violations in doing their duties, will be responsible to the parties and stakeholders. When a document is partly or completely invalidated due to their fault or violation of related rules and regulations, and consequently damage is caused for those persons, they must be responsible for the damages induced in addition to the regulated punishments. Claims related to the damages resulting from the violations of notaries and office assistants will follow general rules and regulations". And it is also regulated in 23 that: "the notary is responsible for all affairs of the office and the office assistant is firstly responsible for affairs that have been taken on by them due to regulations, or doing those affairs are referred to them by the notary within the regulations. Regarding the recent case, the notary and the office assistant will have a common liability..."

By considering these two articles, we note points concerning the liability of notaries which will be investigated in detail in some statements.

First statement-the fault and violation of the notary must concern doing the notary task.

That is to say, if there is a violation in doing tasks related to the clients, which are not part of the notary's duties, he/she will not be responsible since the action is not related to the notary's duties.

Second statement-the notary's liability will be toward the parties and stakeholders in transaction.

Therefore, the legislator considers the notary to be responsible only toward parties and stakeholders and it's not clear what the aggrieved should do because of the actions of the notary while doing a task that are not among the parties and stakeholders in the transaction; for instance when the notary makes a mistake in insertion of the four limits written down in the proceedings while setting the real estate transference document (according to the separation proceedings), this will lead to the violation of the buyer of the land attributed to the neighbor's property, and eventually in order to prove his/her ownership, the neighbor will be referred to the judicial authorities and prove his/her ownership. Here, the notary is responsible for the loss (the loss he/she has suffered in order to prove his/her ownership) caused for the neighbor, but if we consider only this article as the basis of the legal liability of the notary in doing his/her liability, we must not accept the neighbor's claim against the notary since according to this article only the stakeholders in the transaction and the parties will be entitled to claim damages. Persons have argued that the legislator only has the position of stating and based on this has intended to limit the liability of notaries; but this view can be criticized since the general rules of civil liability and justice require that the neighbor in the example above have the right to claim damages against the notary. Thus, it seems that the legislator has inadvertently forgotten the third parties due to negligence.

Third statement-the loss caused must be due to the notary's fault or violation of rules and regulations.

The concept contrary to this paragraph is that if the notary causes loss to persons without fault or violation of the regulations, he/she is not responsible (since the tasks of the notaries are the same which have been stated in the related rules). Thus, in cases when the legislator hasn't regulated any assignments for the notary, in doing the tasks which are not part of the ordained duties for him/her in rules and regulations, if a loss is caused for persons either the stakeholders or the third parties, he/she is not responsible; for instance when the notary takes an illiterate person's registration form and completes it in order to help the person, but enters some erroneous information and thus after registration of the real estate, causes a loss and damage to be induced to the owner due to correction of the data written in the real estate document; here, the data inserted by the notary in the real estate registration form causes loss for the owner and it seems that the legislator has had the position of stating, and by focusing on the principle of benevolence, has exempted the notary from responsibility; since benevolence and good will are among the liability cancellers. Although the notary has caused the owner of real estate to suffer loss, as he/she has intended to help and be beneficial, he/she is exempt from responsibility.

Fourth statement-the claims related to damages resulting from violations of notaries and office assistants will follow general rules and regulations.

Therefore, the stakeholders will have to go to court in order to claim the damages resulting from the violations of the notaries; unless an agreement has been reached with the notary regarding the payment of damages, or it is paid according to a contract that the notary has with one of the branches of the insurance agencies.

Fifth statement-the notary is responsible for all matters in the office.

Although regarding the matter of civil liability, considering the notary to be responsible for all matters in the office (which can be due to the actions of employees) seems to be justified but as regards the criminal responsibility, this is absolutely against the personal principle of crime and punishments (however, this recent topic is beyond our discussion).

Thus, if in doing the legal responsibilities in the office each of the employees cause loss to the parties and stakeholders, its responsibility lies with the notary; in effect, the legislator has enacted this article by inspiration from article 12 of civil liability law approved in 1960; such that considering the article 12 of the recent law, it is observed that the responsibility of the employer is subordinate to the worker's responsibility and guarantees the rights of the aggrieved. To this end, the employer can also refer to the worker who is to blame, after compensating for the damages of the third parties; on the other hand, according to the article 1 of the recent law, basically a person is considered to be responsible when he/she has caused loss deliberately or due to carelessness. In the worker-aggrieved relationship no exceptional rule governs: neither is his/her fault assumed nor has there been created an objective responsibility. Thus, the aggrieved must prove the worker's fault as a preliminary step in order to be referred to the employer. Furthermore, if a reason like the existence of the omnipotent power or the lawful defense leads to the worker's exemption from paying damages, the employer's responsibility is omitted as well. In other words, the employer is responsible for damages that his/her employees cause others sue to committing fault, while working or on its excuse: the employer's responsibility is the reflection of the worker's responsibility and the worker is responsible when he/she has been faulty and this is why the employer's responsibility stems from the action of others (Note 6).

In article 23 GH.D.A.R.S.D the legislator has given absolute responsibility to the notary for the matters of office while he/she has forgotten that the volume of work in the notary office is beyond what could be taken on by a single person.

That is to say, the notary is responsible to undertake all the matters in the office since according to this article, it is his/her duty to do these except in cases when the responsibility is given to the office assistant based on regulations; in the matters which are referred to the office assistant by the notary within the regulations for doing them, the notary and the office assistant will have shared responsibility.

In this article, the legislator has intended to introduce the notary as the person responsible for all damages (of course except the matters which are taken on by the office assistant based on regulations). Additionally, in cases when matters are referred to the office assistant by the notary, the notary and office assistant will both have a shared civil liability. In article 12 GH.M.M. explicitly the mistake of employees and workers are mentioned and has considered the employer to be entitled in referring to the worker after paying the damages of the aggrieved, if the damage has been caused while working or with its excuse, and elements of liability are also completed; at present according to the article 23 GH.D.A.R.S.D. the legislator considers the notary to be directly responsible for all matters in the office and this must be criticized since the volume of work in notary offices is so much and a single person can't take them on. Thus, the notary has to recruit some persons for undertaking the matters in the office; in this case, if each of the employees does an action deliberately, and another person is caused damage, the notary will not be considered responsible for this.

In answering this, it should be claimed that if an employee does actions beyond the empowering tasks given to him/her or deliberately (or by collusion with the customer (Note 7)), that cause the customer damage, the notary must be considered exempt from responsibility.

From another perspective, it seems that as all the services that are offered the clients in offices are completed by the signature of the notary, the legislator has enacted such an article; however, this doesn't reject the criticism leveled above at the view of the legislator; since the notary, due to the collusion of the client, may ask a person to sign at the office who is other than the person who has to sign the document.

In the matters in which the responsibility is given to the office assistant due to regulations, the notary will have shared responsibility with him/her. This action of the legislator has to be criticized as well since at the time when the office assistant deliberately does an action against regulations and it is proved, it is unfair and illogical to consider the notary responsible as well.

Sixth statement-when the notary's fault and violation of regulations is not due to the actions by the aggrieved.

First paragraph-the aggrieved fault is among the omnipotent power.

When the aggrieved fault is allocated the attributes of the omnipotent power, the summoned person will be exempt from compensation of damage; since the person who intends to cause self-loss, and this action plays the role of an external unpredictable and non-preventable agent for the summoned, even in the assumption of responsibility and fault for the summoned as well, it indicates that this legal assumption is not compatible with reality; thus, the summoned for the claim can exempt himself/herself from responsibility and compensation of damage, by proving that the summoned has acted as an omnipotent power for him/her (Note 8). For instance, if

the aggrieved regulates a document by the notary by presenting a fake document, and eventually the mentioned document is cancelled, here the notary is not required to pay damages to the aggrieved.

Second paragraph-satisfaction of the aggrieved.

When the aggrieved allows the notary to regulate the document against regulations with full satisfaction, in fact he/she has committed fault with full satisfaction, and therefore when the document is invalidated it can't appeal to the notary's violation. Among its examples the third paragraph M 100 GH.S. could be mentioned: (notary) "registers a document under the name of persons who haven't done that transaction". The six paragraph M 100 GH.S. also says: "registers the transfer documents with the knowledge of the non-ownership of the transferor".

And according to the seventh paragraph M 100 GH.S: "registers a document that is clearly not documented or its documentation has been invalidated".

In all these cases as the person requesting the document registration (of the aggrieved due to the cancelling of the document because of the document registration loss) has allowed the notary to regulate the document against regulations with full satisfaction and in fact according the principle of acting with knowledge and intention and satisfaction he/she has accepted the predictable loss, thus he/she is not entitled to claim the loss caused him/her from the notary (Note 9).

Seventh statement-not knowing the law doesn't remove responsibility.

According to the articles 2 and 3 GH.M. 15 days after publication in the newspaper, the laws have to be enacted; thus, not knowing the law doesn't remove responsibility.

When a notary regulates a document by violation of laws and regulations, the principle is that both the notary and the aggrieved are familiar with the related laws and regulations. When a person goes to the office in order to regulate documents and regulate the document book without observance of the related regulations, here the person visiting must avoid signing the recent document since owing to the aforementioned principle, the mentioned will be assumed to be aware of the law and in fact by signing the document he/she has acted to his/her own loss (and has allowed this to be so), and has accepted the notary's violation of the regulations and has undertaken its consequences (which are usually predictable). Thus, considering the notary to be responsible in these cases is to be thoroughly reflected.

2.3 Third Chapter-Elements of Civil Liability of Notaries

2.3.1 First Topic-Loss

By considering the article 22 GH.D.A.R.S.D that appoints: "...when a document is partly or totally invalidated due to their fault or violation of related laws and regulations and as a result loss is caused those persons, they must be responsible for the damages induces in addition to the regulated punishments", we note that the loss must be a result of the notary's violation of laws and regulations and the loss must be definitely realized as well. Nevertheless, what is primarily inferred from the text of the recent article is the fact that the notary is only responsible for compensation of damages of document invalidation since otherwise insertion of the statement "...partly or totally invalidated..." wouldn't be necessary; yet due to the general rules of responsibility and top of the article mentioned that has stated: "the notaries and office assistants that commit violations in their tasks, will be responsible toward the parties and the stakeholders..." the verdict of the notary's liability is generally stated and includes the financial damages caused the persons as well.

Concerning uselessness also as the damage is called useless which is certain to obtain, therefore when in this regard some damage is caused the stakeholders due to the notary's violation of laws and regulations, the notary will be considered responsible.

Surely here it has to be stated that the topics related to uselessness have sometimes misled some lawyers such that they have considered "uselessness" and "the damage resulting from uselessness" to be equivalent and believe that receiving the useless damage based on note 2 M 515 GH.A.D.M. is not possible while it should be admitted that uselessness is considered as damage per se but it must have some conditions in order to be achieved; thus, not all useless damages can be achieved; rather, the uselessness which is certain to obtain (inevitably obtained) can be achieved which is different from "damages resulting from uselessness" which is in effect considered as damage of damages.

Moral damage can also have different states like damage to the personality rights or damage to emotional feelings (Note 10).

As regards the notaries also although there exists no explicit text in this respect, according to the article 1 of civil liability law in case the conditions are obtained, there is the possibility of considering the notaries responsible as well.

2.3.2 Second Topic-Acting against Regulations

(1) First statement-action:

If the notary has acted against regulations in regulating the document, and each of the parties or stakeholders causes damages, he/she is responsible; that is to say, by writing the document (action), the notary causes damage.

(2) Second statement-omission of action:

It may be in the beginning assumed that only by committing the financial action the notary causes damage; yet, by a little reflection it can be inferred that sometimes omission of action can also lead to damage on persons. For instance, in regulating the definitive document, undertaking some queries of the state offices is necessary and some answers of the queries such as registration query and taxes are long-term and after their validity period is spent, they must be extended before document registration. Now if the notary avoids registration of a document all queries of which have been done and the state rights of which have been paid so that the validity period of its queries is spent, by his/her omission of action he/she has caused damage on the stakeholders. Another example is that the notary postpones the registration of a document all state rights of which have been paid so that after a few days, the aforementioned document is included in the new tariff and thus by omission of the notary's action, the stakeholders are caused damage.

2.3.3 Third Topic-Causation Relationship

If the notary acts against regulations in documentation but the loss induced on the stakeholder or parties is not due to the action of the notary, the notary can't be considered responsible. Thus, the causation relationship between causing damage and the action of the notary (an action that has been conducted against regulations) must be established. If the aggrieved affects the action of the notary and some damage is caused due to the action of the notary, if the action of the aggrieved is the evidence of principle of pride, the notary can't be deemed responsible.

3. Second Part-Liability-Causing and Liability-Removing Factors of Notaries

3.1 First Topic-Payment Deficit

3.1.1 First Statement-Tax Administration

According to paragraph A note 3 article 42 of the Value Added Tax (VAT) law, when regulating the definitive document or auto sale representations, asset transfer tax is not paid or is paid less than the ordained level, in addition to paying an amount equivalent to taxes or difference, it will be set a fine as much as two percent (2%) per month compared with the unpaid tax and the delay period.

In this regard, regardless of the deliberateness or error of the notary, has assumed the causation relationship between the action of the notary in the taxes not being paid and the damage being caused at the tax office; thus, just to do it, the action of the notary will be included in the legal verdict above. However, if delay in payment is due to the electronic payment system being disconnected, definitely the notary is not responsible for paying the damages to the tax office. Also, when the payment deficit is due to a mistake in declaring the accurate taxes by the competent authorities, the same verdict is applied.

3.1.2 Second Statement-Registration Office of Documents and Real Estate

Regarding the registration right funds in case of non-payment or payment deficit, the legislator has required the notary only to pay the main or difference of the fund; in this regard, paragraph three of the circular no. 10/8779 dated 1985/11/7 of document and real estate registration organization states: "if the notary and the office assistant are indebted they must be warned to immediately pay their debts and present the receipt of payment to the relevant inspection and reflect the receipt number in the proceedings".

Also, in the article 9 of executive instructions of the electronic payment system project of funds at notary offices it has been ordained: "when a mistake is made in calculation or determination of the accrued state rights degree, its legal liability in terms of the deficit of the related amount will lie with the notary and the office assistant".

3.2 Second Topic-Overpayment

Regarding the asset transfer tax with criterion unity of the notes of article 42 of VAT law, it can be inferred that in cases that funds in addition to the amount appointed, are paid to the tax administration and they can be achieved by notary certification, additionally according to the vote of the general board of administrative justice

court of no. 1338/8/20-102/77/0 all additional deposited funds of the office to the account of the state treasury, are reclaimable; thus, all the asset transfer tax and all the registration right will be reclaimable in case the excess of the amount due is paid. The mentioned view is therefore thus: “in article 49 the law of the country’s general calculations approved in 1987/6/1 of the Islamic council assembly is clear”. The funds that are achieved without permission or as excess of the amount due, regardless of the fact that the source of this additional reception is the mistake of the payer or the collection officer or the non-compliance with the collection amount with case, or the fact that the additional fulfillment of the received has been obtained due to consideration of the related system or the executive authorities obtained, the general income location must be rejected such that in implementing the rights of the stakeholder no delay is made; thus, toleration of the liability of reclamation of funds that anyway have been deposited at collection notary office and the state treasury for registration of contracts and transactions and deals, and to the notary who hasn’t used and benefited from it and is opposed to the explicit verdict of the legislator based on necessity of reclamation of the funds excess to the degree due in law of the general income location, and as a result the statement “the compensation of the damage of the client in terms of the received addition will be the notary” of the text of the circular of the no. 1/34/22247 dated on 1995/12/19 of the document and real estate registration organization of the country “the document is cancelled to the second section of the article 25 of official justice court”.

3.3 Second Part-Civil Liability of the Notary Due to Guiding the Clients

At the first look, it may be said that a loss that may be caused the client is due to the guidance of the notary; thus, the causation relationship is complete and the notary must compensate the damage induced; but with little reflection in article 22 of the law of notary offices and notaries and office assistants, it can be inferred that the notary’s liability is when he/she commits fault or violation of laws and regulations in doing his/her tasks. Thus: if the notary causes damage on persons without fault and violation of regulations (for instance in order to guide clients based on the principle of benevolence) also in cases that no duty and assignment has been enacted by the legislator for the notary (in doing an action), the notary is not responsible for compensation resulting from guidance of clients.

For instance, “the notary has taken the real estate registration form of an illiterate person as requested in order to help the person and has personally” completed the form, but he/she enters some information by mistake and this way causes loss and damage on the owner in order to correct the information inserted in the ownership document after registration of the real estate. Here the information inserted by the notary in the real estate registration form leads to damage on the owner and it seems that the legislator has been in the position of stating and by focusing on the principle of benevolence, he/she has considered the notary to be exempt from liability (in tasks that are not considered among his/her duties and are not considered as violation of regulations), since benevolence and good will are among the liability cancellers (Note 11).

However, whenever the notary strives to guide clients without any intention of benevolence and merely in order to gain financial benefit which leads to damage being caused on them, the topic of non-liability of the notary is to be reflected, since on the one hand guidance has been to gain more benefits of the notary and on the other hand no intention of benevolence has been at work and the action of the notary has been the direct factor of inducing damage on the customer. For instance, where a person after hypothecation of his/her real estate document at the office intends to re-hypothecate the property of the mentioned regarding its surplus and due to the lowering of the document registration costs of the notary question regarding the fact whether the introduction letter of the bank should be in mortgage or contract amendment and the notary guides the mentioned person such that it leads to his/her greater profit and this say it also causes damage to the client.

4. Third Part-Civil Liability of the Notary due to not Doing the Duty of Bewaring the Clients Regarding the Consequences of Regulating a Document They Sign

First topic-obligation to warn in France, doubtless more and clearer than any other place, “obligation to warn” is represented in the relationships between the notary and his/her client, and is considered as the complementary of the obligation of presenting service which is the main obligation.

This obligation which was authorized primarily by civil branches of the country’s supreme court in 2nd April, 1872, today has a significant position among the assignments of the notary; such that one of the most in-depth studies that have been conducted in this field divide all the obligations of the notary into two sections; one is “obligation to establish the authenticity of the document” which is based on law and the other is “obligation to warn” which is based on executive procedure. Since 1872, courts have always extended the domain of this obligation and have endowed it with heavier content.

Today, a very broad domain is considered for it. The courts have specially asserted that this obligation is not only taken on by the notary who interferes in the negotiation stage of a contract, but also the notary who is only responsible to authorize a document which has been negotiated without his/her presence and is probably regulated in an ordinary document, must carry out the duty of warning (view of the first civil branch, 18th October 1960, 10th February 1972, 15th February 1978, 30th June 1987 and 5th July 1989). Based on the issued sentences, the notary must strive to inform the document companions even if they haven't asked him/her anything or even when he/she is asked only to regulate an ordinary document and not an official document (specifically the view of the first civil branch, 24th June 1963).

In addition, the notary has such a duty toward all companions of the document and not only toward "the customer", since he/she must never violate absolute neutrality (judgment of the first civil branch, 27th April, 1978).

In terms of content, this duty requires the notaries to inform the clients of the range and effects of the obligations they take on; but in reality, obligation to warn is beyond these and requires the notary to provide very complete information for the clients not only regarding the document credit conditions that clients intend to regulate but also concerning its efficiency (judgments of first civil branch, 26th January 1988, 12th November 1987, 25th January 1989 and 6th January 1994).

Obligation to warn regarding the document credit is very accurate. The notary must conduct absolutely complete investigations and inform the document companions of all the defects that damage the contract project and warns them about the risks resulting from that (judgment of third civil branch, 17th January 1978, 22nd April 1980, 10th May 1992, 10th January 1995). If he/she observes that there is a reason that can cancel the document, he/she must avoid its regulation. The investigations of the notary include the capacity of the document companions, rights of each of them and the range of their authority (which requires the investigation of the credit of licenses that they have probably received). He/she must even try to find the frauds and make sure of the authenticity of the statements presented to him/her (judgment of first civil branch, 14th January 1981); but the unauthentic statements that have been made by one of the parties can remove the liability of the notary regarding the utterer (judgment of first civil branch, 9th December 1974).

The notary's obligation to warn not only requires him/her to inform the document companions of the conditions of the document credit, but also to subject them to such conditions so as to be able to effectively and optimally provide their resources. To this end, the notary must recommend to them the best method for accessing the proposed objectives of the document companions (judgment of the second civil branch, 9th December 1974 and first civil branch, 17th February 1981 and 26th January 1988). He/she must also draw the attention of the clients to all the risks that the proposed operations have for this or that party. This risk obligation not only includes executive risks (judgment of first civil branch, 12th May 1976, 28th April 1986, 21st February 1995, 26th March 1996, and 20th January 1998) but also covers all risks that have a mere economic aspect (judgment of third civil branch, 5th October 1971, judgments of first civil branch, 7th February 1984, 19th May 1992, 30th May 1995, and 26th November 1996) and specifically about conferring loans, regarding the lack or inefficiency of an insurance that can ensure the payment of future maturities in case of the death or failure of the loan borrower before complete payment (judgment of first civil branch, 4th February 1997) and also includes the inadequacy of the deposited money to the lender (judgment of first civil branch, 6th June 1977, third civil branch, 24th April 1985, judgment of first civil branch, 26th November of 1996).

Eventually, the notary must carry out all the necessary investigations in order to inform the clients of the accurate financial status regarding which the operations take place (judgments of first civil branch, 11th December 1990, 13th November 1991, 20th October 1993, 26th November 1996, and 27th May 1997); specially if the proposed asset is immovable he/she must inquire its legal status from the related references in order to inform the document companions of the existence of easement in that asset (judgment of first civil branch, 9th February 1972, 5th July 1989, and third civil branch, 23rd 1994 (Note 12)).

This obligation in Iran's statutory can't be seen the way it exists in the executive procedure of France. Assume that you go to a notary office in order to regulate the lawsuit legal document; after regulating and obtaining the representation and handing in to the proposed lawyer, you will notice that this lawsuit is not reputable for defense in presence of the judge (of course if the document lawyer is not the official lawyer of court). The notary in Iran has no obligation regarding the statement of effects of document regulation and its efficiency to clients (although the moral duty of a professional notary requires this) but in fact as the notaries don't have such a duty mostly they forget to inform the clients of the consequences and effects of the regulated documents thus when damage is induced on the parties or stakeholders, the notary will have no responsibility in this regard since based

on article 22 of the law of notary offices and notaries and office assistants, the notary is responsible only regarding the matters that are part of the duties of the mentioned.

Second topic-non-attributability of the “warning” principle regarding the liability of notaries

The “warning” principle is derived from the hadith “he who warned apologized in fact”. This account is related to Imam Sadiq PBUH who has quoted this from Imam Ali PBUH. Based on the afore said principle, if someone warns another person before doing an action that may probably endanger someone, and despite this the addressee or the listener doesn’t heed his/her warning and therefore not apply it and take the risk, and due to the action of the person who warns damage is caused on the person warned, the person who warned will not be responsible for this; thus, the basis of this principle in cases where inattention to that leads to liability or civil or criminal liability, it can remove liability and remove liability from the obligation of the required persons and the natural and legal persons; for instance, the gutters that are drilled in streets by municipal workers or tender workers of private companies to offer urban cities and the required warning signs that are appointed in proper places, can be an example of this principle or in highways and main roads, beneath the pedestrian bridge and the like, installment of the pedestrian bridge itself acts as a warning and will remove liability. Late Sheikh Mofid 413 B.C. states: *va man kana yarama...* which means that: as the shooter has warned although the opposite part has been obliterated due to the arrow he/she has shot, yet no liability and responsibility is taken on by the shooter of arrows (Note 13). According to the levels of the mentioned, in order to implement the principle of warning some conditions are required: first, the effective warning of the subject; second, warning should be in such a way that the addressee becomes aware of it based on principle; thus, if the aggrieved hasn’t been informed of the incident taken place and is neither informed by the warning of the addressee, the principle of warning isn’t applicable either. In other words, if the aggrieved were informed of the incident he/she wouldn’t have the right of demand for damages from the loss-implementing person. In contrast, regarding the duty of warning in law of France the notary is obliged to give the necessary warnings to the person regarding the consequences and effects of a document he/she is regulating for a specific person. Here, unlike the principle of warning (where the aggrieved is not the subject), the aggrieved is the subject and the agent and the notary only has the duty of warning regarding the consequences of document regulation; thus, according to the mentioned levels we will notice that these two issues are not congruous and therefore in Iran’s law by appealing to the principle of warning the notary can’t be seen as responsible for the duty of warning regarding the clients.

5. Fourth Part-Condition of Civil Non-Reliability and Civil Liability-Removing Factors of Notaries

5.1 First Topic-Non-Reliability Condition

What lawyers have stated about the non-reliability condition is the fact that in the contract that is signed between the responsible person and the possible aggrieved and due to this the responsible person is exempt from paying all or part of the damages (Note 14).

The parties’ permission for civil non-reliability of the notary doesn’t cause failure of liability per se; unless the liability has been negated by symmetry or assertion but ant kind of non-liability condition or non-liability is associated with permission; thus, the relationship between this public and private is “men vajah”; that is, the non-liability condition doesn’t require the existence of permission but the existence of permission doesn’t imply non-liability (Note 15).

In Iran’s law insertion of such a condition in the contract is admitted on the condition that the damage resulting from the faults is not intentional. The non-liability condition is justified considering the freedom of contract principle (article 10 Iran civil codes (Note 16)).

In France’s law as well no condition has an effect on contract liability of the party which is due to heavy fraud or fault (Note 17).

It is fine if the employer in the private contract that he/she signs with others, reduces this guarantee in that relationship and limit his/her liability to a certain amount or exempt himself/herself from it; since this principle according to which the employer guarantees the mistakes of others is not related to the public order; it is a guarantee to the benefit of the contract party that can voluntarily do away with it, it isn’t to the disadvantage of the workers either since they are responsible for their personal faults (Note 18).

There is no definite verdict in laws and regulations and circulars related to the notary offices regarding the civil non-liability of notaries; just a registration organization within a circular hasn’t approved of the non-liability of the notary regarding the series of transfers, has stated thus: “in some notary offices regarding the series of transfers in inquiry, the notaries try to exempt themselves from liability; as this non-liability is not right and if the office starts to doubt in transfers regarding the accuracy and indisposition of the transaction or the

conditional document, it may inquire the related office for the levels and by adoption of answer and removal of doubt regarding the transfers, by accepting liability it may take measures for due assignment in the circular (correction of the circular of the no. 3/5224 dated 1975/8/1 of the country's document and real estate registration organization)".

Considering the article 22 GH.D.A.R.S. as the legislator has considered the liability condition of the notary toward the parties and stakeholders to be his/her violation of the relevant regulations, it seems that the intention of the legislator has been merely guarantee of the rights of the parties and stakeholders; thus, when parties and stakeholders insert a condition based on civil non-liability with full satisfaction in their regulated contracts at the office, the aforementioned condition is right since the nature of the aforementioned condition hasn't be discharged so as to referred to implementation of "ma lam yajab" canceller (rather, the non-liability condition means that when in the future the conditions of fulfilling a special liability are gathered, that liability won't be brought about; that is, the contents of the agreement have a view to the future and are according to its probability (Note 19))

That is to say, the damage that is caused after documentation will be removed from obligation of the notary on the condition of the civil-non liability which has been inserted in the document, and in fact the removal of the liability is carried out after attainment of damage and by means of the condition inserted in the contract.

Nevertheless, seemingly the insertion of the non-civil liability condition of the notary is faced with limitations and is not absolutely applicable.

In cases in which the person deliberately caused damage or does actions with full awareness that is considered deliberate in terms of civil law, the non-liability condition can't reduce his/her obligation toward compensating the damage (Note 20).

Today, among the notary offices it is not common to use this condition for non-civil liability (although its implementation by the notaries is not legally prohibited); instead, by propagation of the civil liability insurance of the notaries, such liabilities are covered by insurance.

5.2 Second Topic-Civil Liability-Removing Factors of the Notary

5.2.1 First Statement-Pride

The term pride refers to deceit and deception; pride means the persuasion of another person toward the damaging seizure of one's property and life by his/her adornment in the appearance and self-satisfaction (proud) so that he/she does the damaging actions by determination and will.

The liability-causing pride has been divided into two groups: word pride and practical pride.

1) Word pride is when the vain person by expressing statements and words that encourage and evoke pride, persuade him/her toward damaging seizures and when naturally the result of such words and statements induce damage on the vain person, he/she must compensate for this.

2) In the action pride, the deceiving person causes the pride of another person by doing an action (Note 21).

5.2.2 Second Statement-Benevolence

In the legal sense, benevolence refers to doing a benevolent and desirable action and the benefactor is that who by removing the financial or spiritual damage from a person or to his/her benefit, has done an action to help and has served him/her. The sacred ayah (verse) of "the benefactors of the way" has been interpreted that the benevolent person or the benefactor can't be beaten and injured and harmed and reprimanded; in other words, neither is the assigned verdict of respect at work nor is the enacted verdict of liability (Note 22).

In this regard, the same former example could be mentioned when the notary tries to complete the real estate registration form for one of the clients and due to error of the notary (at the time of documentation) after the real estate registration the owner suffers damages in order to correct the document, here also as the notary has acted thus due to benevolence and helping the person and this action hasn't been part of the duties of the notary, therefore the notary is exempt from liability.

5.2.3 Third Statement-Competent Authority Measures

When the courts make a mistake when issuing a verdict regarding the real estate registration and the requirement of the summoned for registration of the official document concerning the insertion of the four limits of the real estate verdict, and the notaries regulate an official document based on the presented limits in the court verdict, here as the action of the notary has been in accordance with the competent authority measures, he/she is exempt from civil liability. Also in the cases when for instance the separation proceedings of real estate are regulated

erroneously by the registration office and based on that it is regulated in notary offices, the notaries are exempt from civil liability.

6. Conclusion

By examining the present study regarding the civil liability of notaries it is concluded that the civil liability of notaries has been legislated considering articles 22 and 23 GH.D.A.R.S.D. by reliance on general rules of civil liability. Therefore, to enact the civil liability of the notary, the fulfillment of the general elements of liability is necessary; thus, damage must have been caused, that is to say, the potential damage isn't adequate and the notary must have committed a damaging action as well, and therefore there must have been eventually a causation relationship between the inducement of damage and the action of the notary; that is to say, the action of the notary must have induced damage. The legislator has enacted the recent M 22 GH by reliance on the fault theory and its M 23 by reliance on the risk theory. Non-coordination in stating the theoretical foundations of civil liability of notaries is a major flaw; as if the legislator has assumed the notary offices to be a factory and the notaries as its trustees whose only objective is to gain more profit and benefit. Whereas by considering the legal nature of the notary offices, it can be realized that this institution is the legal personality of general laws and Acts governing the registration and transfer documents do.

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Notes

- Note 1. Hussaingholi, H. (1991). *Civil Liability* (p. 1). University Campus Publications, Tehran.
- Note 2. Naser, K. (2007). *Civil Liability, General Rules* (8th ed., Vol. 1, pp. 382-383). University of Tehran Publications, Tehran.
- Note 3. Muhammad, M. (2007). *Moein Lexicon* (3rd ed., p. 452). Nobahar publication, Tehran.
- Note 4. Seyyed, M. G. (2007). *Foundations of Civil Liability* (p. 43). Mizan publication, Tehran.
- Note 5. However, by the law of notary offices and notaries and office of companions being approved in 1975/04/25 according to the specificity of the recent law, article 68 of the document and real estate registration law of 1931 has lost its feasibility regarding the notaries and office assistants.
- Note 6. For more studies and seeing the opposite view see the book: Naser, K. (2007). *Civil Liability, Specific and Mixed Liabilities* (8th ed., Vol. 2, p. 16). University of Tehran publications, Tehran.

- Note 7. Naser, N. (2003). Liability of Notaries. *Journal of Notary Association* (p. 14). Tehran.
- Note 8. Seyyed, M. G. Z. (2007). *Civil Liability Foundations* (5th ed., p. 406). Mizan publication, Tehran.
- Note 9. To study more regarding the principle of acting see the book: Abolhasan, M. (1995). *Principles of Jurisdiction* (2nd ed., p. 235). Yalda publication, Tehran.
- Note 10. Hussaingholi, H., *ibid.*, p. 70.
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