A DISCUSSION ON THE INTELLECTUAL PROCESS FORMING THE INTENTION: A CHIEF BASE FOR LEGAL CAPACITATING IN CONTRACTS WITH SPECIAL REFERENCE TO MAJOR JUDICIAL EVENTS

BY

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ABSTRACT

The works attempts to rest on the significance of the intellectual process of the parties translating briefly into intention. Intention to that context is often expressed as a necessary element for the existence of an indenturitive bond in any legal system. The writer defines intention, based on his theory, as a mechanism that may be ascertained as a pre-contractual instrument that reflects preliminary agreements or understandings of one or more parties to a future contract. As a prerequisite such study needs to evolve around the intellectual process of the parties to reach at the stage of Intention, where is the resting point of study, making them able to legally enter into a contract/bond. The study enjoys comparative angles of intention with particularly focusing on; Islamic Legal System, Civil Law and Common Law. The analyze begins with early consensualistic tendencies of the eighteenth and nineteenth centuries, based on the "meeting of minds" provide as the start of the thesis doctrinal views. This, in the first "Preface" and then in "Introduction" chapters is discussed reviewing on eminent of pre-codification jurists such as Domat and Pothier and the draftsmen of Civil Code such as Portails. Then we read that it is the conjunction of "wills" of the parties and mutual "consent" that generates a contract. Adherents of this trend favoring the "declaration theory" leads the writer to reach his most crucial part of his thesis in chapter three where he anatomizes the intellectual process of a party on seven legally defined and psychologically distinctive stages. All the stages may and can have legal consequences should be taken into a motion in the progress of creation of a contract. As a believer in this theory the writer then assumes in effect that only the dispatch of the acceptance establishes the reality of the legal practice through defined mental stages of the contributors. As the final conclusion we understand that inner psychological elements, residing within the mind of a legal person, can never be known to anyone else except if they are legally exteriorized. A purely internal process of mind, related to a psychological element required for the formation of a contract under any legal system, is, first, beyond the reach of the law, but is a concern of the law. The writer, since briefly compares the standing of inner intellectual elements translated into intention and its applicability in contracts from the approach of major legal systems. He concludes this part, saying that the difference in approach is only a matter of emphasis, since, all legal systems have to work with exteriorized indications of inner cerebral elements in order to appraise and evaluate their legal effects.

ملخص البحث

تُحاولُ الدِّراسَة الإستِنادَ على أهمِّيةِ العَمَليةِ الثقافيةِ للأطرافِ والتي تُتَحَوّلُ سريعاً إلى *النيةِ*. *النّيةِ* في ذلك السياقِ في أغْلَبِ الأحْيانِ تُعَبَّرُ كعُنْصُرٍ ضَرُوري لِوُجودِ رَابطةٍ كِتَابيةٍ في أيّ نِظامٍ قانونيٍ. الباحث، على ضوءِ نَظَرِيَتِه، يُعرِّفُ النيةَ كَآلِيَةٍ يُمْكِنُ أنْ تَكُونَ مُحَقَّقَةً كآلَةٍ قَبْلَ التَعَاقُدِ الذي يعْكسُ إتِّفَاقِياتٍ تَمْهيدِيةٍ أَوالفهمَ مِنْ أحدِ الأطرافِ أَو أكْثَر إلى عقدٍ مُسْتَقبَلي. وكَشَرْطٍ ضَروري تَحتاجُ مثلُ هذه الدِّراسَة أن تَتَطَوُّر حَولَ العمليةِ الثقافيةِ للأطرافِ للوُصُول إلى مرحلةِ النيةِ، حيث نُقطَةُ تَركِيزالدراسةِ، التي تُمكِّن لَهُم قانُونيًا الدُخُولَ إلى تعَاقْدٍ/رابطةٍ. تَتمتّعُ الدراسةُ بالزَّوايا المُقارِنَةِ للنيةِ مَع التَركيز بشكل خاصٍ على؛ النّظامِ القانوني الإسلامي، القانون المَدَني والقانون العَام. يَبْدأُ التّحْلِيلُ بالمُيول الحِسّيَةِ المُشْتَرَكَةِ المبكِّرةِ للقرنِ الثَّامِنِ عَشَر والتَّاسِعِ عَشَر، مُسْتَنِداً على "إجتماع العقول" مُعْتَبِرَةً كَبِدَايَةٍ لوِجْهاتِ النظر المَذهَبيةِ للإطروحةِ. هذه، في "المقدّمةِ" الأولى وبعد ذلك في فصولِ "التقديم" هناك تُنَاقَشُ مُرَاجَعَةٌ على الخُبَراء القانُونيّين السَّاميين مِنْ قَبْلِ التَّقنين مِثلُ دومات (Domat) وبوثير(Pothier) ومُؤَلِّفي القانونِ المَدَنِي مِثلُ بورتيلس (Portails). ثمّ نُلاَحِظ بأنّ إرْتِباطَ "إراداتِ" الأطرافِ و"الموافَقةِ" المتبادلةِ هما اللذان يُؤدِّيانِ إلى عَقدٍ ما. أتْباعُ هذا الإتجاهِ الذين يُفضّلُونَ "نظرية الإعلانِ" يَقُودُون الكاتِبَ إلى الجُزْء الحاسمِ مِنْ إطروحتِه في الفصل الثالثِ حيث يُصَنِّفُ العمليةَ الثقافيةَ لطرفٍ ما في سبعِ المَراحِلَ. كُلّ المَراحِلُ التي يُمكنُ أو قَدْ تَكونُ لديها نتائجَ قانونيَةَ يَجبُ أَنْ تُؤْخَذَ إلى اعتبارٍ في طَريقِ إنْشَاءِ عَقْدٍ ما. كَمُؤمِنٍ بِهَذِه النَّظريةِ، يَفْتَرِضُ الكاتِبُ حِينَئذٍ في الواقِعِ بأنَّ إرْسالَ القبولِ فقط تُؤسّسُ حقيقةَ الممارسةِ القانونيةِ خلال المراحلِ العقليةِ المُعَرَّفةِ مِنْ المساهمين. وكخَاتِمَةٍ نهائِيَةٍ نَفْهَمُ بأنّ العناصرَ النَّفسيَةَ الداخِلِيَةَ، المُسْتَقِرَّةَ في ذِهنِ الشَّخصِ القانوني، لا يُمْكِنُ أنْ يَعْرَفَها أي شَخصٍ آخر إلاَّ إذا تَجسّدتْ قانُونيًا. إنّها عَمَلِيةً داخليةً تماماً في العقلِ، مُتَعَلّقةٌ بعُنْصُرٍ نَفْسي مَطلوبٌ لتشكيلِ عَقدٍ ما تَحتَ أيّ نظامٍ قانُوني هي أولاً خَارِجَةٌ عَنْ مُتَنَاوِلِ القانونِ، ولكن يَهْتَمُّ القانُونُ عَنْها. وبعد أن يُقارِنَ الكَاتِبُ سَرِيعاً مقامَ العناصرِ الثقافيةِ الداخليةِ المُتَحَوِّلَةِ إلى النيةِ وتطبيقَها في العقودِ مِنْ نظرةِ الأنظمةِ القانونيةِ الرئيسةِ؛ يَخْتَتِمُ الكَاتِبُ هذا الجزءَ، قَائلاً بأنّ الإختلافَ في النظرةِ هو مسألة التأكيدِ فقط؛ لأنَّ كُلّ الأنْظِمَة القانونيَة يَنْبَغِي أَنْ تَعْملَ بالإشاراتِ المُجَسَّدةِ مِنْ العناصرِ المُخِّيَةِ الداخِلِيَةِ لِكَيْ تُقَدّرَ وتُقيّمَ تَأثِيراتِها القانونيةَ.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Arts (Islamic Civilization).

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Ahmad Kazemi Moussavi
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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Mohammad Reza Bayat

Signature……. Date……...

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Affirmed by Mohammad Reza Bayat

…….. ……

Signature Date

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CHAPTER ONE

THE STATUS OF CONTRACTS; PSYCHOLOGICAL ELEMENT, *AL-IRĀDAH*; 'ESSENTIAL CONDITION' OF FORMATION OF A CONTRACT A COMPARATIVE STUDY

INTRODUCTION

Legal Function of Psychological Elements; a General View

Under Roman, French, and Iranian Law (which is an outstanding example of marrying French and Islamic Law in certain areas, mostly in Civil matters), Contracts fall within the wider purview of '**obligation**'. The same may be thought to apply to English and Islamic Law, but this would entail the superimposition of an alien notion on them since general category of obligations has not historically developed under either system.[1]

Obligations in Roman law arose, pursuant to Justinian's codification, *ex contratu, ex delicito, quasi ex contractu* or *quasi ex delicto.* French law has adopted with certain modifications, the same categorization and has, as a result, developed in due course a general theory of obligation, of which contractual obligation forms a part but with its own characteristics.[2]

---

[1]*Obligatio* in Latin is a derivative of *ligare* , which originally meant 'to obtain' but gradually came to mean to unite, to bind or to tie, together. It denotes at the same time the burden, the 'debt', assumed by or imposed on person, its correlative benefit, 'the credit', accruing to the other person, and the correlation between the two sides, whether the bond is generated by a contract or a tort. Its etymological significance is close to that of the Arabic term '*aqd*', (contract), in Islamic law, which means a tie, or a knot, binding the together.

[2]The French theory of obligation has in the course of the present century been thoroughly revised by doctrinal writings under the influence of German BGB (German Civil Code). This is also widely influenced by the introduction of the concept of 'juridical act', termed in French *acte juridique*, which covers any intentional act to produce a given legal effect.

The essential conditions in French law for formation of contract in general is set out under Article 1108 of Civil Code, which provides: "Four conditions are essential for the validity of a contract:

1. The legitimate consent of the party who binds him/herself (to the contract);
2. His/her capacity (each party) to enter and conclude a contract;
3. Existence of certain object which indicates the subject-matter of the contract;
4. A lawful cause for the obligation."

The requisites of contract formation under English law are more complex and cannot be encapsulated in few basic rules. Parties' intention to create legal relations is not enough to produce an enforceable contract. Hence there must also be 'consideration', namely, an exchange of the material value, or, otherwise, the formality of writing and seal. The concept of a simple contract in English law, therefore, may provisionally be regarded as being an agreement involving exchange of promises in a bargain.[3]

In Islamic law the concept of *'aqd* is, in comparison with English 'contract' or French *contrat*, at once wider and narrower in two different ways. Hence, in comparison with those above mentioned systems its concept from an Islamic approach is wider in import for embracing some dispositions, which are not considered 'contracts' or *contrats* such endowment (*waqf*) or dispositions (*waşiyyah*).[4] In the result, Islamic *'aqd*, roughly covers in principle the same grounds governed today in French law by *actes juridique*. But we should be very careful since *'aqd*, on the other

[3] This only can correspond, as has been indicated in the previous lines, to only one of the types of contract in French law: *contrat a titre onereux*. It is worth to say, here, even for the '**onerous**' contracts, the agreemental element of '**consensus**' and its derivations as used in English law do not have the same significance, nor have they the same function, as has *le consentement* in French law.

[4] In this way, *'aqd* comes nearer to the French *acté juridiqué,* but should not be identified with it. *'Aqd* always requires an acceptance, whereas *acte juridiqué* does not always do so.

hand, represents a narrower concept than ‘contract’ or *contrat* because of the range of contracts is closed in Islamic law and there are certain limitations, based on some formalistic considerations. Furthermore, the notions of will (*irādah*), intention (*qaşd*) and consent *(ridā*) have their own particularities in Islamic law.

Islamic law, like Roman law, to me lacks, due to the absence of a certain law of contracts, general requirements or conditions for the formation of a contract. But however three of the four conditions found under French law, as we just saw, the intention and consent of the parties, their capacity, and the subject matter of the contract are introduced as the four pillars of contract. Hence, comparatively speaking, the only difference which can touch an equivalent to French *cause* is not understandably to be found in Islamic Law. Though certain comparable counterparts are to be encountered where the legality of ‘cause’ is at issue or where ‘cause’ signifies ‘motives’. In this respect we will widely discuss in the coming chapter.

Finally we can suggest that the concept of contract is the widest in French law and the narrowest in English law. With Islamic law in this respect, stands in between. Notably, then, presence of the psychological elements of intention and consent, come more visibly to view. With regard to the conclusion of all the varieties of contracts, none of the legal systems is entirely ‘consensualistic’ or ‘formalistic’. The difference lies in the shift of emphasis and in the nature and scope of the form or the degree of the consent required for a contract in a particular legal system.

Various psychological elements operating in the legal systems under review fall, broadly speaking, into a common pattern. All major legal systems namely, English, French and Islamic law all assign a certain role to some psychological elements in the formation of a contract or contracts. This, however poses jurisprudential problems and goes, in the final analysis, to illustrate in adequacy of

traditional concepts pertaining to the formation of a contract under the changed and sophisticated conditions of the modern era.

English law requires the presence of an 'intention to create a legal relation' and also makes-or has made- use of such psychological elements as 'consent' and *consensus ad idem*. French law considers the will (*volonté*) of the parties to be the basic element and refers to their consent (*consentment*) and defects therein.[5] The legal notion of these notions are to be treated beyond their respective lexical meanings, and their respective roles in the formation of a contract are to be compared in theoretical and functional terms. But anyhow some attempt will be made here to go into a philosophical or psychological analysis, which may fall beyond both the scopes of the present work and the knowledge and ability of the writer.

Range of Psychological Elements

All systems require a primary generation of decision-making as a result of distinctive intellectual process, whether their motivating factor is termed 'intention', *volonté,* or *qaşd;* an accompanying willingness, whether it is termed 'consent', *consentment,* or *ridā*; and, a freedom from external pressure, deceit or other adverse influences all in order to conclude a valid and binding contract.

These elements, depending on their respective roles, contribute to demarcating first, a legally valid contract from an ethical agreement and second, legally binding contract from a legally void-able contract or an attempted void contract.

This common pattern presents only an oversimplified picture. There are refinements in each system, there are controversies in varying degrees about the respective roles of these psychological elements, and there are certain other elements

[5]Iranian law provides that there should be both intention (*qaşd*) and consent (*ridā*).

under one or the other system, which have similar functions but are not psychological.[6]

On English Law; 'Intention to Create Legal Relations', 'Consent' and 'Mutual Assent' or *'Consensus ad idem'*

Before focusing on the Islamic definition of intention to create a contract, the writer would like to point out a comparative analysis in this regard briefly. In English Law references to the 'will' of the contracting parties, as an element in the formation of contract, have been scarce in the traditional technical approach of judges and legal scholars. So Intention as an element for the formation of the 'simple ' contract in English law has been superimposed on the indigenous criterion of consideration. Through a chain of judicial decisions originating in the 'classic' approach of English law to contract it has been used as a test for demarcating a legal relation from a purely domestic, social or moral relation.[7] Elimination of intention as a test would, it appears, raise many problems since other criteria of contract of formation, being consideration and offer and acceptance as the common mechanism, has its own shortcomings, inconsistencies and lacunae.[8] The reluctance of the courts to change course, if

[6]For more see; Chloros, "Comparative Aspects of the Intention to Create Legal Relations in Contract." in *Tulane Law Review*, new ed. (1959) 33: 607-20. Also see; R. A. Hall, "Intention to Create Legal Relationships", in *Law Journal*, new ed. (1960), 110:523., B. H. Hepple, "Intention to Create Legal Relations", in *Cambridge Law Review*, (1970), 28(1): 122-37., Anne de Moor, "Intention in the Law of Contract", Elusive or Illusory?", in *Law Quarterly Review*, (1990) 106: 632-55.

[7]For some 'gravest objection' to the 'subjective theory of intent derived from continental sources' and its reflection in textbooks to the effect 'that misrepresentation, undue influence, duress and mistake' in English law affect contract 'by destroying consent', See: S. Williston, *Contract*, Vol.1, Sec.20., (London:1970)

[8]There is a slight point here that an offer in the ordinary sense would not technically become an offer in the legal sense if not so intended. Practically speaking, the mechanism of offer and acceptance fails in a number of cases to satisfactorily meet the intellectual process of contract formation. The test of consideration may also fail to cover certain situations not meant to create legal relations. An exchange of promises involving material value, in social and friendly context not meant to create a legally enforceable agreement. Compare this, with a similar exchange of promises but between two commercial enterprises engaged in public relations to further a business objective, where the context changes and the agreement would become legally binding.

technically due to a long line of judicial decisions, may otherwise be due in part to complex implications which discarding the test of intention would entail, and in part to an entrenched outlook about its function. Once however the presence of intention to create legal relation is established, then other factors come into play. Consent continues to play a part in certain areas of English law such as duress and undue duress where it is considered to be affected.[9]

On French Law:*Volonté* (Will) and *Consentement* (Consent)

In French law much stress is laid on *volonté*[10] associated with *consentement*. *Volonté* sometimes signifies the psychological state of one party. A contract in French law is held to be an *accord*, a *rencontre* or a *concours* of the *volontes*, i.e. the meeting of the wills, of the parties. This accordance, or agreement between the individual wills of the parties is termed *consentement*. This provides a brief sketch of the technical employment of these psychological elements in the formation of a contract.[11] Generally, for any discussion of the role of psychological elements in the formation of contract it is the element of *volonté*, which is taken up and considered rather than *consentement*. Technically, *volenté* is frequently ascribed a role similar to 'intention' in English and Islamic law (also Iranian law), while consentement more closely plays

[9]With regard to the analysis of a contract in terms of consensus *ad idem* or 'mutual assent', the attitude of English law has much changed since the reception and prevalence of such elements in the nineteenth century. To me, this is due, in the main to the objective assessment of the outward expression of psychological elements through offer and acceptance and the presence of consideration.

[10]*Volonté, stricto sensu*, has an individual and personal character which, is held to remain distinct even in the 'meeting of the wills' of the parties in generating a contract.

[11]For more See: G. Ripert and J. Boulanger, *Traite de civil d'apares de Planiol*, Vol. 2, (Paris:1957), 33-130. , B. Starck, *Driot Civil, Obligations, Contrat*, 3rd edn. by H. Ronald and l. Boyer (Paris:1989),557., Also see: J. Carbonnier, *Droit civil, Les obligations, Le contrat*; *Formasion*, 2nd ed. (Paris:1988),31 and 191., A. Rieg: "La role de la volonte, Naissance evolution d'un concept", (Ph.D. Thesis University of Strasbourg, 1961).

the function imputed either to 'consent' or to 'mutual assent' under the classic English law of contract, as well as to 'consent' under Islamic and Iranian law.[12]

On Islamic Law: *Qaşd* (Intention), *Ridā* (Consent), *Irādah* (Will) and *Ikhtiyār* (Freedom of Choice) With a Comparative Observation on Shiite and Sunni Schools

Islamic law shows at times an appearances of consensualism but it has, in fact, a formalistic approach to the formation of contracts. These formalities which are contrary to what used to be in early stage of Roman law, are not usually in the performance of certain ceremonial acts, but in the utterance of appropriate words in the right way for the formation of contracts. Thus, a trend comes to view in the nature of Islamic studies suggesting that there is no 'formalism' (*shakliyyah*) (except in *nikāh* where has a separate chapter to pay attention in this work) in Islamic legal system. But a 'verbalism' (*lafziyah*) which is based on strictly logical and grammatical analysis of various modes of declaration of intention and consent has more rooms to be given. So the underlying psychological notions consists of and consent which provides, *prima facie*, a consensualistic basis for the conclusion of contracts while, this notwithstanding, verbalism retains its dominance.[13]

Technically speaking the term 'will' (*irādah*) is not usually employed in Shiite law in the same way, as it is in-mostly recent- Sunni legal works. It appears in specific defined environment because of its definition in the principles of Islamic

[12]One major point of comparative interest is the high degree of coherence noticeable under the French approach to various facets of *consentement* in contract formation than is to be found under the other three systems under review.

[13]For more see:Ja'far Ja'fari Langaroudi, "Ta'sir-e Erade Dar Qanoon-e Madani" (Effects of Will in Civil Law) [of Iran], in Persian (Ph.D. thesis, Tehran University, Tehran: 1962), 44.

jurisprudence (*'Uşul al-fiqh*) or in theological or philosophical writings, where the term 'will' has, as in Sunni jurisprudence, a distinct significance.[14]

'Freedom of Choice'[15]: There is then, *ikhtiyār,* which for practical purposes at the moment, may be translated as 'choice'. To me, the term stands for different concepts in Shiite and in Sunni law. Precisely the meaning of the term is 'the choice in giving or withholding consent', that is freedom from external pressure. Therefore, in vice versa way, it cannot be obtained if the consent is extorted by duress. [16]Hence, legally speaking, only pressure is removed, and the victim has regained his choice (*ikhtiyār*) and given his consent, the contract will become binding.[17]"The contract of a person subjected to duress (*mukrah*) shall be binding if he consents after (regaining) his 'choice' (*ikhtiyār*)."

'Will': In the presentation of Sunni law 'will' is frequently used as comprising all three elements of 'intention' 'consent' (*ridā*) and choice (*ikhtiyār*). So far, concerning with this approach 'will' so defined as such, finds, surely a verified legal identification than 'intention'. For we see 'intention' as part of 'will'. Hence, 'intention' being as a part of *ikhtiyār* in Sunni law, exists, as in Shiite law as well, even in the case of duress. But it may or may not be accompanied by the element of

[14]In such sophisticated texts 'will' and 'intention' are distinguished from each other. 'Intention', according to the Voluntarists (Ash'ariyah) is distinguished from 'will' and is considered as constituting one of the stages preceding the formation of 'will'. For more analysis of 'will' with reference to Shiite and French sources. See: Nasser Katouzian, *Qawa'ede 'Omumi-e Qaradadha* (Civil Law: General Principles of Contracts), in Persian, vol.1, 2nd ed. (Gang-e Danesh, Tehran : 1985)125-221. Hence Cited: Katouzian, *General Principles*. For deeper *fiqh* analysis also see: Khu'ini, *Khod Amooz-e Kafaya al-'Uşul* (Self Study of Kafayah al-Usul), in Persian, Vol.11, 2nd ed. (Qom:1971), 94-107.

[15]It is to be mentioned that the concept of 'freedom of choice' under Islamic law should not be confused, due to the similarity in idiomatic expressions, with 'freedom of choice' in the contest of English or French law which relates to the question of 'freedom of contract' in a juridico-economic sense geared to the idea of *laissez-fair*.

[16]Ansari, *Makāsib*, Vol. 1,[text: Islamic law and Trade], the book of Sale, in Persian (Iran:1970) 33-4.

[17]See: Allamah al-Hilli, *Qawā'id al-Ahkām*, the Chapter of Duress.

'choice' which in Sunni law is directly connected with 'intention', whereas in Shiite law it is more closely linked with 'consent'.[18]

Sanhuri with reference to Sunni schools says:

> ... (Will) is composed of two elements: choice (*ikhtiyār*) and consent (*ridā*). If the will perishes, both elements perish together... in duress..., according to Islamic law, the element of *ridā* is lacking but the element of *ikhtiyār* exists...[19]

Ikhityār in this context, may either be equated with, or be taken to comprise, the Shiite notion of intention (*qaşd*). On the significance of these three elements Zarqa in the context of Sunni law states:

> *Irādah* is the mere volition for an act and directing of mind towards it, while *ikhtiyār* means the power to prefer doing or not doing an act, and *ridā* is the desire to do an act and the contentment with it. [20]

With an effortless observation it is clear, as put for the Sunni law, *irādah* suggests a larger implementation in practice and so of a general concept as again Zarqa mentions:

> *Irādah* is more general than all the rest. *Ikhtiyār* is a particular instance of *irādah*, because a person who has *irādah* may or may not be have the power to choose otherwise, that is, he may be free or forced. *Ridā* is a particular instance of *ikhtiyār*, because a person may be free in doing an act, namely, he may have the power to do otherwise, but may not have consent in doing it, that is, may not desire it or be content with it, such as a person who does not wish to kill, but kills in self-defense.[21]

It should be noted that *ridā* in the latter part of this exposition is used more in details and technical sense and signifies contentment or desire. Technically, what is meant by *ridhā* in its Shiite version is a 'contractual or transactional willingness'.

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[18] For more see; Katouzian. *General Principles*.

[19] Al-Sanhuri, *Maşādir al-Haq fi al-Fiqh al-Islami* (Sources of Right in Islamic Law), Vol. 2, 2nd ed., (Cairo: 1960), 202. Hence Cited: Al-Sanhuri, *Maşādir al-Haq*.

[20] Mustafa Ahmad Zarqa, *Al-Fiqh al-Islami fi al-Thowbah al-Jadidah*, [different volumes have different editions], Vol. 1., (Damascus: 1958-1959), 358-9.

[21] Ibid., 359-60. For more on the divergence between 'will' and 'intention' and a classification of different stages of 'will' and 'intention' and a classification of different stages of will resulting in the formation and expression of intention, also see; S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, Translated into English by Farhat J. Ziadeh. (Leiden: 1961), 159 *et seq*.

This, the Shiite approach, should be coupled with a real and internal contentment.[22] A person under personal distress may have to sell a thing at a price much lower than its real value, but, yet, he is held to have a 'transactional consent' (*ridā al-mu'āmeli*).[23]

A Technical Discussion on Differentiation between 'Intention of Word' (*Qaşd al-Lafz*) and 'Intention of Meaning' (*Qaşd al-Ma'nā*)

This is a base for any contract to be concluded, the parties should have the 'intention to create' (*qaşd al-inshā'*) the proposed contract.[24]

Exposition of Differentiation- Having said that we will elaborate the subject in the 'marriage' chapter quite wide and relatively in great details. - The primary distinction made by some eminent Shiite jurists, is between two types of intention: "Intention is of two kinds, as jurists state at several junctures", "The intention of 'words' and the intention of their meaning".[25] To explain this, jurists hold that in the formation of contract no more than an intention to pronounce the words is required. Says Shaykh Murtada al-Ansari elaborating his classical view: "to have only the intention as to words in which is inferred from the words used ...is enough". In modern language, a contract for which the party has only the intention to pronounce the words, but not the intention to create what those words mean, will not be void *ab*

[22] For more see: Katouzian. *General Principles*. Also see; Syed Hassan Imami. Hoqouq-e Madani [Civil Law], Six volumes, Third Vol. Tehran: Islamiyyah Publication: 1992. Hence Cited: Imami. *Civil Law*.

[23]Mahmud Shahabi, *Qawā'id-i Fiqh* (The Rules of Islamic Jurisprudence), in Persian, dealing with Shiite law (Tehran: 1973) 71-2.

[24]This expression may loosely be equated with *animus contrahendi*. But certain distinctions made under Shiite law between different kinds of intention reveal its strongly objective approach through verbalism. Such distinctions produce certain anomalies, which fall back on the function of intention.

[25]Mohammad Jawad al-'Ameli, *Miftāh al-Karāmah*, the book of Matajir [Trade], Vol. XXII, (Qom: 1984), 174.

initio. Hence, it will be only solemnized by the person who has thus made it.[26]This is not, as it may appear at first sight, a circuitous argument. What is meant, simply that the requirement of a valid contract, to this extent, is satisfied if the person pronouncing the words intends to pronounce them, in order to first indicate then to declare his/her clear intention.[27]

Ensuing Anomalies- where a person pronounces words consciously and where he pronounces them unconsciously, and the fact that his words are taken to have legal effects in the first instance but not in the second, entails certain anomalies.[28]

a- Discerning Infants- This is about infants, jurists say that their purported contracts are void.

b- Utterances in Jest- When a person is making or accepting an offer in jest, though he does not mean, in a legal sense, what he is saying, he is fully conscious of what he says and has, employing the terminology of the aforementioned jurists, the intention as to the words he uses.

c- *Lapsus linguae*- In the case of a person making a *lapsus linguae* , he is rightly held to have no intention as to the words nor *a fortiori*, as to their meaning.[29]

Consensualistic Approach of Shiite Legal Thought- What may be termed a 'consesualistic' approach in Shiite law[30] is based partly on certain Qur'anic verses and partly on certain traditions. Some of these verses are often cited as maxims, and a

[26]Shaikh Mortada al-Ansari, *Makāsib*, Vol. 1 (Qom: 1976), 117 and 174.
[27] For more see; Katouzian. *General Principles*.
[28] Ibid.
[29] Ibid. For more in Sunni sources see: Anwar Sultan. *al-Bay'* [the Sales Contract], second ed. (Alexandria: al-thiqafah: 1952), 47-67. Hence Cited: Anwar Sultan. *Sales Contract*.
[30] Development of specific contracts and the absence of a law of contract, together with the predominance of word of mouth as the expression of contractual intention, has driven classical Shiite jurists to devise pre-cast patterns for the formation of various contracts. When it comes, therefore, to detailed rules of formation, it is not only the outward expression but also what amounts to formation ways of expression, which count.

general saying giving effect to intention has also taken shape. The most important of such texts (*nusus*) and maxims are as follows.

Qur'anic Verses- It is mainly based on the 29th Verse of the Forth Chapter of the Qur'an (Woman) which says: "O believers! Devour not your assets among yourselves in vanity, except in trading by your consent.[31] In subjectivist terms, it is argued that what is meant in this Verse by 'consent' is the inner readings to enter into a contract, with out any necessity for the consent and intention to be expressed in a particular manner.[32] It is likewise reasoned that the 275th Verse of the Second Chapter of the Qur'an (The Cow), which says: "...God made a sale [trading] licit...", is of general application and embraces all cases in which the parties have the trading, regardless of the ways in which they choose to express their intention. There is also the 1st Verse of the Fifth Chapter of the Qur'an (The Nourishment): "O believers! Keep faith with contracts..." which is the most significant among such verses in enjoining that contacts should be performed and promises kept, whether they are contracts properly so-called *'aqd* or an engagement or obligation created by any means other than word of mouth. This is supported by the 34th Verse of the Seventeenth Chapter of the Qur'an (The Night Journey), which ordains: "...Keep faith with covenant [or pact] since covenant [or pact] begets responsibility,", and the other two verses; The 152nd Verse of the Sixth Chapter (The Cattle) and the 91st Verse of the Sixteenth Chapter (The Bee), where keeping faith with a "covenant [or pact] towards God" is commanded.

[31] "Believers! Do not consume your wealth among yourselves in vanity, but rather trade with it by mutual consent"(Dawood's translation). "O believers! Devour not each other's substance in mutual frivolities [game of chance, usury etc.], unless there be a trafficking among you by your own consent."(Rodwell's translation).

[32] Dhu al-Majdayn, *Fiqh wa Tijarat*, (Fiqh and Trade) The Book of Sale, (Qom:1977), 10.

Traditions- Among those the followings are more effective in our discussions: "Acts are determined by intents [or motives]," "The property of a Muslim is not licit for others to enjoy unless by his consent", "Believers must obey their engagements" and "Contracts is law for Muslims."

Maxims- There is a maxim, which has always evolved frequently to support a consensualistic interpretation: "Contracts depend on intentions". Even in the courts the validity of contracts are to be tested by this maxim to see whether what has been concluded was in fact intended. The prima facie significance of said texts and the resulting suggests that the inner psychological elements, as against their expression, be of prime importance under the Shiite law of contract. Katouzian a well-known contemporary Iranian legal scholar gives a philosophical version of our justification as well saying: "Where all precepts are imbued with morality and the spirit and soul of believers are also taken into view". It seems setting side what passes within the mind of a person by stopping at the outward expression and act 'appears difficult'.[33]

The Formalistic Approach

According to this view it is the words, which are the **essence** of a contract.[34] Supporting such notion the same Holy Verse of Qur'an saying: " Keep faith with contracts." is invoked is an interpreted in formalistic term so as to establish that a contract.

[33] Katouzian, *General Principles.*, P., 254. For more also see; Nasser Katouzian. *Huqouq-e Madani*; *'Uqud-e Mu'ayyan* (Civil Law, Specific Contracts), different editions for different volumes. (Tehran: Behnashr Publication, 1955). Hence Cited: Katouzian. *Specific Contracts*.

[34] This trend of thought, regardless of details or the way of reasoning, is close to the approach of Shafi'i school of where an objective attitude is said to have been adopted. For more see: Abd al-Razzaq al-Sanhouri, *Masadir al-Haq fi al-Fiqh al-Islami* (Principles of Right in Islamic Law), 2nd ed., (Cairo: 1960), 56.

Prevalent View- In the principle of Islamic jurisprudence [35] a considerable space is dedicated to the words (*alfāẓ*), their meaning and their value in different contexts. A tradition is quoted from the Caliph and Imam 'Ali to the effect that: "…it is speech which makes [an act] licit and it is speech which makes [an act] illicit".[36] This tradition is frequently cited by Shiite jurists to boost the argument for the intrinsic value of spoken words in legal sense.[37]

Historically, the formalistic approach has prevailed in spite of a multitude of textual materials stressing intention, consent and motive. The classical trend of Shiite jurists is predominantly formalistic. But both considerable approach 'formalistic' and 'consensualistic' attitude under Shiite law in correspond. Therefore to the 'theory of the declaration of will', this suggests a familiar similarity to a system with strong Civil Law attributes.

On Legal Ground of Silence

There is a maxim in Islamic law, which displays the inefficacy of silence. This maxim says: "Silence amounts to a statement where there is a need to speak."[38] Silence has

[35]This science, which came into existence sometimes towards the close of the second century after Hijrah, deals with methods of deducing legal and religious precepts from the primary sources of the law. Imam Shafi'i is generally believed to have laid its foundation in his famous work, al-Risalah (The Treatise). For the function of the Science of *'Uşul*, it is generally held that the 'principles' discussed are used for the 'inference' (*istinbāṭ*) of religious precepts. Thus, a proposition, question or principle of *'Uşul* is only a means, a tool, which does not directly concern the spiritual or secular affairs of the believers. Only recently, mainly in the present century, attempts have been made for a systematic study of these scattered rules of general import and for their presentation in a coherent body. For more see: (Abu al Qasim al-Qomi, *Qawānin al-'Uşul*, Lithograph Edition., (Qom: 1972),. Shaykh Mortada b. Mohammad Amin al-Tustari Ansari, *Farā'idh al-'Uşul* [*al-Rasa'il*],(Tehran:1926).

[36]M. Shahabi, *Do- Risaleh: Waz-e Alfaz wa Qa'ideh-e La-Dharr*, (Two Treaties on the Origin of Words and the Rule of Negation of Harm),(Tehran: 1951)

[37]It is not therefore surprising to find some scholars claiming a divine origin for words and ascribing a sort of mysterious weight to them. Discussing the rules of *Fiqh* (*Qawa'id al-Fiqh*), and also in their works on the *('Uşol al-fiqh)* principles of Islamic jurisprudence, Shiite jurists devote long passage to the 'causes' '*aşbab* of juridical relations. They also argue widely regarding the use of words, as distinct from act or conduct, as being a condition *sine qua non* for the formation of 'binding' (*lazim*) contracts.

[38] It is brought by Katouzian narrating from Mirza Habib-Allah Rashti and Na'ini with the same effect and more extension. See Katouzian, *Qanoun-e Madani* (Civil Law), *Ijarah* (Hire), (Tehran: Gang-e Danesh, 1984), 164.

mainly acceptable position in Sunni law.[39] It is our that such a proposition, influenced as it appears to be by modern thoughts, constitutes a superimposition on traditional rules of Islamic law rather than reflecting its actual position.[40] Indeed the application of the sub-maxim to contract formation is severely limited due to a twofold reason. First, cases of efficacy of silence generally concern contracts *inter absentes* the validity of which under Islamic law is, to say the least, in doubt in the most important categories of 'binding' contracts even when the intention may be expressly manifested. Secondly, in contracts *inter praesentes,* formalistic verbalism classically obtaining under Islamic law requires the pronouncement of formulate to the degree of questioning the validity of conduct, let alone silence. Even in 'facultative' (*jā'iz*) contracts, where there is generally a latitude on the rules of formation, silence in place of acceptance, as distinguished from conduct, is not directly considered.[41]Despite the fact that there are several instances under Islamic law, including some contractual ones, where silence, or in fact 'inaction', produces legal effects, none relates, except one to be noted below, to the formation of contract.[42]

[39] Anwar Sultan. *al-Bay'* (The Sales Contract.),47-67.
[40]Al-Sanhuri, *Maṣādir al-Haq*,.pp.,129-30.
Performance of the act subject of agency may, according to one trend of opinion, be sufficient for the conclusion of contract *inter absentees*.
[42]For its classical and practical conclusion we should note that it appears altogether three contractual cases may be enumerated. First: efficacy of silence of the owner of a thing in an unauthorized transaction unless it is stated by a post-classical jurist M. K. Tabatabai-e Yazdi, that his silence may be expressive enough to be customarily deemed authorization. Second: Lapse of the right of rescission arising out of an opinion (*khiyār*) if not promptly exercised. Third: the exception to be noted below under a virgin's marriage.