



## Research Paper

### The Strategy of Islamic Jurisprudence Concerning *Taqiyyah* in Islamic International Relations

Samira chami<sup>1</sup>, Hamed rostaminajafabadi<sup>2\*</sup>, Masoud Shirani<sup>3</sup>

1- Phd student, department of law , najafabad branch , university of islamic azad, najafabad, iran.

2- Assistant professor, department of Imamiyah jurisprudence & law, Faculty of jurisprudence & Islamic law, university of Islamic demonimation, Tehran, Iran.

3- Assistant professor, department of law, najafabad branch , university of islamic azad, najafabad, iran..



HTTPS:// 10.22034/MFU.2023.62893

Received: July, 7, 2023

Accepted: October, 17, 2023

Available online: December,6, 2023



#### Keywords:

principle of consensualism, principle of freedom of contract, ceremonial contracts, formalism.

#### Abstract

Formalism and the consent principle have been open to discussion in law for a long time. When speaking about the principle of consensualism encountering with formalism in law, it is usually concluded that the principle of consensualism is ranked as first and formalism as the second. However, today after going through extremes in implementing these principles in western law, it seems that the confrontation of originality with formalism has been significantly reduced due to new forms and goals. Therefore, it can be said that these two are implemented in law proceed without breaching each other and in line with elevating the science of law in the field of legal practices. Today, the forms that bind legal practice have appeared unprecedentedly, all of which have reasonable and expedient goals; for instance, western law protects consumers against professional sellers in request to establish a legal relation between a skilled worker and an amateur individual in a written form containing the necessary information. Based on the descriptive-analytical method, this research concludes that the synchronicity of the consent principle and modern formalism, in contrast to Western law, in contemporary jurisprudence and Iranian law, has not been well received by scholars in this field. Additionally, the consensualism of legal acts against the new formalism is considered as a principle.

Chami, S., Rostami najaf abadi, H., & Shirani, M. (2023). Chronology of Conflict between Consent Principle and Formalism in Legal Jurisprudential Literature. *Comparative Studies on the Schools of Jurisprudence and its Principles*, 6(2), 67-46

**Corresponding author:** Hamed rostaminajafabadi

**Address:** Assistant professor, department of Imamiyah jurisprudence & law, Faculty of jurisprudence & Islamic law, university of Islamic demonimation, Tehran, Iran.

**Tell:** +989132333401

**Email:** hamedrostami@mazaheb.ac.ir



3041-8682 © The Author(s) This is an open access article under the CC BY-NC /4.0/ License.

(<https://creativecommons.org/licenses/by-nc/4.0/?ref=chooser-v1>)



## Extended Abstract

### 1- Introduction

The principle of freedom of contract is a significant philosophical principle that underpins the theory of obligations, and contractual freedom and the principle of consensual legal acts are considered its outcomes. Until the late 19th century, the principle of consent was considered a crucial legal principle and one of the hallmarks of the advancement of law in the modern era. However, in the early 20th century, Western legal systems witnessed a phenomenon known as the revival of formalism, which pushed legal science towards marginalizing the freedom of form in legal acts. This transformation, which is unfamiliar to Iranian law, has not been extensively examined in legal articles and books. In the Iranian legal system and in published legal works, the acceptance of the principle of consent is still considered a sign of modernity, and the image presented of this principle is the same as the concepts presented in the 18th and 19th centuries.

Legal writers, in their books, by placing the principle of consensuality of legal acts as a rule, consider formalism as an exception to the principle of consent, which should be considered as an exception to this issue. Therefore, they have neglected modern formalism and its objectives. Moreover, the conflict between the principle of consent over time has not been examined in legal books and research; for example, the late Dr. Nasser Katouzian, in the first volume of his esteemed book on the general principles of contracts, analyzes the foreign roots of the principle of consensuality and briefly explains its effects. However, he has not studied the conflict between the principle of consent and the principle of form, which is the subject of this research. Meanwhile, formalism has today become one of the effective legal tools for realizing the rational objectives of modern law,

playing a constructive role in moderating individual will while respecting public interests. This research has been conducted to investigate this issue.

In fact, formalism and the principle of consent are issues that have been discussed in jurisprudence for a long time. When we talk about the conflict between the principle of consensuality of legal acts and formalism in jurisprudence, we reach a long-standing conclusion that the principle is based on the consensuality of legal acts, and formalism is secondary to this principle. However, in Western law today, after going through extremes in the implementation of these two principles, it seems that with the development of new forms and with new and different objectives, the conflict between the principle of consent and formalism has been significantly reduced to the point where it can be said that the principle of consent and formalism, without violating each other, are moving forward in the direction of the advancement of legal science in the field of legal acts. In the present era, forms that bind legal acts have emerged on an unprecedented scale, all of which have reasonable and expedient goals. For example, today, Western law, by requiring the creation of a legal relationship between a skilled professional and an unskilled individual in the form of a written form containing necessary information, supports consumers against professional sellers.

### 2- Method

This research has been conducted using a library-based approach and a descriptive-analytical method.

### 3- Result

Today, the influence of modern formalism, alongside ancient forms in legal acts derived from Imami jurisprudence, such as the presence of a witness in the execution of a divorce contract or the acceptance of delivery in real contracts, can be found in



other laws. For instance, the influence of modern formalism with new objectives can be seen in the sale of ships under the Iranian Maritime Law of 1343 and the transfer of shares in a limited liability company under the Commercial Law. Despite the acceptance of the principle of consent, modern formalism seems to have expanded in Iranian law, reducing the conflict between these two concepts.

#### **4- Conclusion**

The conflict between formalism and the principle of consent in various legal eras is discussed in this article. It is stated that in periods such as ancient times or the era of early jurists, individual will itself and alone did not have a primary role in the formation and creation of legal acts, and an excess of formalism and the non-expression of the principle of consent were evident and undeniable. In Iranian law as well, we witnessed maximum formalism for a period; however, Iranians, apart from the maximum formalism they had in ancient times, were pioneers in moving towards the principle of consent due to their adoption of Roman law at that time. However, in other periods, such as the Age of Enlightenment, the principle of consensuality of legal acts prevailed over formalism. In any case, the growth and development of human intellectual capacities and the advancement of economic and social conditions have created a favorable and conducive environment for the rebirth of formalism in the modern era. With an instructive and protective purpose, form has become one of the important legal tools for achieving the rational objectives of legal science.

Therefore, in the present era, there is neither an extreme principle of consent nor extreme formalism. Consequently, it must be accepted that a narrow and extreme

definition of formalism in law distances us from the realities of contemporary society. Because, as mentioned in the article, various new and advanced forms of formalism have manifested themselves in most legal acts with their diverse objectives and functions. Therefore, it is sometimes difficult to distinguish the functions of formalism from one another. However, the important point is that the growth of formalism in this era and its alignment with the principle of consent in the path of growth and development of the legal system weaken the hypothesis that in this period, the principle of consent is primary and formalism is secondary, while this is contrary to Western law, and also in contemporary Islamic law. Therefore, it is suggested that special attention be paid to modern formalism in Iranian law, so that in this way, the ground is prepared for the development and advancement of the legal system, and the legislator and jurists, by adopting a rational approach based on realistic experience and with the aim of protecting and guiding in the field of contracts and unilateral acts, proceed to make changes in the relevant laws and judicial procedures in the system governing legal acts in Iranian civil law.

#### **5- Funding**

There is no funding support

#### **6- Authors' Contribution**

Hamed rostaminajafabadi, The corresponding author of this article. Assistant professor, department of Imamiyah jurisprudence & law, Faculty of jurisprudence & Islamic law, university of Islamic demonimation, Tehran, Iran

#### **7- Conflict of Interest**

Authors declared no conflict of interest

I am grateful to the honorable professors who helped me in this research.