Man In India, 97 (11) : 301-311

A REVIEW OF MEANS OF CONCLUSION OF EMERGING CONTRACTS

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Abstract: The frame offered as emerging contract like "intentional assignment of contract" in jurisprudence and law refers to two contracts of elementary peace (settlement) and untitled contract, subject to article 10 of Iran Civil Code. However, the accuracy of the two contracts has been doubted seriously first from this perspective that peace is existed or possible in position of dispute and elementary peace is not legitimate and second, due to the origin of corruption and seizure of contracts, new frames could not be applied. In this study (conducted using analytical-descriptive method using library and documentary instruments in Imami (Shiite) jurisprudence and Iran Law), the problems with these frames have been analyzed and solved. Generalities of verses and narratives have been called as the most important evidence on the accuracy.

Keywords: Elementary peace, untitled contracts.

INTRODUCTION

Nowadays, because of extensiveness of exchanges and their globalization, new contracts have become common among people, which neither their accuracy could be rejected nor they could be considered among certain contracts; because it is not certain or assignment of interests for certain time or certain contracts of sale, lease or other contacts considered as a reason for such transaction.

In law and jurisprudence, two methods have been usually traced as the causes of such contracts:

First: Elementary peace contract

Second: Untitled contract

There are disputes among lawyers to compare the two approaches and preference of one of them and some lawyers (Jafari Langerudi, 1970: 265) believe that because of development of peace contract in Civil Code and including elementary peace in transactions and non-transactional contracts; there is no need to article 10 of Civil Code. They have also added that with the extension of referent or signified in the articles of Civil Code on peace, no contract remain that is not titled as peace contract to be included in article 10 and they have introduced peace contract as "Sayed a-Oghud" (the highest contract) (ibid: 135).

However, some others (Katuzian, 1984: 304) are opposed to development of peace contract and claim that "with the existence of article 10 of Civil Code,

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there was no need to accept elementary peace with no property and to provide conditions for types of legal tricks". In view of some contemporary jurists, criticism of elementary peace contract in new contracts is considered as "permissibility of swap" (Khuyi, 190/2).

1. Elementary Peace Contract

Elementary peace is a peace contract, which could be used as cause of transactions without literature of dispute or probability of emergence if disputes.

Legitimacy of elementary peace contract has some opponents among lawyers (Katuzian, 1984: 304) and jurists (Emami, elementary peace, 2003: no.34; Musavi Khomeini Sayed Mostafa, 184/2).

Hence, it is necessary to investigate the basis of these defects and in addition to answer the criticisms, evidences of such contract should be also expressed:

Lexical meaning of peace: the most important objection is that lexical meaning of peace is "Salm" (peace) (Firuzabadi, 1991: 473/1; Ibn manzur, 1995: 384/7) that is opposite of the word "Harb" (war (Ibn Manzur, 1995: 302/1 and 307) and as elementary peace has not been used in lexical and common meaning, such contract couldn't be considered as peace contract.

Answer: The objection is nor accepted, since scholars have defended legitimacy of elementary peace contract; although they have considered lexical meaning; for example, Allameh Helli has claimed that for Shiites, dispute on peace contract is not binding (no date: 177/2) and even issues are given showing that they have accepted elementary peace (1999: 5/3). Deceased Ayatollah Behabahani has used the term "remove corruption" in his definition of peace and has claimed that if peace contract is not realized in a case, corruption has happened on that case because of lack of arrangement of legal effect that is accuracy in transactions (1996: 436). With such interpretation of peace, elementary peace contract is considered as legitimate action and non-opposite to its lexical meaning. Moreover, Saheb Manahel has provided similar theory (Tabatabai, no date: 342).

Considering theories of other scholars strengthens this answer that they have permitted elementary peace considering the lexical meaning of peace: for example, Saheb javaher (Najafi, 1988: 212/26) has claimed that although peace contract is concluded to remove hostility; it is an independent contract same as contract of sale, which is not stopped on originality of hostility. Elsewhere, Deceased Sheikh Ansari (1994: 13/13) says: "it is acceptance". In fact, he has interpreted peace as agreement and acceptance of parties and not solving the disputes. Moreover, he has used elementary peace contract in "permissibility swap" in practice (Ansari, 1994: 90/3). If he believed that this contract is not a legitimate contract, how he could introduce it as a frame to conclude the Permissibility of Swap?

Contemporary jurists have also affirmed the lexical meaning of peace and legitimacy of elementary peace (Sabzevari, 1992: 167/18; ghomi, 1992: 121/3).

In field of law, majority of lawyers (Emami, 1987: 320/2; Katuzian, 1984: 299; Jafari Langerudi, 1970: 134; Adl, 1996: 1373) believe in elementary and primitive peace.

Therefore, just with the deduction that lexical meaning of a word is different, it could not be mentioned that the word could be defined just in limit of lexical meaning; since in legitimacy of a contract, the evidences should be considered and not lexical meaning.

Elementary peace has not been referred in Civil Code of Iran: no article in Civil Code has defined elementary peace and only the article 752 of said code has announced that "A settlement of account is possible either in the case of the adjustment of an existing dispute, or for avoidance of a possible dispute, or in the case of a transaction and the like". The definition has not encompassed the elementary peace, since the focus at the end of this article returns to transaction and not dispute, so that it could be said that peace is defined in non-dispute in this article.

Even if the word "or" is existed in the text of law and at the end of article is said "or others" instead of "and the like", again the said article has no affirmation on the permission of elementary peace; because it is possible that the legislator has counted just two permitted items; first, peace on existing dispute and second, peace to prevent probable dispute. The two cases could be realized either on traction or other cases like that and the pronoun "that" in the article refers to "transaction". However, the background of hostility and dispute or the probability of dispute is binding in permission of peace contract.

In other words, the term "or in transaction and the like", is not included in the two items mentioned above of existing dispute and the probability of dispute, but also it could be an item in addition to the two items. Hence, the legislator has accepted no assumption other than existing and probable dispute (Emami, 2003: 34). The assumption of some lawyers (Haeri Shah Bagh, 1997: 658/2) is also used, which have not attributed elementary peace to this article.

Answer: Despite to comment of some lawyers saying that article 752 of Civil Code has an affirmation on elementary peace (Jafari Langerudi, 1970: 141), the criticism is accepted on the Civil Code and the article has no affirmation. Maybe the reason that the legislator has not mentioned elementary peace is that he has considered article 10 (Private contracts shall be binding on those who have signed them) as a reliable article and feels that there is no need to define elementary peace. Hence, the legislator has just permitted private contracts in case that they are not contrary to the explicit provision of law and hence, there is no need to arrange another article in line with same article 10.

However, other articles of Civil Code could be used to prove legitimacy of elementary peace. As article 754 says: "every settlement is effective, except that which relates to an unlawful matter".

Moreover, article 758 of Civil Code has affirmed the originality of peace contract: "A settlement made in respect of a transaction, though it provides the final result of the transaction which it replaces, does not include the special conditions and attributes of the transaction. Therefore, if the subject of settlement is a definite object given in return for a consideration, its results will be the result of a sale, without the execution of the special conditions and rules appertaining to a sale".

Through considering these articles alongside, the idea of legislator that is legitimacy of elementary peace could be explored. Moreover, elementary peace is also called peace and the principle is on independence on one case of peace on conditions of other ones.

Moreover, the principle is on permission of elementary peace; unless its illegitimacy is proved. No affirmation in Civil Code can't be a reason for inaccuracy and illegitimacy of such contract, but also as legislator has the power of expression, he could mention if he believed in illegitimacy of elementary peace and no prohibition is mentioned in articles. Based on no opposition of legislator, legitimacy of such frame in civil code could be confirmed.

Conflict of legitimacy of elementary peace with interest of certain contracts: the legislator, in addition to common laws arranged for the contracts and transactions, has also considered some regulations for each type of certain financial contract. Obtaining the outcomes and fruits of transactions could be just depended on observance of general and special regulations of contracts. As all regulations and sentences follow interest and corruptions, conclusion of the two type of law is for purpose of achievement to interests and avoidance of corruptions.

For example, when the legislator has considered a condominium for the mediator of pre-emption in contract of sale, he tends to preserve and observe the actual rights of partners; although the transactional parties could conclude the contract in frame of peace and violate the pre-emption.

Certainly, the legislator who has considered such right for the mediator, has no tendency to make parties escape from regulations of special regulations through changing the title of contract and gain the outcomes of desired contract. Moreover, rational explanation of such legislation is difficult and such power could not be given to the legislator to remove the limits and provisions of certain contracts through changing its frame (Emami, 2003: 34; Katuzian, 1984: 304).

Deceased Khuyi has said about using peace contract to conclude "permissibility of swap" that just consistency of the concept of peace with this contract can't make that be an example of peace contracts and if it is right, all contracts could be referred to peace, even marriage contract (no date: 190/2).

Answer: The criticism is not accepted. Firstly, the discussion is not on marriage, since all scholars have consensus that marriage could not be considered in frame of elementary peace contract.

Secondly, people without belief in elementary peace have introduced legal frame of "uncertain contracts" and this objection is also accepted for the uncertain contracts. Hence, the claimant for the discussion should consider restriction of contracts in certain contracts and such statement could have no fan due to extension of transactions.

Another answer to this criticism could be found from the inference of Korki (1987 A.H: 407/5) in description of regulations. When he mentions the definition of Allameh Helli on regulations, he refers to the philosophy of explanation of broken prayers (short prayers for people in travel). This kind of saying prayer has been accepted because of difficulty; although the ruling sentence is not around the issue of difficulty; because saying prayers is broken in travel even without difficulty. Although the principle of legitimacy of peace is to meet hostility, it doesn't mean that in all cases of peace, meeting hostility is considered.

In other words, solving the hostility is the sentence of legitimacy of peace contract and not a cause for it and the legal sentence is the axis of its own cause and not a sentence for it. Moreover, the sentence of legitimacy of cancellation in authority of defect is the defect of price; but in defects without defect of price and even increase in cost (Shahid Sani, Masalek, 1992: 257/4) or womb healing, which is the sentence of period and not a cause for it (Najafi, 1988: 211/26).

Secondary nature of peace contract compared to other contracts: some scholars believe that peace contract is a secondary contract (Sheikh Toosi, 1008: 288/2); it means that the conditions of primary contracts should be observed in peace contract. For example, if the contract is a contract on sale, as it is secondary to contract on sale, the conditions of the contract on sale should be observed. Therefore, there is no contract under the title of peace contract in reality, but also the provisions of original contracts should be observed and the effects of those contracts are also remained. For example, the pre-emption that is an effect of contract on sale is remained for the partner of a person taking peace in position of sale.

Answer: This objection is not accepted, since the statement to authenticity of peace academically is not an introduction to accept the elementary peace and the elementary peace could be accepted with the presumption of secondary nature of peace. In other words, the dispute is in this field that whether elementary peace is authorized and legitimate or not? and the dispute is not in this field that whether peace is considered as a secondary element compared to other contracts. This is because; the main focus of the study is on legitimacy of such contract and not effects of the contract that whether it has effects of other contracts or independent effects and the evidences are considered in legitimacy of a contract.

Lack of consensus: evidence of fans of elementary peace is consensus of Shiite jurists; although the idea of some scholars is against this. Through referring to works of jurists before Allameh Helli, it could be found properly that they have presented just some secondary issues in field of peace, in which dispute and hostility are referred or are probable and no branch and secondary field is found in the works of ancients as an example of elementary peace (Halabi, 1982: 453; Toosi, 1996: 291/3; Helli, 1988: 366/2).

The statement of some contemporary jurists (Fazel Meghdad, 1983: 201/2; Makarem Shirazi, 2008: 347; Moghniyah, 2000: 86/4 and Aal Kashef Al-Qata, 1940: 36/2) also show that they used to apply elementary peace contract where the hostility is existed or a probability is created, since in their definition of peace contact, they have considered solving the disputes and there is no evidence on their belief in elementary peace. Hence, the discussion is not the case of consensus.

Answer: The criticism is not accepted, since firstly, the scholars defined peace contract in such way that the necessity of hostility or probability is found from the definition, have not confirmed illegitimacy of elementary peace explicitly.

Secondly, if they have such idea, there is no need to consensus as their identity is clear.

Thirdly, with such carefulness in their books, the scholars have used usually consensus as a cause for elementary peace. For example, Allameh Helli is the first Shiite jurist, who has emphasized the issue of necessity and no necessity of background of hostility and dispute in his works. Through presenting this issue in the book "Tazkareh", he has attributed the statement of lack of hostility to Shiites using the term "for us" (no date: 177/2). The jurists after him have also typically claimed for consensus. Korki (1992: 190/1) and Shahid Sani in the book "Masalek and Sharh Lamhe" have used same word (1992: 257/4 and 1989: 173/4). Ardabili has used the public idea and lack of opponent statement and has claimed for consensus (1982: 331/9). Sabzevari, in "Kafayah" (no date: 16) and Bohrani in "Hada'egh" (no date: 84/2) have claimed for no dispute. Finally, Saheb Riadh (Tabatabai, no date: 35/9), Saheb Javaher (Najafi, 1988: 211/26) and Mir Abdolfattah Maraghi (1996: 222/2) have documented to consensus.

Apparently, Hanifi jurists, similar to Shiites, have not considered hostility as an element for peace (Jafari Langerudi, 1970: 141).

The outcome: Assuming that it is accepted that there is no special cause on elementary peace contract and the mentioned statement evidences could be criticized (Tabatabai, Riyadh Al-Masael, no date: 36/9), according to the following evidences, it is belived that the elementary peace has the required legitimacy for causality in new contracts:

First: The verses and narratives, as jurists (Ardabili, 1982: 331/9; Bohrani, no date 84/2; Tabatabai , Riyadh al-Masael, no date: 36/9; and Al-Manahel, no date:

116 and Ghomi, 1992: 121/3) have documented, common evidences on accuracy of contracts are proved in verses including "fulfill [all] contracts" (Al-Ma'idah/1); "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful" (An-Nisa/29) and narratives such as "people have dominance on their properties" and "believers are committed at their conditions".

Second: Consensus: as it was discussed.

Third: The initial condition: the first principle on no requirement of background of hostility in peace contract (Korki, 1987: 407/5): this is because; existence of condition and requirement for a contract needs evidence. The claimant for condition on hostility should have evidence and certainly, lexical meaning could not be a cause for existence of a condition.

Untitled Contract

The second reason for concluding emerging contracts could be the contracts concluded by individuals that violate no right and are not contrary to law. Article 10 of Civil Code: "Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law".

However, a problem in this field is that jurists believe that the original problem and issue in contracts and transaction is corruption (Maraghi, 1996: 6/2), as the original problem with worshiping and saying prayers is cancellation of prayers; unless all conditions and pillars of worshipping are existed. In transactions, as construction is a new issue, taking legal measures should be proved with all of its conditions; otherwise, it could lead to lack of hospitality. The legal action is not realized and the condition is that the contract should be in frame of certain contracts; where it is not taken as a certain contract, it would be same current principle.

The origin of the said principle is that arrangement of each issue is successful and needs forge and legal confirmation and the said forgery and signature needs legal proof and if there is doubt in this field, its initial principle is cancelled; unless the legal evidence is provided and has proved it.

The Evidence of Originality of Corruption

First: The beginning of An-Nisa verse 29 "do not consume one another's wealth unjustly but only [in lawful]", at the first the principle is presented that includes any kind of wealth and then, the verse has taken an exception and in suspected cases like new contracts, it could not be said that this is an exception, but also the beginning of the verse includes any kind of emerging contract.

Second: Principle of non-priority of effect also refers to lack of creation of contract.

Third: Consensus of jurists on originality of corruption considered by some jurists (Mostafavi, 2000: 148)

Answer: In answer to this problem, majority of jurists have changed initial principle of corruption in transactions into secondary principle of accuracy of untitled contracts. The reason for theory of principle of accuracy in transactions is priority of verbal generalities on lack of hospitality (Naraghi, 1996: 14; Maraghi, 1996: 6/2).

Evidence of Secondary Principle in Contracts

The verse "fulfill [all] the contracts" (Al-Ma'idah/1): in this verse, there is no phrase on this basis that applied contract should be in time of legislator; except for saying that the term all in the verse refers to the certain contracts of time that the verse was come down or the common legal contracts (Najafi, 1988: 212/22). The idea could be criticized, since the term "all" includes all contracts, whether titles or untitled (Tabatabai Yazdi, 1997: 192; Musavi Khomeini, 2000: 67/1; Khuyi, 1989: 142/2; Naraghi, 1996: 1-8; Isfahani, 1996: 35/1).

Verse 29, An-Nisa: this verse has authorized any kind of common transaction legally and has applied effects of legitimate transaction on it, since the Islamic legislator has legitimated the business that is based on consent of both parties and no condition is mentioned in the verse (Seifi Mazandarani, 2006: 136; Helli, 2008: 301/2; Husseini Ameli, 1998: 253/15). In other words, the recent part of the verse is a generality and incudes any kind of business with consent of parties.

It should be mentioned that referring to the verse shows that the aim by cancellation at the beginning of the verse is considered as its common meaning; although if it is considered as illegal, reference to this verse to affirm the common transactions and contracts is impossible. This is because; a quasi-example is created, in which it is impossible to use generalities (Musavi Khomeini, 1997: 64/1).

The well-known hadith "people have dominance on their properties" is also another document; since the concept of hadith is that people have right to have any kind of interfere in their wealth and properties and could apply that in any quality (Ansari, 1994: 41/3).

This perception of this hadith has some opponents. Some scholars have said that acceptance of this hadith is depending on this issue that the hadith is in position of legitimacy and refers to permission of any kind of dominance and interference that is announced legitimate by the legislator. Hence, this hadith is interpreted in this way (Khuyi, no date: 101/2).

The hadith has also other comments and interpretations, according to which the hadith is not evidence on untitled contacts. According to a perception (Ansari, 1994: 41/3), the hadith refers to accuracy of dominance in stage of causes and not the stage of means. It means that people can sell their properties; although the way

of trade should be according to statements of legislator. Hence, people have right to have any kind of interference in their properties and can even sell them; although the quality of dominance should be confirmed by the legislator and the hadith has not referred to means.

According to another comment (Musavi Khomeini, 2000: 79/1), the hadith has just referred to freedom of people in domination on their properties and has discussed on no force for people; although has not referred to type of dominance and its way. Hence, type of dominance should be based on legal and rational regulations.

Only the fans of the first perception could use the hadith to correct legal dominations of people on their properties and use the hadith as evidence on untitled and emerging contracts.

Hadith "believers are committed at their conditions": as some scholars have mentioned (Tabatabai Yazdi, 1997: 192), if the condition is considered as absolute necessity, whether the necessity is initial or is in form of stipulation, it includes all types of contract and according to this hadith, and believers have to be committed on contractual provisions and conditions.

On the contrary, another perception has not considered the conditions as absolute necessity and has considered it just as secondary necessity, in addition to original necessity (Musavi Khomeini, 2000: 85/1; Ansari, 1994: 11/6), and it could be found that the narrative can't be evidence on emerging contract.

However, it should be noted that using the said generalities is on this basis that real use of terms in contracts and transactions are not only used in their accurate examples and legal effects and false use in their corrupted examples, but also the truth could be in accurate and corrupted issues, so that it could be applied for all contracts in suspected cases; because in first assumption, the doubt in accuracy is considered as an equivalent to doubt in realization of contract and there is no chance to use it for generalities (Husseini Milani, 2016: 30; Makarem Shirazi, 1990: 116/1; Musavi Bojnurdi, 1998: 287/1).

CONCLUSION

Both forms of elementary peace contract and untitled contracts have sufficient evidences and foundations and have the ability to cause formation of emerging and new contracts.

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