

Considerations regarding the creative intention in unilateral legal acts by deciding the separation of intention and consent

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Abstract

In legal systems, the intention of people in certainty of legal performance plays the main role and the contracts & transaction attributes to persons' intention as the general & public principle. The people by their intention establish obligation & undertakings for themselves and others in the frame of contracts & unilateral obligations, in the realm of law to obtain the commitment force for his/her intention that causes establishing the commitments and the responsibilities of the peoples. The volition is consisted of intention & consent elements for establishing the commitment, in other words each of these elements, intention and consent are efficient in the situation of legal act through canceling or lack of legal act influence. The quality of this effecting and performance guaranty of the lack of each main conditions in certainty of the volition in the field of contracts have been considered and the rule in the field of contracts has been clarified in civil code but in unilateral obligations, in respect of unilateral obligations, there are some ambiguities in the role and clarifying basic conditions which these ambiguities are the results of leaving unsaid the many regulations about unilateral obligations in civil code by the jurisprudents and the legislators. In this article creative intention in unilateral obligations to be surveyed and it would be a step for clarifying the opposed and agreed views.

Keywords: *creative intention, legal act, unilateral obligations, ruling of free volition, unilateral intention, unilateral commitment*

JEL Classification: K10, K40

1. Introduction

The importance of unilateral legal act and its role in society life is more than one thing that seems, at the first prospect, legal act is on the strength of one or two person's free volition which is divided into contract & unilateral obligations³ in legal act the volition is for efficiency and for creation the nature in law universe that inquires different steps both perception, measurement, consent and accomplishing the decision.

The last step which in the legal nature to be created is called creative intention. Creative intention among the basic conditions as like contract correctness

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³ Katouzian, Nasser, *General regulations of the contracts*, 2012, Behnshar Publication, vol.1, p. 15.

is the basic element and creator of legal nature and other elements are complementary ones.

The volition and the following creative intention is necessary for all legal acts (Contracts & unilateral obligations) because legal acts have the root in the volition of the persons. In this regard the firmly executive guaranty "absolute void" has been observed for legal act that lacks free volition.

In respect with the effecting of creative intention in creation and establishing the contracts, the lawmen & jurisprudents have mentioned the subjects in detailed. The jurisprudent also have stipulated the impress of composition purpose for establishing contracts & treaties but in connection with unilateral obligations there has not been any research and if a law man has made an step, it has been as a hint and so briefly, so as the role of unilateral obligations in social life is not recognized and so many questions have been remained unanswered.

The important questions which findings the answer for them could be useful for legal system of the society and play the main role, for example these questions could be answered. Is there any possibility for separation of the volition from consent in the unilateral obligations? Is the principle necessity in unilateral obligations as like the contracts or vice versa or allowance?

These regulations after so many years ' surveying have been accepted in the contracts, in unilateral obligations there are so many hesitation and is not clarified that if the basis of necessity of unilateral obligation is due to will or because of relationship with other people's rights? Is there any principle that judge to attribute to it in the cases of hesitation and help him to run from the wandering state?

The references are not enough for answering in spite of unilateral obligations is the important section in legal acts and has many effects on social relationships, however the role of unilateral legal act in social life is not known and has stopped in the half way of completion.

Jurisprudents merely note dispersedly the important unilateral obligations (divorce, cancellation and possession of the rights).

The large section of general regulations of unilateral obligations are uncertain therefore in this article composition purpose in unilateral obligations on the basis of the intention & consent has been studied.

2. Concepts

2.1 Purpose

The meaning of purpose & the intention is free will towards the act, a group of lawyer men believe that in the law science intention means deciding for one legal act as like sale and etc⁴.

⁴ Jafari Langaroudi, Mohammad Jafar, *The effect of the will in civil law*, 2000, The Publication of Tehran University, p.16.

The purpose from Islamic jurists' views is nothing unless composition of the volition to clarify this affair. In Iran's law also the purpose by noting the article 191 and the following articles from civil code is the intention of composition or free will for establishing the contract and unilateral obligation.

2.2 Consent

Consent in legal act means wishing for taking step, and obtains in decision phase after measurement. The origination of consent is conception and verifying the things which the people agree with them.

In relation with legal reliabilities in the contracts and unilateral obligations, the highest point of consent excitement is indeed creative intention, therefore the composition purpose is the end of sensual route.

The consent is not the same as creative intention but composition purpose is not separated from the consent either⁵.

2.3 The relationship of intention and consent in Iran's law

In religious jurisprudence the most of jurists consults exception of Mohaghegh Ardabili, believe that the intention & consent are two separated sensual beings. In the article 190 of civil code the intention of the parties and their consent are stipulated as the condition of correctness of the contracts therefore primary inspiration of the mind delivers the unity of consent and intention nature and this affair has caused discrepancies so as some of law men believe that intention & consent due to analyzing and creation steps have elegant differences.

One of them know the consent and intention the same and believe that intention is the end of consent and they are separated erroneously in law writings⁶.

Some of them are thinking of complete separation of intention & consent⁷ but by analyzing the brain activities steps of the person of contract accomplishing and distinction of appearance phase of each intention & consent and by regarding different roles of these two in the contracts and the difference of contract situation, in the case lacking of intention & consent and the regulations stipulated in article 191 of civil code.

It would be confirmed that this regulation is following Imammia jurisprudence that has accepted the separation of intention & the consent also, the jurist in the article 191 has mentioned the effect of intention and the related conditions.

Therefore we find that the intention and consent have two different natures and each of them are the required elements for the validity of legal acts (contract laws in Imammia jurisprudence).

⁵ Idem, p. 16

⁶ Idem, p. 16,

⁷ Shahidi, Mehdi, (2001), *Establishing the contracts & commitments*, vol 1, Jurists publication, p. 7

In the other hand since the contracts and unilateral obligations are legal actions some of the jurists believe that there is no any difference in the main conditions of contract and unilateral obligations.

3. Reviewing separation the intention from consent

In this connection the agreement is that composition purpose would have legal effect when to be attendant with consent and what the difference is that if in the realm of law acts specially unilateral obligation, the intention & consent are separable due to law effects or not?

There is no hesitation that these two are separable in the position of meaning & context, it means the intention without consent lacks legal effect or they are separable from each other due to legal effects and intention without consent both has the effect and consent is the condition of influence of unilateral obligation and not correctness of the condition.

In reply to this question, first by referring to word context and expression of intention & consent and their relationship in Iran's law, we clarify the opinions and the reasons of adherents of each these two views, the possibility & impossibility of separation the intention from consent.

For clarifying this subject it should be mentioned that expression of intention means the firm purpose of composition the commitment and the prerequisite and the meaning of firm purpose is heart felt for it, also in mentioning the purpose in law acts. It is said that in creative sentences there are three kinds of intention till legal act to be ascertained, the term/ vocabulary of intention, the target of the meaning of the term/ vocabulary and the aim of creation and establishing the meaning. What becomes the origination of the effect in law is the purpose of composing the contract that in the fourth phase from mental activity ascertains and by noting that creative strength to create valuable being⁸.

Consent also in legal terms is eagerness of the contract party for accomplishment legal act after surveying the profits of the contract, this eagerness which is in the third step of mental activity to be called consent⁹.

In previous discussions accepting the separation of intention & consent has been mentioned. In Imamia jurisprudence there are two cases of separation & affiliation between the intention & consent

3.1 The opinion of lacking separation between intention & consent

Some of jurists have discussed the opinion of unity or the attendance between the intention & consent.

They think that free will is an extensive sensual state and analyzing it into intention and consent is not right, it could not be thought that one person to do a

⁸ Ghanavati, Jalil, Abdi pour fard, Ebrahim & Vahdati Shoubeiri,(2004) by surprising of Mostafa Mohaghegh Damad,1389

⁹ Idem, 2004

job but there is no satisfaction or heart felt in him / her. As the result the lack of consent generally is attendance with the lack of intention¹⁰.

They believe that there is affiliation between the intention & consent and separation of them is not permissible and therefore the contract without satisfaction is faulty such as lacking the intention or its fault that makes the contract void¹¹ and another problem is that satisfaction from mental point is before intention phase then to consider the intention without consent.

It should be said firstly, the firmest reason for proving the possibility of one affair is certainty and occurrence, in our law and Islamic jurisprudence the contract without consent has been accepted as the lack of consent in reluctant treaty could be observed.

Secondly, if we do not accept the lack of consent, from technically the consent fault which causes the lack of authority and the consent fault that leads to cancellation could not be specified.

Thirdly, the common judge about optional contract and reluctant contract is different. In connection with reluctant one thinks of lacking the consent while in option/ optional contract there is consent but it is faulty.

Fourthly, the priority & and being the last one of intention and the consent in the will process is the priority or the last time not causative but the certainty of the intention is due to consent certainty¹².

3.2 The opinion of separating the intention & consent

Most of Imammiea jurisprudents believe that intention & consent are separated from each other. On this basis due to analyzing of legal reluctant contracts indicated that the person by intention of establishing legal impact needs satisfaction and does not have good senses.

This group in analyzing their thoughts to pay attention of two necessary affairs. The expression aim and the intention of purport occurrence but for it s influence the third condition is required which is satisfaction and good sense, in the case of lacking the third condition even though to be created due to certainty of first two conditions of the contract but the contract will not be penetrating and in reluctant contract this condition will not be existed therefore this contract could not be known as the cancelled one because the correlation and attaching the intention and the consent is important and not matching from the time point between them.

Therefore, each time that the consent to be applied to the intention, unauthorized treaty will find legal influence.

In Iran's law in following of Imammiea jurisprudence (the opinion of separation of intention& consent) the followers¹³ believe that the will is compound

¹⁰ Idem, 2004

¹¹ Imammi, Seyed Hossein, (1999), Civil law, vol.1, Islamieh, publication, p. 18

¹² Idem p. 19

¹³ Shahidi,Mehdi,(2001), Establishing the contracts & commitments, vol 1,Jurists publication, p. 35

and think that the consent has not been composition subject and the nature is not expedient of the composition of legal effect.

In opposition with the creative intention that its nature is expedient of legal composition and only the intention of composing the creative element to establish the law effect, they have applied the title of volition to collection of intention & the consent.

It should be said that in Civil Code the volition has not been mentioned.

In jurisprudence also the intention and consent have been specified, necessarily the word of the volition has not been used in the meaning of consisting of intention & consent but there are differences between the context of it

This analysis in connection with unauthorized treaties is accordance with the articles 247 & 253 of civil code because the reminded articles have mentioned about the next allowance of unauthorized treaties' penetration and as some of the law men¹⁴ has indicated, the allowance or rejection could be justified when the basis of lacking influence in unauthorized contract is the separation of intention & consent.

The analysis of lacking the reluctant contract influence through the lack of consent would be impossible and some of jurisprudents¹⁵ & some of the lawmen¹⁶ have clarified it.

By differentiation of the topics of fool' contracts, minor's contract and the insane ' contract, they could be analyzed on the basis separation the intention & consent opinion so as that the foolish, insanity and minority might be the reasons of faulty in the intention.

Accordance to article 1214 of civil code the contracts and possessions of immature persons should find legal penetration through his parent's allowance. Permission of the parent (allowance reflected in article 1214 of civil code) is declaring their satisfaction about idiot/ fool's contracts & possession and since what seems as the principle here is the consent.

In other words as some of the law men believe¹⁷ their (Fool) consent is not valid and in the rule they are not existed, in fact the fool & the minor have not legal capacity that causes their consent to be damaged and the matter connects with the will.

The lack of minors' action influence has been accepted among the law men¹⁸ and their contracts have been observed as fool's treaties. This opinion in Imamieh jurisprudence also has advocators¹⁹.

Now if the separating the intention & consent to be accepted on the basis of justifying the lack of penetration regarding the contracts, this principle should be

¹⁴ Imammi, Seyed Hossein, (1999), Civil law, vol.1, Islamieh, publication, p.18

¹⁵ Safaie, Seyed Hossein, (2001), preliminary course of civil law, Commitments and contracts, vol.2, Superior Accountant Institute, lacking of publication turn, p. 27.

¹⁶ Idem, p. 29

¹⁷ Idem, p. 37

¹⁸ Katouzian, Nasser, (2012) general regulations of the contracts, Behnshar publication, vol.1, p. 167

¹⁹ Idem, p. 190

accepted about unilateral obligation as well because in reality unilateral obligations are as like the contracts which are arising of human options.

Therefore, there is no differences between the base & preliminary of optional act and by considering the similarity of contracts & unilateral obligations from the basis & the tools, there is not reason for cancellation of unilateral obligations lacking of valid consent but also in respect of unilateral obligations the next allowance should be known effective in authorization²⁰.

In other words "if volition faulty to be compensated in composition affairs, there is no differences that this "will" to be the consent element with the one (contract) or itself to be useful in forsaken (unilateral obligation)"²¹.

In the law of European countries such as France, there is no any separation between the intention & consent as Iran's law and in spite of intention has the main role in contract and has regulations for certainty of each action, it has not been a name of it as the element separated from the consent.

In basic conditions of contract in civil law and the law of these countries and in the mental condition place of contract party in civil law only "consent" has been mentioned that in legal written sometimes the consent reminds the word of "volition" without paying attention to creative intention and specified from the consent²².

4. Creative intention

In civil law the aim of creation is the aim that reliability reason is self-existence for establishing legal effect in contracts and unilateral obligations.

The aim of creation is based on the individual and is the effect of conception and confirming but is not an mental being²³ but the top point of soul satisfaction that is close to the explorer of the intention of conclusion therefore the composition purpose is called the late part that is not separated from it.

"Volition " also to be used by the law men for conveying the intention, if the origin of the effect or effects becomes legal, it is called creative intention that in this meaning it would be called creative intention.

4.1 Creative intention and creating the effect

Intention in law science suggest decision for doing a legal action as like selling and etc. but in this discussion the creative intention is noting and the intention which has creative power and could have one or several effects with

²⁰ Jafari Langaroudi, Mohammad Jafar, *op. cit.*, p 74

²¹ Katouzian, *op. cit.*, (2012), p. 194

²² Katouzian, Nasser, Civil law,(2013) certain contracts, Modarres publication, vol.2, Enteshar Co. & Bahman Borna Co., Bahman publication, p. 195.

²³ Idem, p. 196

reliable capacities such as the intention of the seller that establish possession of the objects in favor of the customers²⁴.

As definitions by jurists and jurisprudents, it could be said that the suggestion of intention is verily composition intention and in other words is creative intention which stands against informing intention and conveys the will for establishing law nature, on the contrary informing intention is stating the affair which has happened before or it will occur in the future and there is no any creative aspect in it as like one person to inform another one that "I have sold my home or I sell my house" that these are some notification and there is no legal worth in them.

Doctor Langroudi indicates that somebody might not be in the position of selling his property but he has decided to sell his house in the future and if he says that "I sell my property" at this time a person might tell him to want to purchase, here no contract to be concluded, also he might have sold his property and to inform to the third person that "I have bought this property in 1thousand Rials " at this time if the third person says that he buys it, no purchase has accomplished, therefore it could be said that composition intention is one serious & firm will in contract party based on unilateral obligation of legal action which is the basic element and makes the contract, both in the contract the creative intention & both in unilateral obligation there are differences in declaring the intention. In contract existing a explorer of creative intention has demonstrating aspect and establishes the conclusion while in unilateral obligation has proving aspect.

5. Composition suggestion on the strength of unilateral obligations' kinds

Unilateral obligation is an legal action through an intention that causes legal effect without causing a loss for someone, both to be refuse able from another party or not²⁵ on the contrary with the contracts which creative purpose is not forsaken bringing about legal effect, legal effect is the result of unilateral obligation composed by one will therefore in unilateral obligation there is no waiting after composing of one party and after creative the effects will be created without requiring any other person's will.

5.1 Covenant in unilateral obligation & creative intetion

Some of law men to return covenant unilateral obligation to open contract because they believe creating commitment might not be possible through one free will and at the same time they know unilateral obligation as the source of commitment, in describing the evidences feeling hesitate for example feeling doubt if the necessitating of indicator is due to his free will or arising from implicit agreement?²⁶ If the necessitating which the person commits is in the opposite of the

²⁴ Jafari Langroudi, Mohammad Jafar, *op. cit.* (2000), p. 74

²⁵ Shahidi, Mehdi,(2014), Civil law3, commitments, Majd Publication, p.7

²⁶ Katouzian, Nasser, *op. cit.* (2013), p. 175

third person or is arising from his free will that stipulates in the contract or its source is the contract and the possibility of the undertaking should be accounted from exceptional effects of the contract?²⁷ Whether undertaking of cheque issuer arises from his will or is due to impact of agreement of the first holder or is the result of agreement of each holder in connection with the exporters that establishes the commitment? Or is subscriber of company's holder share yet has not got legal personality, only undertakes by his own will or his agreement party is a new establishing company? Is that the forging commitment which takes in opposite of the public and is called unilateral obligation? Or is resulting from an agreement?²⁸

Covenant unilateral obligation might be uncommon, this exception should be away from complete analyzing for each legal base and it is enough to be accepted as the division of unilateral obligation into covenant & possession. Establishing the commitment for others is harder than undertaking by ourselves and it requires of exceptional intention. In addition in our law there is an clarified sample in injunction, in article 834 civil code after declaration that in injunction no undertaking is accepted, it is stipulated that the executor while the testator is alive can reject the injunction and if before death of testator not to be rejected, after that he can not reject it even though he has been ignorant of injunction²⁹.

This principle in Imamieh jurisprudence has famous opposed³⁰ regardless that civil law has gone to famous way and has made the injunction as unilateral obligation to force undertaking on executor³¹.

5.2 Distinction of covenant unilateral obligation from contract & creative purpose

Undertaking unilateral obligation is one sided legal act that has predicted in the law and to make certain the person's creative intention and gives it reliability and on this basis the creditor could oblige the debtor for accomplishing the commitments.

The subject of undertaking unilateral obligation is one person could establish commitment for others or to undertakes for other's profit, there is no any hesitation for being exceptional of the first case but about the second one it should be said that this group of undertaking unilateral obligations are ceased on the indication of legislator and at present some arrangements for accepting the ruling of free will is required which has not predicted in the law.

The conditions of occurrence undertaking unilateral obligations and its effects just in exceptional cases are following by the general regulations of the

²⁷ Idem, p. 174

²⁸ Idem, p. 134

²⁹ Idem, p. 135

³⁰ Ghanavati, Jalil, Abdi pour fard, Ebrahim & Vahdati Shoubeiri,(2004) by surprising of Mostafa Mohaghegh Damad,

³¹ Katouzian Nasser, *op. cit.* (2013), p. 123

contracts. In respect with reluctant & unauthorized undertaking unilateral obligations the principle of lacking the influence should be preferred.

Suspended undertaking unilateral obligation in spite of all different views should be known as correct principle. Implicit conditions also has not place in undertaking unilateral obligations.

In respect of execution guaranty which has been stated in the law, in comparison with the contract, in the case of existing condition for establishing responsibility and undertaking unilateral obligations for declaration and relationship with public interests would cause liability, for execution guaranty there would be discussion of loss compensation.

5.3 Property unilateral obligations & creative purpose

One of legal effects of unilateral obligations could be established for ownership but by noting the nature of unilateral obligation which occurs only by one free will, this ownership in proposition to the case could be created for the person for obligation or another one, in other words the property from the person of this legal act without any will to transfer to another person which is called property unilateral obligation.

In article 140 Civil code the unilateral obligation is one of the possession tools that cause establishing the possession or it is called possession/ ownership unilateral obligation.

5.4 Authorization unilateral legal act and creative purpose

On the contrary of possession and undertaking unilateral obligation the influence of obligation arises from permission & authority and increases other's option and there is no any problem because in this assumption there is no undertaking on the party spoken to and no right to be added to the property and what it creates, is increasing the power & the option.

Using and performance this power is in his authority and there is governorship, the obligator of unilateral legal act could break the authority and whenever he feels regret, he could return his permission, therefore this authorization should be accounted accordance with the regulations, in financial affairs, the regulation of article 108 civil code defines that : in all cases that the benefit from other person's property to be due to mere permission, the owner could revoke his permission unless there has been an opposed reason.

5.5 Giving possession unilateral legal act and creative purpose

This is an unilateral obligation which one person giving his property to others freely and without interfering other's will. The term of "Freely" is for that establishing the commitment for another person without his consent is irregular affair that is not possible just by the rule of legislator.

Creative intention among the establishing elements has been legal nature and other elements are complementary, therefore the composition purpose in private law has special importance because the main base of private law is legal act which creative purpose is the establishing element.

Since creative purpose has sensual quality so the exact position of it in the mental of establishing a legal act is not clarified, some of the law men do not know the intention independent from the consent and they observe the unity of intention and the consent and vice versa some of jurists believe that the intention is independent from the consent.

5.6 Conclusion

By considering the definitions by jurisprudents & law men it could be said that creative purpose is one serious volition in concluder, based on unilateral obligation of one legal act which is the main element of it and the maker of the contract.

By noting the article 190 of civil code the will (creative purpose) is one of the basic conditions of correctness of the contracts and the correctness of all contracts require creative purpose even though between the contract and unilateral obligation there are some differences. In the contract existing the explorer of composition purpose has proving aspect and is the establisher of the contract while in unilateral obligation has been demonstrated.

In addition social interests and keeping secure the contracts causes that the realm of the cancellation to be limited and part of contracts to be revived by the next authorization and to take the effect³² this social necessity in unilateral obligation should be accepted as well.

In other hand in Iran's law by following Imamieh jurisprudence, the followers believe in separation of the intention & the consent³³, they know free volition as a compound and think that consent is not from composition affairs and its nature is not the expedient of legal effect composition.

On the contrary creative purpose & its nature is advisable for legal composition and only composition purpose is the creative element which establish the legal effect in reliability universe. They applied the title of the will to collection of intention & consent. It should be indicated that in civil cod there is no sign of the "volition".

In jurisprudence also in spite of distinction between intention & the consent the term of "volition" has not been used through conveying the meaning consisted of intention & consent but there are differences in the context.

³² Shahidi, Mehdi, (2001), Establishing the contracts & commitments, vol 1, Jurists publication, p. 18

³³ *Idem*, p. 19.

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