Formalism and the Principles Governing IT

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Abstract: Formalism theory, has always been considered besides the theory of consent in legalactions. But in our country, the jurists have mainly paid attention to consent in legal actions and have explained the principles governing it. They do not consider any role for form, except in formation and proof of legal action. Early jurists are also in favor of consent authenticity, and merely believe in a kind of formalism named term orientation. So that they know moatat useful for occupation. While western lawyers, have paid more attention to Formalism and its principles and have gone so far as to speak today about renaissance of formalism. In our law, the legislator has also mostly considered the formal legal actions in recent years. Recent and contemporary jurists have examined this issue with a broader view and have voted to property in moatat. For this reason, understanding the concept of formalism and its different types and familiarity with the principles governing it can be an effective step in explaining this theory. In this research, after the definition of form and analysis of various definitions of formalism, we conclude that it is possible to define formalism with the authenticity of certain, exclusive, binding and with sanction forms that are imposed on individual will and qualify the occurrence, accuracy or one of the effectiveness level of legal action and/or the punishment of the doer or his/her civil liability. Formalism in its two traditional and modern types is based on various political, economic, sociological and philosophical principles that we have mentioned.

Keywords: Form, Formalism, Intend. Unilateral and bilateral

1. Introduction

In ancient Rome most of the contracts were special contracts, in a way that the contracts did not lack the formalities which were needed to establish rights (BahramiAhmadi, 2011, p 113). In this system, the form was the successor of the individual will and violation of it led to invalidation of legal action. This maximal formalism is based on religious, supernatural and fantastical foundations rather than being based on rational basis. Gradually the development of rationality and the expansion of the humanist school undermined the status of ancient forms and considered a basic role for the individual will. Hence, philosophers and lawyers in the eighteenth and nineteenth centuries emphasized on the authority of will in legal actions and proceeded to the level that they assumed the consensual legal action as a principle (RafieeMoghaddam, 2011, pp. 35 onwards).

But today, many Western writers consider the twentieth century as the era of renaissance of formalism (Ripert et Boulanger, 1957, n44, et Josserand, 1938, T2, n 135) and legislators tend towards formal legal actions; formalism that has significant differences from its traditional form. While in our country still lawyers speak about the consensual principle of legal actions and about the subject of formalism except providing a definition for special contracts they have not mentioned any other words (Katouzian, 2009, vol. 1, p 88 and Shahidi, 2011, p 84 and Emami, 2011, p 219 and Amiri GhaemMaghami1999, vol. 2, pp. 91-90) In Imamate Jurisprudence also preceding jurisprudents believed to the kind of formalism known as literalism. So that they had tendency towards literal proposal and acceptance and they did not consider conducts (Moatat) as property (Juba'ial'Amili, 1994, pp. 225 and Al-Hilli, 1998, pp. 16 and Tusi, 1988, pp. 235 and Ibn Idris, 1990 Volume 2, page 250 and Ibn Zohre, 1997, Volume 14, page 214, and Ghazi Ibn Baraj, 1986, Volume 1, page 350). As well as they did not give any importance to present tense in conclusion of the contract (HosseiniShirazi, 2005, vol. 1, p 277). But contemporary jurisprudents do not believe in the monopoly of literal embodiment and also accept the present will statement and consider the

conducts (Moatat) causer of property (Yazdi, 1995, vol. 3, p 120 and Najafi, 2007, pp. 144 and Mostafavi, 2003, p 17). Nevertheless, there are many questions about the formalism. For example what is the definition of legal form? What does Formalism mean and what are the types? Which principles govern formalism and why a legal system becomes formalist? In this query we seek to answer these questions correctly.

2. The concept of Formalism

In order to understand the concept of formalism, it is necessary to become familiar with the definition of the legal form and formalism.

2-1. Definition of legal form

In dictionary, form means external and outward structure of an object which is used against its material (Anvari et al, 2003, vol. 2, p 1999). While according to one of Western writers, though lawyers constantly use the term form and apply it against the nature but they have not provided a definition for it (Nicod, 2001, p10). In his view, what is the essence of legal practice such as intention and consent are substantive issues and outward elements such as proof and dissemination are subjects related to the form (Ibid, p11). However, several points should be considered in defining the legal form. The first is that in the science of law, form is always raised in relation to legal will. Form sometimes like receipt in real contracts[1] is the provision of legal rectitude and sometimes like the prosecutor's permission for the sale of ward immovable property by the caretaker[2] is the influential condition for legal action.Also, sometimes the form like the receipt is the necessary condition for possessory will.[3]Moreover some forms have positive aspects[4] and sometimes disregarding the prescribed formby the legislator leads to civil liability or penalty of the agent of legal action[5].Of course, sometimes form possess such an importance that substitutes the internal will. This matter is tangible in commercial documents.Thus, in a general definition the legal form can be defined as follows:external and tangible element which is a symbol or substitution of internal will and the nature, existence or a degree of effectiveness of legal actions is dependent on it or its observance leads to no punishment and the responsibility of the agent of the legal act.

2-2. Definition of Formalism

In dictionary, formalism can be considered as a doctrine that does not pay attention to the content and focuses its attention on the form and shape (Sadeghi, 2008, p 67). In science of law, some lawyers have provided a narrow definition of formalism while some others have presented a broad definition of it. In narrow definition, formal legal action is an action that the form available in that action is the precondition for formation, correctness or proof of its action (JafaariLangroodi, 1340, No. 40-39, and Katouzian, previous, volume 1, pp. 88-89 Abdalla, op.cit, p172, et Engel, 1973, p539) or form is the successor of internal will (Chestin, et Desche, 1990, pp828-832)or that form is the only condition for proof (RafieeMoghaddam, 2011, pp. 39 and Abdalla, op.cit, p539). In the broad definition, formalism consists of the necessity of observing specific form to express the will so that the violation of it faces legal action with securing of implementation (Ripertet Boulanger, op.cit, pp20-21 Ibid, p539 et). In our opinion, several points should be considered in the definition of formalism. The first is that the formal legal action is an act in which prescribed form has no equivalent and alternative. In other words, in the event that an agent of the legal action is free in choosing the legal form then that action is a consensual legal action.

The second point is that the legal form has the warranty of implementation. However, warranty of implementation of non-observance of form is not merely invalidity of legal action, but rather it is the legal form of gradation and has variety of guarantees of implementation such as invalidity, infectivity, unenforceability against third parties, disproving and civil or penal responsibility of the agent of the legal action. Also in definition of formalism we should not merely consider the written and oral forms. But meanwhile the behavioral forms such as delivery should be

1-The real contract is the contract that for its formation or validity it is necessary to submit material (Shahidi, 2011, p 85).
2- Article 1241 of the Civil Code
3-Article 830 of the Civil Code
4-Article 291 of Non LitigiousMatter Actrefers to article 276 of the same act
5-Article 51 of the Family Support Act of 2012

included. Hence in our opinion the division of contracts in terms of the will being constrained or conditional to objective, consensual or special contracts (Katouzian, previous, volume 1, page 88, and Shahidi, previous, page 84 Imami, previous, volume 1, page 219 and Amiri GhaemMaghami, previous-pp. 90 and 91) is not correct. But the real contracts should also be placed among the formal contracts and from this perspective contract can be divided to consensual and special contracts. According to these points formalism is:

Originality of certain, unique and compelling forms that in some way impose sanctions on a person's will and makes the occurrence, accuracy or effectiveness of legal action or punishment of the agent of legal action or his civil liability conditioned and constrained.

3. Types of Formalism

Formalism can be viewed from the different perspectives and assume several different types for it. However, in this study, from the historic point of view and theprinciples governing it, we have divided formalism into two types of traditional and modern formalism.

3-1. Traditional Formalism

Most of the authors believe that in the old laws of Rome, the individual will had no legal value. In other words, the individual will, have no legal value except in certain and specific forms of ritual and sacred and legal functionaries were the product of external inherent rights (Rouxel, 1934, p11). Since this system had the religious and metaphysical roots it was strongly formalist and had a profound attachment to form in a way that symbols had complete domination on wisdom and ingenuity of the Romans at that time (Gazzaniga, 1992, pp37-38). In ancient Roman law, legal actions were single and therefore imperfections of willpower and lack or illegitimacy of reason had no effect in legal practice (Ihering, 1877, T3, p306 et Abdalla, op.cit, p48). This matter was because of that shapes and forms were the creator of nature and the content of legal actions and the inner will had no position in formation of the legal action (Gazzaniga, opcit, p89 et Mazeaud et Chabas, 2000, p395). For the conclusion of the contract it was required to use specific wording that it should be expressed in Latin and no other language was accepted (Ibid, pp119-120). There were no correspondence contracts and conclusion of contracts by the representation, due to the necessity of the presence of person in contracting legal action was not possible (Rouxel, op.cit, p12 ETIhering, opcit, p129). Technical methods and tools of formalism in ancient Roman law can be placed in three general groups. In Islamic law, though the jurists have tendency towards the consensual legal actions, but the traces of traditional formalism can be seen. Sunni scholars of jurisprudence regarding this issue are divided into two groups. Some of them believe that, in the four Sunni schools, the deals are essentially consensual (Mohmesany, 1948, Vol. 2, p 28). This category of scholars believe that the Holy Prophet has prohibited all types of form contracts of the age of ignorance that were concluded regardless of the intent, consent and merely to perform some formalities and Islam has abolished and invalidated such transactions (Gharehdaghi, 2003, vol. 1, pp. 23-18 and Maghrebi, in 2006, volume 2, page 23). In contrast, some scholars believe that in the Sunni Islamic jurisprudence, there is a certain type of formalism known as literalism (Shehata, 1936, pp. 130 onwards and Savari 1998, pp. 206-263). The presence of real contracts such as hebe (gift), mortgage, forward sale, sale of coins against other coins, loan and borrow in this legal system are another reason for the tendency of Sunni jurisprudence towards formalism (Savari, 1985, pp. 113-118). But the Sunni scholars consider intention and consent in all kinds of legal practice, as validity condition of legal practice (Sanhoory, 1997, vol. 1, pp 93-76) Article 3 of Law of judicial judgments is biased towards the same opinion[6]. In Imamia jurisprudence also there is another type of formalism known as literalism. So that the verbal offer and acceptance is necessary in conclusion of the contract and conducts (Moatat) is not the reason of ownership (Juba'ial'Amili1994., pp. 225 and Al-Hilli previous Page 16, Toosi, previous, page 235 and Ibn Idris, previous, volume 2, page 250 and Ibn Zohreh previous pp. 214 and Ghazi Ibn Braj,

6-Article 3 of Law of العبره فى العقود للمقاصد والمعانى لا الالفاظ والمبانى judicial judgments:

previous, volume 1, page 350). Also early jurisprudents did not consider any role for the present tense in signing a contract (HosseiniShirazi, previous, volume 1, page 277). This issue, in ancient periods, was to the extent that SahebJavaher considered literal condition in contracts as necessary, and of the necessities of Imamiye religion (NajafiEsfahani, 1980 vol. 22, pp. 210-209 Juba'ial'Amili earlier, p 225). The main reasons of this group inrequiring verbal contracts is the traditions such as " انما يحلل الكلام و يحرم الكلام"that imply onexclusivity of embodiment to verbal contract.

3-1-1. Features of traditional formalism

In our opinion, by considering what was mentioned about traditional formalism, the following items can be presented as the main features of traditional formalism:

3-1-1-1.Being based on the traditional practices of human behavior

Max Weber divides human practices into four kinds and draws the evolution of human society from the lowest ranks, which is a traditional practice to the highest levels of rational action toward the target (Freund, 2004, page 99 onwards). In this action man without imagining the target or understanding the value of function performs it unconsciously like the machine because and based on customary learning and customs and religion. Thus, the bases of forms are the social, customary and even religious beliefs of persons and sometimes even irrational human beliefs become the basis of it.

3-1-1-2. Promotion of verbal and behavioral forms

In this formalism, more than written forms we face spoken and behavioral forms. The reasons of ancient people's tendency towards spoken and behavioral forms are holiness of words and religious and metaphysical principles governing the ancient legal system.

3-1-1-3.The same degree of sanction of forms

In traditional formalism, in terms of sanctions, forms are of one degree in a way that violation of forms leads to invalidity of legal action.

3-1-1-4.The possibility of abusing the formal requirements

In traditional formalism due to unimportance of internal will and importance of the apparent will and disregarding the defects of will and illegitimate tools in the formation of legal acts, there has been always the possibility of abusing the formal requirements by knowledgeable people.

3-2. Modern formalism

Many Western authors believe that the legal systems after their extremist turn towards the principle of sovereignty of will and the theory of consensual legal acts have turned to the formalism in the twentieth century. Hence, these groups of scholars speak about the renaissance of formalism (Ripert, et Boulanger, op.cit, n44 et Josserand, op.cit, T1, n135). This type of formalism is generally different from its traditional type in terms of features and principles governing it. From twentieth century onwards, the obvious tendency of legislators towards creating special legal actions can be observed. Our legislators in articles 46 and 47 of the Real Estate Registration Law have subjected the sale of immovable property to formal document adjustment; the same method has been followed in article 1071 of the French Civil Code, article 313 of German Civil Code, article 1277 of the UAE Civil Transactions, article 1 of Registration Law of Egypt and article 1148 of Jordanian Civil Code. In the laws of England, in accordance with the laws between 1925 and 1677, the sales of immovable property should be in written documentation. In Russian law according to articles 239 and 257 of the Civil Code, sale of town houses and bungalows and granting properties with the worth more than five hundred rubles is required to adjust the official document. Also in our law, as the article 11-261.L of the construction and occupancy law of France, Article 3 of Law of Pre-sales of building approved in2010, has subjected the pre-sales ofto formal document adjustment.

Further contracts such as marriage[7], attorney in courts[8], lease[9], transfer of the goodwill[10],

7-Article 1062 of the Civil Code and Articles 20 and 49 of the Family Support Act of 1391

transactions and rescission of the same and interest of ships[11], possessory and contractual wills[12], transactions of lands within the towns[13], transactions goods liable to consumer protection law[14], insurance contracts[15] and employment contracts[16], are among the present special contracts. To this class of special contracts, real contracts such as endowment, mortgages, sale of coins against other coins and granting with reference to articles 59, 772, 364 and 798 of the Civil Code can be added. Cadences such as divorce and reference by referring to articles 1029 and 1134 of the Civil Code and articles 20, 24, 25 and 27 of the Family Protection Act are new examples of formal cadences. In French law, contracts such as, loan, borrow, deposit and mortgage of estate, are among real contracts that the traded receipt in them is the true condition of the contract.[17] Also transfer of patent rights, contract publishing, working with fixed-term contracts, as well as document partitioning condominium with reference to articles 8-613L, and 7-132L, intellectual property law and article 1-122.L of labor law and paragraph 2 of article 1873 of the Civil Code, require the registration formalities.In Swiss law in the sale and exchange of immovable property, promises to deliver a concrete law,acts relating to companies according to articles 216,237,243,637,647, 779, and 784 of the Swiss Code of obligations are examples of formal legal actions in that country. In Sunni jurisprudence, the late scholars believe that the principle of consent in contracts and cadences today has faced with many exceptions that we cannot refer to consensual contracts and cadences as a principle (Savar, previous, pp. 275-272). In Imamiye jurisprudence, too, late jurists deny the past and Arabic contracts according to absolute virtue, reference to the customary meanings and weakness of sayings such as "انما يحلل الكلام ويحرم الكلام" and in conduct (Moatat) unlike earlier jurisprudents they believe in the property acquisitions (Mohaghegh Sabzevari, 2003, vol. 1, pp. 448-449, and Moghadas Ardabil, 1998, vol. 8, pp. 138-146 and Neraghi, 1997, pp. 431-434 and Hosseini Maraghi, 1998, vol. 1, pp. 94-130 and Shahidi Tabrizi, B., vol. 2, p 189 onwards and Mousavi Khoei, 1999, vol. 2, pp. 104-174 and pp. 271 and 263 and Khomeini, 1984, vol. 1, p 202 onwards and Yazdi, 1995, vol. 3, p 120 and Najafi, previous, page 144 Hosseini Shirazi, previous, volume 1, page 277). Even some believe that in sale, the principle is conduct and sale in the form of documents and words is the alternative which has been resulted from the complexity of relations of human in the society, the problem of transportation of lords and the impossibility of storing goods (Makarem Shirazi, 1993, volume 1, p 19).

3-2-1. Features of modern formalism

Following items can be considered as distinguishing characteristics of modern formalism.

3-2-1-1.Being based on rational action directed towards the goal

In this action, human behavior is formed on the basis of objectives and evaluation of disadvantages, advantages and attracting the interests. So in modern formalism, legislators have a goal from counterfeiting any form that has alignment with the ultimate goal of it that is the protection of the interests of individuals and society.

3-2-1-2.The supremacy of written forms

In this formalism, written forms including formal and ordinary forms are considered more than verbal and behavioral forms. These forms due to characteristics such as stability and strength have extraordinary capacity to encompass written observations and impose protectionist and guiding measures and possess high position alongside variety of forms.

3-2-1-3. Gradation of sanction of forms

8- Article 1 and 32 of the Law of Attorney Act of 1315 and subsequent amendments
9-Article 1 and 2 of the law of landlord and tenant relations Act of 1376
10- Paragraph 2 of Article 19 of the law of landlord and tenant relations Act of 1356
11- According to Maritime Law Act of 1343
12- Article 276 and 291 of non-litigious matter Act of 1319
13- Acquired from the meaning of Article 9 of Law of Land Act of 1366
14- Acquired from the meaning of Article 1-3 of the Consumer Protection Law Act of 1386
15- Article 2 of the Insurance Law Act of 1316
16- Acquired from the meaning of Articles 7 and 10 and Article 140 of the Labor Code in 1369
17-Articles 1875,1892,1915 and 2071 of the Civil Code of France

Modern formalism is graded and considering the goals of the legislator has variety of sanctions. Therefore as we mentioned non-compliance of form lead to invalidity or infectivity of legal action and sometimes it is impossible to prove that in judicial authorities and sometimes violating form leads to civil or criminal liability of the subject.

3-2-1-4. Preventing misuse of formal requirements

In this formalism strategies that are adopted by the legislature or the courts somewhat makes the abuse of formal requirements impossible. For example, according to the principle of good faith in legal actions and fraud law that corrupts the practice generally[18], the judge is able to prevent abuse of formal requirements (Terré, Simler et Lequette, 1999, p154). That is why Article 17 of the Geneva Convention, adopted in 1930 of unenforceability principle of the objections, does not cover an individual with bad intention.

4. Principles governing formalism

Principles governing formalism are different in both traditional and modern formalism.

4-1. Principles governing traditional formalism

We are going to investigate the principles of traditional formalism in two fields of ancient Roman laws and Islamic rights.

4-1-1. Principles governing the traditional formalism in ancient Rome law

It seems that the following principles are the most important maximum principles of formalism in the legal system of ancient Rome laws.

4-1-1-1.The mentality of the people in ancient societies

According to Brule, the mentality of ancient societies was primitive, irrational, illusionary, non-scientific and mythological. In mythical thought people are incapable of understanding reasonable affairs and for understanding these affairs they resort to material and tangible factors and that are why rites and rituals are important in ancient societies. In this idea the voluntary action is an action that comes from the will of the gods of natural forces (did Cassirer, 1999, vol. 2, p 35). Thus the human have instinctive and unconscious tendency towards bringing objectivity to cognitive and mental phenomena (Gény, 1925; T3, pp101-102 et Carbonnier, op.cit, T4, p171). So it is clear that in such a society, the individual will is not effective except in prescribed ritual and religious forms.

4-1-1-2. Concrete structure in ancient societies

Ancient societies have religious foundations and totems (Durkheim, 2002, p 255). According to these people rights are themselves religious and are raised by orators and commentators who interpret the will of the gods. Obviously, in such a ritual and religious system that the individual will have no role, the rights will tend towards formality.

4-1-1-3. Political and social structure of ancient Rome society

In ancient Rome, the individuals had no legal personality and their value was tied to group identity in which they were living. In a way that even the responsibility had grouping and collective aspects (Delvecchio, 2001, p 31). So there is no person will and legal acts move towards formality, because the formal legal action shall provide the monitoring tools for the government. In this system the economy is subsistence economy and transactions usually takes place in form of mutual beneficence and because of the less significance of the trade the speed of transactions is not important t (Roche, 1996, pp. 71-73). This subject provides basis for the expansion formality in the legal system.

4-1-2. Principles governing the traditional formalism In Islamic Law

In Islamic jurisprudence there is a kind of formalism known as literalism. But considering words and past tense is not on the basis of belief to magic, spell and belief in illusionary supernatural but rather it is based rational principles which are in accordance with the situation and state of that time. Belief to the seizure of transactions, restriction of possessory

18-Fraus Omiacorrumpit

tools and lack of legitimate reason on other ways to perform the contract and also lack of compliance of title of contract and cadences in non-verbal holies and sayings such as انما یحلل الکلام ویحرم الکلام can be considered as the principles of literalism of Islamic law in that period (Najafi Isfahani, previous, vol. 22, p 209 onwards, and Savari, previous pp. 272-275)

4-2. Principles governing modern formalism

Modern formalism is based on the various political, economic and social bases. In the following example, we refer to some of these principles.

4-2-1. Transformation of the concept of freedom

During the school of individualism, human was considered as the measure of everything and his will was the creator and basis of everything (Alam, 2008, p.1). But gradually, from the late nineteenth century and early twentieth century the attitude of lawyers towards the freedom was changed. Freedom took on social meaning and lawyers spoke of applying the will in the field of law (Robier, 1951, pp237-240). According to them, if the individual will was the basis of the formation of legal acts, it was due to the social interests and if the social interest required, this will could be limited (Ripert et Boulanger; 1957, p183). So in modern formalism individual will is not denied, but forms appear in interaction with legal will. Forms that are mainly created to avoid the domination of the capitalists on handicapped persons, to prevent controversy transactions and avoidance of positive problems and rather than being governs on legal will are supportive and guider of this will. In other words, considering society and substituting the social interests instead of personal interests allows legal system to expand their monitoring on the legal acts and the means of this monitoring is nothing better than the legal form. The necessity of maintaining the social interests has driven the jurists to deny the past and verbal tense and to accept ownership of conducts[19]. When the lack of detention of transactions is proven and the concept of customary nature of the contract become the criteria of the practice and considers the applicability of religious arguments in legislation deals, expecting another outcome is impossible (Mohaghegh Sabzevari, previous, volume 1, pp. 552-648 and 448-449 and pp. Mughniyeh, 2002. 34, pp. 11-13 and p. 28 onwards).

4-2-2. Economic Foundations

In the economy based on supply and demand, the person is the main principal of economic activity that in the pursuit of material interests, strives to achieve maximum benefits. In this way, free practice of both supply and demand forces has resulted in the provision of social benefits (Tafazzoli, 2008, p 16). But in the modern era this belief has been strengthened that in relations between the weak and the strong, belief in free will is enslavement and captivity (Bordo, 1999, pp. 50-51). In other words, the system based upon the principle of supply and demand which justified the principle of sovereignty of will and the consensual nature of legal actions was collapsed due to the adverse effects of the capitalist domination on poor groups in the new era and government intervention was accepted as an important principle in the economy (Bordo, 1999, pp. 140-142 and pp. 166-176). Thus, for example, in a country like Germany the theory of the social market economy was introduced. In this type of economy market is underway based on the free price, but where inappropriate economic chaos occurs, the state will enter to compete and direct this disorder. Sometimes the government particularly interferes, for example, attempts to provide pricing for agricultural products and specifies public transport tariff specifies (Nourbakhsh, 2007, pp. 184-185). Obviously, in this situation the government requires an efficient tool for implementing its economic policies. This efficient tool in realm of law is the legal form.

4-2-3. Political Foundations

Perhaps we can consider the creation of a welfare state theory as an important political foundation. In theory of the welfare state, the government is not solely responsible to maintain order and security in society, but also the obligation of government is to expand social

19-In this regard, reference can be made to the rule of binging interests and ward off evil (Bahrami Ahmadi, 2012, p 324).

welfare and social justice in many aspects. This matter also causes the intervention of the government into private affairs of individuals. The government simply does not play a supervisory role in the formation of legal actions. But it is the director and guider of people's behavior in society thereby it can prevent the jobbery and individual totalitarian and fulfill social justice. It is in line with implementation of such policies that the government considers itself bound that by limiting the freedom of the will and directing it, takes a step towards social justice and the protection of persons. One of the most important tools of government in this regard is the establishment of certain, exclusive and non-equivalent forms that its types and levels of sanctions are considerable.

5. Conclusion

The legal form has the distinct definition from its literal meaning. Form in its lexical meaning is the external symbol of objects but in realm of law this external feature is manifested in embodiment. Also forms have variety sanctions such as invalidity, infectivity, unenforceability against third parties, disproving and civil or penal responsibility of the agent of the legal action. Hence legal form can be defined as external and tangible element which is a symbol or substitution of internal will and the nature, existence or a degree of effectiveness of legal actions is dependent on it or its observance leads to no punishment and the responsibility of the agent of the legal act. However, we knew that between the lawyers about the definition of formalism there are differences, some has defined it broadly and some narrowly. But we should also consider the fact that legal form has no equivalent and alternative and violation it is along with sanction. Also in definition of formalism we should not merely consider the written and oral forms. But meanwhile the behavioral forms such as delivery should be included. We have defined the originality of certain, unique and compelling forms that in some way impose sanctions on a person's will and makes the occurrence, accuracy or effectiveness of legal action or punishment of the agent of legal action or his civil liability conditioned and constrained. Formalism can be viewed from the different perspectives and assume several different types for it. However, in this study, from the historic point of view and the principles governing it, we have divided formalism into two types of traditional and modern formalism. In traditional formalism in the area of ancient Rome rights we reached the conclusion that the maximum formalism is dominant, in a way that the contracts did not lack the formalities which were needed to establish rights. In this system, the legal actions were based on the form and non-compliance of form led to the invalidity of legal acts. There were no correspondence contracts and conclusion of contracts by the representation, due to the necessity of the presence of person in contracting legal action was not possible. In Islamic law, though the jurists have tendency towards the consensual legal actions, but there was a kind of literalism, in a way that the conclusion of the contract with the present and future tense is not possible and the conduct is not enough for the acquisitions of property. Therefore the orientation of forms towards traditional act of human behavior, one degree of sanctions, the supremacy of verbal and behavioral forms and the possibility of abusing the formal requirements can be seen as the most important features of this type of formalism. However, from the twentieth century onwards the legal systems have witnessed the emergence of formalism which is completely different from the traditional type and is based on supportive and guiding goals. Ancient social structure and belief in totems and illusionary supernatural and religious aspects of ancient human thought and subsistence economy and lack of need for speedy transactions can be considered as the principles that governed the formalism in ancient Roman law. Modern formalisms based on rational action directed towards the goal and legislators have a goal from counterfeiting any form that because of this we can observe the supremacy of written forms over verbal and behavioral forms. This intellectual property has made scholars to deny the verbal and past tense condition in contracts, the ownership of conduct and paying attention to written forms. On the other hand most jurists deny the past and Arabic contracts in contracts and sayings such as " انما يحلل الكلام ويحرم الكلام" and detention of

transactions can also be considered as the foundations of traditional formalism in Islamic jurisprudence. Modern formalism is the product of changing attitudes towards the concept of freedom and originality of the collective will in the minds of scholars and giving priority to social interests rather than the personal interests. Also, the development of the ideas such as the welfare state and state economy and the social market economy can also be considered as the political - economic fundamentals of this formalism.

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