

A COMPARATIVE STUDY OF IMPLIED CONDITION IN IMAMIYYAH JURISPRUDENCE AND THE LAWS OF IRAN AND ENGLAND

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Terms are very important in commercial relationships and transactions. One of the unique conditions in contracts is an implicit condition that has special effects and rulings due to its relationship and dependence on the contract. It has been neglected in Islamic jurisprudence and civil law and has not been discussed independently. Conditions are so closely related to contracts that the interpretation of contracts without taking into account the conditions is unrealistic, and Imamiyyah jurists consider the condition to be a secondary obligation and the contract to be secondary and consider it as the basis of the main contract. The legitimacy and scope of the implied condition in Imamiyyah jurisprudence is not mentioned under the title of independence, but it is understood from the meaning of the word and the citations of the jurists. Implied conditions in Imamiyyah jurisprudence can be divided into two types: main conditions and customary conditions; conditions that are mentioned before the composition of contract but not mentioned in the text are called main conditions, and conditions that are not mentioned before the composition or in the text are called customary conditions. In Iran's law, there is no explicit mention in this regard, and from some articles of the Civil Code, it is possible to infer the implicit condition. In the English law, conditions are divided into explicit and implicit ones based on whether they are mentioned or not mentioned in the text of the contract, and implicit terms are divided into three types: actual, legal, and customary.

Keywords: *condition, implied condition, main condition, customary condition, condition in contract, selling*

Introduction

Today, one of the most important issues in sales and other contracts is the condition that is used in pre-contractual negotiations. Sometimes these conditions are mentioned in the text of contract, which are known as explicit conditions, and sometimes they are not mentioned in the text of the contract, which are known as implicit conditions. In Imamiyyah jurisprudence, the analysis and examination of the implied condition is not discussed under an independent title, but the implied condition is understood with the jurists citations as the condition included in the contract. It should be noted that there is no discussion in this field in Iran's civil law either. Considering the volume and promotion of transactions and the expansion of people's relationships, there are some conditions which have great importance and those conditions have been taken into consideration before entering a contract, but in Iranian jurisprudence and law, they have been given less attention. In fact, they have been neglected. Examining this subject in the English law on the other hand, we realize the importance and effectiveness of these conditions. However, conditions have their own rulings and effects, because today's writing of contract is concluded based on the negotiations and discussions before entering the contract. The challenging issue, in the jurisprudence and laws of Iran and England, is the status of a condition that is not specified in the text of the contract, but contracts are drawn up based on it (in terms of legitimacy and illegitimacy). The conditions that are common in contracts and the interpretation of the contract are not possible without including them by the name of implied terms; the civil law article no. 454 refers to the implied condition, but does not provide any definition of it. In jurisprudence, these conditions are sometimes referred to as implied conditions, sometimes as general understanding conditions, and sometimes as main or customary conditions. In jurisprudence, a condition is binding whenever it is mentioned in the text of the contract (Ansari 1996: 282). Such a condition has been accepted in Iranian law (such as articles 235, 237, 238). Therefore, among the applications of this implicit conditions, we can point out that they are interpreters and moderators of contracts. In British legal system, conditions are divided into explicit and implicit, depending on whether it is mentioned or not mentioned in the text of the contract, and in fact, what we consider as main condition, they consider to be an explicit condition. In the works of Imamiyya jurists including Sheykh Tusi, Allamah Hilli, Shahid Sani, Sahib Jawahir, Sheykh Ansari and the later ones, the main condition has been raised and discussed, while, in law according to the articles 1113 and 1128, jurists raise and examine the main condition (Katuzyian 2013: III/548).

The Concept and Nature of the Condition

The word condition means an obligation and something obligatory included in a contract (Ibn Manzur 1999: VII/63). It means to make something necessary in any contract or sale and also to oblige or commit to something during a transaction (Omid 1984: I/729). Some have defined it as a covenant or suspension of something. The condition is an obligation of another person as part of a contractual obligation, without being bound by a condition (condition) for the main contract. In other words, sub-obligations and commitment during the transaction are called conditions or conditions among the contract, just like when a person buys a product and at the same time, it implies the seller is to carry out some action. Conditions of the contract are different; in general, they are divided into conditions of doing something, conditions of the result, and conditions of the specification (Bojnurdi 1998: III/223). Jurists are of the opinion that a condition refers to the two common meanings of obligation and commitment to something, the absence of which implies the necessity of non-conditionality. However, the majority of famous scholars are of the opinion that the first meaning is bound by the fact that the obligation and commitment are included in the contract. The reason for this is that this meaning is brought to mind from the condition; in addition, they have cited the sayings of lexicographers. Some supporters of this theory believe that a condition is a kind of conjunction, suspension, and postponement, which are some of other common meanings of the word.

After explaining that the condition does not have a separate customary and idiomatic meaning and that it all comes down to the same meaning, Muhaqqiq Khuyi considered the single meaning to be conjunction and postponement, and says that postponement is sometimes generative, like generative conditions such as binding the effect to its cause. Of course, in this case, after the determination of the Sharia, the postponement is under a generative condition. For example, after the Sharia includes purity in the prayer, the cessation of prayer would be a generative and rational matter, and sometimes it is a pure forgery, like contractual conditions in transactions (Tawhidi 1992: VII/297–298). In terms of principles of jurisprudence, it is any matter whose existence is necessary for the realization of another matter. They say in its definition: the condition is something that, if it does not exist, the conditional will not exist, but if the condition is present, it alone is not sufficient to create a condition (Jafari Langarudi 2018: II/2256). In short, we can say that condition is used in two meanings in terminology: (1) obligation to the object and commitment to it, among sales and other transactions; (2) absolute obligation and commitment (Ibn Manzur 1999: VII/82). The same meanings are used in civil rights.

A condition in legal terms is sometimes used in the sense of suspension, i.e. depending on something else, such as when a person suspends the purchase of a house from the sale of his land. In this example, the purchase of a house is suspended from the sale of the land. This kind of condition is actually one of types of conditions in its philosophical and logical meaning. Conditions are used in the same sense in article 191. Sanhoury writes in the definition of a condition that a condition is something related to the future on which the occurrence or deterioration of an obligation depends on. In the specialized legal sense, the condition has not deviated from its literal meaning, and it is a direct or indirect commitment to a conditional contract, at the will of its parties. In such a meaning, suspension is outside the special meaning of the condition. The word condition is used in the second book of the Civil Code and articles 232 onwards of the Civil Code in the same sense. In the legal term, a condition is a relative obligation which at the same time concludes the contract. Therefore, it does not have an independent existence, but it depends on the contract. However, some jurists have defined the nature of a condition as follows: it is something likely to happen in the future that the parties of the contract or the person making it, the creation of a legal effect or the happening, or a description that one of the contract parties committed to it in the transaction. On the other hand, they consider a condition as an absolute obligation, whether included in the contract or independent from the contract, in which case, the condition is divided into two types, one condition included in the contract and the other is initial condition.

Other meanings mentioned for the condition are as follows: condition is basically something whose existence is necessary for the fulfillment of another condition. Also, a condition is something that does not come into existence if it does not exist, but if it does come into existence, alone, it is not enough for existence of contingent (Jafari Langarudi 2018: 380). One of the uses of a condition in jurisprudence and law is mentioning it in contracts; for this reason, the condition is divided into two types: initial conditions are conditions that are not mentioned in the text of the contract, but they are obligations and commitments which are not followed by a contract. One of the parties makes such a transaction for the other party, but the ruling of which is non-compliance to such conditions (Bojnurdi 1998: II/377).

In the English law, there is no equivalent term for the word condition, for which there is no comprehensive definition, and only the general definition is represented. From some opinions and theories, the condition can be defined as follows: statements and commitments of the parties during the negotiations that lead to the conclusion of the contract in which form a part of the contract. The privilege of a condition in the English law is to be part of a contract. Otherwise, the title of condition is not applied to it and it is placed under the

title of description. It should be noted that in the English law, if a condition is violated, the judicial solution is to file a lawsuit (breach of contract), which is, due to the importance of the condition, only compensation for damages or in addition, violation of the contract may be applied.

The Concept of Implied Condition in Imamiyyah Jurisprudence

In Imamiyyah jurisprudence, there is no separate and specific investigation and analysis about the legitimacy and scope of the implied condition; but its provisions and contents are cited in the words of the predecessors. Shahid Awal states: “If the sale is formed in an absolute form, the meaning of the application requires that the price must be paid immediately, therefore, if the urgency is a condition in the text of the contract, it is of no use except for emphasis. The urgency is limited as you have to pay today (if you don’t pay by that date, the seller has the right to cancel the transaction)”. Shahid Sani further adds that even if the scope of urgency is not specified and the sale is still absolute and the customer does not pay the price in the usual time, the seller has the right to cancel due to violation of the condition. The words of Shahid Sani refer to absolute loyalty. While in addition to the contents, he has assumed a condition, and this is actually the implied condition (Amili 1982: III/513).

As a result, a condition that is not included in the contract is invalid, and the invalidity is due to the invalidity of something that was not agreed upon by the parties in the contract. In fact, the contract or the text of the contract is between the offer and the acceptance, neither before nor after it; according to this, the condition in the contract is the condition that came between the offer and the acceptance, and it is in this case that the action becomes obligatory on the condition (Tabatabai Yazdi 1991: 135). There is no doubt that there is no difference between the condition stated before and after the contract in terms of non-obligation, and its necessity comes from its mandatory nature, the inclusion of the condition as a part of the contract. Allameh Hilli does not differentiate between the condition that is stated before the contract and after that. He considers both cases to be invalid since they were not included in the contract (Allameh Hilli 1989: II/383). Tabatabai Yazdi says that a condition is not a forgery in the absolute sense, but a forgery and presentation, which brings obligation and causes distress to the conditional terms (Tabatabai Yazdi 1995: 105).

The Concept of Implied Condition in Iranian Law

An implicit condition is an obligation that is not mentioned in the text of the contract (as opposed to an explicit condition that is mentioned in the text of the contract); either it is mentioned before the contract and is formed

regarding to it or it is never mentioned, and it depends on the circumstances and customary practice and other evidences of its contents can be deduced. Therefore, an implied condition can be divided into main implied condition and customary implied condition. For example, the correctness of the seller, although it is not a condition in the contract or before it, but in terms of the customary basis on its soundness, is in the condition included in the contract and it is considered to be of the second type. Therefore, the criterion for identifying an implied condition from explicit condition is its specification or lack of specification in the text (Mohaqqeq Damad 1995: II/53–54).

The Concept of the Implied Condition in the English Law

The explicit condition is expressed in the form of words and is agreed upon by the parties of the contract orally or in writing, and they are brought up during the negotiations during the conclusion of the contract. However, sometimes there are conditions that are not mentioned by any of the parties in the contract, and mostly because the contract has no commercial meaning without that condition; such a condition is called an implied condition. The criterion for distinguishing an explicit condition from an implicit condition in this system is the specification and non-specification of a condition. In the definition of an implicit condition, they say that it is a condition that is basically not specified in the contract. Rather, it is usually a condition that is so obvious that it does not need to be said. In other words, if a condition is expressed in a more or less explicit phrase, it is implicit if it is understood and inferred from the circumstances of the contract or as a result of custom, law, court practice, or legal interpretation of the contract. An explicit condition is a condition that is agreed orally or in writing in the contract, but an implied condition is a condition that is basically not specified in the contract, and it is usually a condition that is so obvious that it does not need to be said. Another definition is that a condition may be expressed or implied. An express condition is stated by the parties during negotiations or an agreement document. An implied condition is not stated, but, nevertheless constitutes a provision of the contract.

An implied term in the English law is actually a term that is understood in the circumstances of the contract or as a result of custom, court practice or interpretation of the contract. In general, an implied condition is understood from the circumstances of the contract and its interpretation, and there is no need to mention it for the sake of justification, for example, a landlord intends to repair the roof of the house, they sign a contract with a local builder. A week after a heavy rain, the owner of the house discovers that the roof has moisture. There is an implicit condition here that when the builder repairs the roof, he

must cover it so that the moisture does not return. Here, the landlord can ask the court for breach of this implied term, breach of contract, or re-enforcement of the contract. In the English law, there is a rule called oral evidence, according to which, whenever a contract is written as a document, there is no reason outside the contract for adding, changing or subtracting from the condition contained in the written contract or any reason that contradicts it. With these conditions, it will not be accepted. The non-contractual reason is not limited to verbal statements, but can also be extended to written matters such as drafts and correspondence. Due to the unfairness of this rule, the courts have avoided it by creating numerous exceptions. This legal system considers three types of an implicit condition — real implied condition, legal implied condition, and customary implied condition. The real implied condition is the one that is included between the parties. The legal implied condition is imposed on the contract by the law, the customary implied condition is imposed on the contract by custom. Therefore, the condition is divided into express and implied conditions in the English law.

Comparison of the Concept and Nature of Implied Condition in the Iranian and the English Law

In the English law, a condition is part of the contract that is placed against the description. Comparing the concept of condition in Iran and England, it can be said that the condition in the Iranian law is not an essential part of the contract, but has a secondary aspect. Therefore, if a condition is violated, the party can terminate the contract according to the option of violating condition. But, in the English law, since the condition is part and parcel of the contract, in case of violation of the condition, the party can file a lawsuit based on the violation of the contract. If the condition is not very important, only compensation will be made, but if the condition is important, in addition to that, he can terminate the contract. In the laws of both countries, an implied condition is given as opposed to an explicit condition, and an implied condition means not specified in the contract. Imamiyyah jurists have defined the validity of mentioning the condition and not mentioning it, as an explicit and an implied condition. In foreign laws, considering a factor, it becomes an explicit condition, and with the absence of that factor, it becomes an implied condition. For this reason, we divide the condition according to two credits, one is the credit of specifying and the other not specifying it, and the other is the credit of the place of specification. The condition itself is divided into an explicit condition and an implied condition depending on whether it is specified or not specified. The criterion for distinguishing explicit from implicit terms in the English law is the specification and non-specification of the condition. If a condition is

expressed in more or less explicit terms, it is explicit; and if it is inferred from the text of the contract through legal interpretation, it is an implied condition. But, in both systems, they are the same and aligned in the some ways. For example, in Imamiyyah jurisprudence, a condition based on the assumption of legitimacy must not be alien to the contract and must be related to it, and in the English law, the condition must be part of the contract.

Types of Implied Condition in Iranian Jurisprudence and Law

An implied condition is not mentioned in jurisprudence and legal texts in separate topics, but it can be inferred from the content of jurisprudence texts and the spirit of the civil law. There are two types of implied condition in Iranian jurisprudence and law: one is the main condition and the other is a customary condition. The main condition is the basis of the contract and is not mentioned in the text of the contract, while the customary condition is not specified either before the contract or in the text. Jurists do not agree with any of the general meaning (absolute condition, whether it is mentioned before the contract or not) and special (merely agreement before the contract). An implicit condition is less discussed in the law, but this issue is discussed in articles 220, 221, 344 and 454 (Katuzyian 2013: III/552).

A. Implied Main Condition

One of the types of an implied condition in the Iranian law is the main condition, because this condition is a prior obligation before contract, which is not mentioned in the text of the contract, but the contract is formed based on it. It must be mentioned in the contract to make it binding, so the main condition is not binding, contrary to the popular opinion, some jurists consider it legitimate and binding; among them, some have also considered the details; but in the Iranian law, according to articles 1113 and 1128, which clearly refers to it as the main condition, the main condition is legitimate and valid.

The main condition is clearly seen in the works of some Imamiyyah jurists, such as Sheykh Ansari, Tabatabai Yazdi, Seyyed Bojnurdi, Shahid Awal, Shahid Sani, Sheykh Tusi, Ahmad Naraq, Allamah Hilli. The discussion related to the main condition can be seen in various chapters of the works of jurists. For example, regarding the choice of seeing, the choice of breach of description, the choice of contract time, the sale of collusion on usury and conditions before the marriage contract. The main condition is one of the conditions that has been disputed by the Imamiyyah jurists, so that the vast majority of advanced Imamiyyah jurists believe in the nullity of the main condition, and even Sahib Riyad has claimed to have a consensus regarding its invalidity (Tabatabai Yazdi 1995:

VIII/234). Some jurists consider this condition as part of the implied condition and others consider it independent of it; it is stated in the definition of this condition that obligations are discussed in pre-contractual negotiations in the form of preliminary contract negotiations between the contracting parties and they are not mentioned in the text of the contract (Jafari Langarudi 2018: 381). In the following, the opinion of some jurists that refers to the main condition is expressed, including Katuziyan who believes that: “The meaning of the main condition is a concept that is not expressed in the contract, but there are signs from the speech of the two parties on the basis of which they agreed and agreed on it before the contract” (Katuziyan 1992: 301). Jafari Langarudi states: “The negotiations that the parties make before the contract and agree on it, but do not specify it at the time of the contract, are called collusive clauses and main clauses” (Jafari Langarudi 2018: I/200). According to Shahidi in this regard, “it is a condition that during the proposal and acceptance, although it is mentioned, its name is not mentioned. But, before the contract, the parties agree on it and then the contract is based on a mental relationship. Such terms are not reflected in the terms of the contract, but it is assumed that during the drafting, the contract is included by the will of the parties”.

These jurists consider the condition of main as correct according to the provisions of articles 1128 and 1113 of the Civil Code and it is considered to be mentioned in the contract. Mohaqqueq Damad and Safayi are of the opinion that if the condition is before the marriage and they have agreed on it, and the contract is based on it, this condition is correct and must be fulfilled (Mohaqqueq Damad 1989: 308; Safayi 1991: I/215). It can be said in the definition of the main contract that it is a sub-agreement where the parties conduct preliminary discussions regarding the main contract, and the drafting of the contract according to the previous will of the parties is part of the provisions of the contract, and its provisions are other than the pillars or elements of the contract. The building condition is one of the initiatives of Imamiyyah jurisprudence. And it is necessary to raise the issue because of the distinction between the conditions and discussions before the drafting of the contract that did not lead to commitment and obligation, because between the condition that is specific to a contract and is common only between the parties to it, and the condition that is common in all transactions, it is different. Among Imamiyyah jurists, there are three opinions regarding the legitimacy and illegitimacy of the main condition: promise to be invalid, promise to be correct, promise to be detailed.

The Scholars who Believe the Main Condition is Invalid

Famous Imamiyyah jurists believe that the main condition is invalid and as a result it will not be required to be fulfilled, and even in some works of

jurists, there is a claim of consensus on this theory (Tabatabai Yazdi 1995: VIII/234). According to the famous opinion, the condition should be mentioned in the text of the contract, to be binding, and although the main condition is mentioned before the contract, but because it is not mentioned in the text of the contract, it is not binding, and the provisions of the condition do not apply to it (Ansari 1996: VI/55). According to the consensus quoted by Sahib Riyad, a condition outside the contract is not obligatory.

The point of view of some jurists who believe that such a condition is invalid is that any condition that is made before or after the contract has no effect on it, and if they agree on a condition but forget to mention it when concluding the contract, the word is closer to the correct one that the contract is void (Shahid Sani 1991: II/259). According to Sheykh Tusi in *Nihaya*, every condition that a man makes on a woman in a marriage contract has an effect when it is mentioned after the marriage, so if those conditions are mentioned and actually after the marriage takes place. If those preconditions are invalid and have no effect, and if those conditions are repeated after the marriage, it will be mandatory to be fulfilled and fixed (Tusi 1990: 493). According to the opinion of Allameh Hilli in the book *Sharayi' al-Islam*, any condition that is included in the marriage contract must be equal to the request and acceptance, and if a condition is mentioned before the contract, it has no ruling (Allameh Hilli 1989: II/531). Also, Allameh Hilli states in the book *Al-Mukhtasar al-Nafi'* that the conditions before the contract will not be fulfilled, and the condition is binding when it is mentioned in the contract.

Muhaqqiq Karaki in his book *Jami' al-Maqasid* says that a condition is valid and must be fulfilled if it occurs between a request and an acceptance, so that it is considered a set of the contract and both of the request and acceptance are applicable to it. Then, if the condition is prior to the contract or after the contract, there is no attention paid to it, and this condition is not considered part of the contract, and what is required to be fulfilled is the contract itself. Consensus on a condition which means an obligation is not enough, but the condition must be composed and expressed. In other words, a condition is one of the matters of composition and its realization depends on composition and creation. The initial condition is a condition not related to the contract, but the condition of creation is a condition related to the contract, and its difference from the express condition is that it should be mentioned before the contract and it is sufficient for agreement during the contract. After reasoning based on consensus, it should be said that consensus is a proof, which means that those who agreed have an opinion on other evidence. It is not correct to refer to the sale with collusion on usury, and the invalidation of the main condition is also not correct due to the lack of proof of the legitimacy of the means and the absence of contradictions with the main condition. Because *hibah zayidah* is

not a condition of the contract, but it is clear that everything that is discussed in the negotiations does not have the role of description or condition, and the contract is not based on it. In the main condition of contract, it must be based on those conditions; that is why Sahib Jawahir considers the trick of usury legitimate and the main condition valid (Najafi 1981: 396).

Evidence of Invalidity of Main Conditioning

1. Consensus: Sahib Riyad from some elders has quoted the claim of consensus that a condition outside the contract is not required to be fulfilled, and a careful examination of the words of the jurists regarding the validity of the sale and marriage of what was narrated by the late Sayyid Ali Tabatabai proves the claim of consensus.
2. Nullity of the initial condition: a condition that is created before the contract and has nothing to do with the contract is the initial condition, and if the conditional party makes the condition necessary for himself before the contract is concluded and creates the obligation of the condition, his obligation will be considered as an initial obligation. It is definitely not obligatory to fulfil it, or if he promises before executing the contract that he will perform the contract along with the mentioned obligation and condition, if he does not mention it in the text of the contract, there will be no reason for the condition to be necessary (Ansari 1996: 56).
3. The impossibility of precedence of the effect over the cause: some jurists have analyzed the relationship between the contract and the contractual conditions based on the relationship between cause and effect in explaining the invalidity of the main condition, according to Allamah Hilli's statement in the book *Idah al-Fawaid*, because the cause of the contract is necessary, and the cause of the contract is impossible before the cause. A condition that comes before the contract is not required to be fulfilled because the reason for the necessity of fulfilling the condition of the contract itself and the occurrence of the effect before the cause is impossible (Allamah Hilli 1984: III/13).
4. Necessity of mentioning the elements of the contract: Sheykh Ansari believes that when the contract has a condition, and since the condition is part of the exchange (*iwad* or *muawwad*), and therefore it is obligatory to mention it in requesting and accepting other components of the exchange, the Sheykh's statement is like this: because the condition is one of the elements the conditional contract..., the condition is

part of *ahad al-iwadayn*, so it is necessary to mention the acceptance and accept it as part of *al-iwadayn* (Ansari 1996: 56).

5. Invalidity of pre-marriage conditions: Sheykh Ansari quotes from famous jurists that in marriage, if the intention of the couple is to have an interrupted marriage, but they do not mention the term and dowry in the marriage, the temporary marriage will be converted into a permanent marriage (Ibid.).
6. The correctness of the sale: among the issues that can be discussed about the sale, is the condition of repurchase. From the past until now, this condition has been used as a tactic to escape usury, that the usurious item is sold to its counterpart in an equal amount and without excess, and then he donates a large amount, without the donation being a condition in the contract of sale, but it is obvious that the donor committed to the donation before the contract and there was a collusion about it. If the implicit main condition must be fulfilled, this trick should not work because the exchange in this case is usurious and void (Amili 1982: 443–444; Najafi 1981: 396; Mohaqeqq Damad 1989: 55). The acceptance of this solution by jurists indicates that they consider the main condition to be ineffective because if the main condition was valid as well as the mentioned condition in the contract, they would not differentiate between the two and should consider the said sale as usurious and void in any case.

Those who Believe in Correctness of Main Condition

Sahib Jawahir, Sayyid Kazim Tabatabai, Muhaqqiq Esfahani, Mirza Habibullah Rashti and Muhaqqiq Khuyi (Khuyi 1989: VI/134–135) believe in the theory of authenticity and believe that it is correct and binding to write a contract based on the pre-contractual agreement. Their reasons are the applicability and generality of the verse *Awfu bi al-uqud*, which is required to be fulfilled, and the other is the hadith *al-Mu'minin inda shurutihim*.

Sheykh Tusi in the book *Khilaf* says: “If two parties make a condition before the contract that after the contract there will be no cancel option, such a condition is correct and the contract of sale will be necessary only with the composition of demand and acceptance” (Tusi 1990: III/21). Allamah in various books says: “In my opinion, a condition is valid if it appears in the text of the contract. Yes, if the condition is mentioned before the contract and they agree on it, that condition is correct” (Allamah Hilli 1984: V/63). Sahib Jawahir in *Jawahir al-Kalam* says: “The fifth opinion about the conditions: the said condition is valid in the contract, neither after the contract nor before the

contract, as long as the contract is not based on it, that is, if the contract is based on the condition before the contract, the binding condition is very strong” (Najafi 1981: 198). Sayyid Khuyi in the book *Misbah al-Fiqaha* says: “The essence of the meaning of the clause is to relate something to the contract, and this fact, as it is not hidden, is achieved by the common intention of the parties and their collusion and agreement and the conclusion of the contract based on it and the need to mention it in the text of the contract. Therefore, there is no problem to refer to a verse of *Ahl al-Bayt* and similar ones to prove the correctness of a contract based on that previous agreement, as well as the legitimacy of such a condition can also be proven with the *hadith* of the believers in their conditions” (Tawhidi 1992: 338).

Proofs of Authenticity

1. The validity of moral restrictions: if the parties have agreed on a condition, that condition is considered a moral condition of the contract. For this reason, the fulfilment of that specific contract is not possible without the implementation of that main condition, and without it, the commercial contract resulting from the agreement will not be the consent of the parties (Tabatabai Yazdi 1991: 293; Ansari 1996: 55). Although the main condition is not mentioned in the text, but in the opinion of both parties, it is a spiritual condition of the contract and forms a part of the provisions of the contract, and the general rule of the contract is included in it.
2. Conformity of the contract to the intention: according to the rule of the contract conformity to the common intention of the parties, if there is a main condition that was considered during the contract and the contract was formed based on it, and if that condition did not exist before the contract, the contract might not have been formed. It is as if there is a connection between the main condition and the contract, and according to the rule of contracts, the main condition should be considered correct.
3. Validity of an implied condition: some jurists, including Sayyid Bojnurdi, Sayyid Khuyi, and Sayyid Sistani, believe that the main condition is like implicit conditions when a contract based on the parties takes place (Bojnurdi 1998: III/254; Khuyi 1989: II/42).
4. The hadith *Al-Muminun inda shurutihim*: there is only one condition out of the totality of this hadith that the contract is not based on, so the mentioned hadith will include the discussed condition on which the contract is based (Ansari 1996: VI/5).

Promise in Detail

Mirza Naini has detailed the difference between authenticity and falsity. In this way, if the main condition is one of the essentials of the contract, like the customary implied condition, in such a way that the contract implies obligation, it is legal and valid; otherwise, it is not legitimate and not binding (Naini 2000: 407). This theory is attributed to Naini. According to him, the terms and conditions that are not mentioned in the contract, but the contract is concluded based on it, are of three types:

- First, the condition that the contract is implied by means of obligation, and that is the condition that is based on some kind of custom and habit.
- Secondly, a condition on which the validity of the contract depends, such as a condition related to an important attribute of the contract, which, if the condition is absent and the party to the contract is unaware of it, is the reason for rescission.
- Thirdly, the condition that the subject matter is outside of the contract and related to the personal and private goals and objectives of the contract, if it is not mentioned in the text of the contract, it is invalid, such as if before demanding and accepting the sale of the house, the parties to the contract agree that the seller within two month after the contract, should repair the house and then demand and accept the contract without mentioning the repair condition.

Therefore, Muhaqqiq Naini considers the first and second of the three types to be valid and the third type to be invalid. The main condition is necessary and appropriate to distinguish it from the customary implicit condition of innovation, because the condition that is specific to a contract and is common only between the parties and the condition that is conventional in all transactions of the same type – are different from each other. It is also useful to distinguish simple pre-contract conversations from what has reached the level of a condition. It seems that among the opinions of jurists, the main condition is necessarily correct because looking at the important transactions shows that the contract is a continuous and connected flow and consists of several negotiations and discussions and requests and acceptances. In order to determine the terms of such a contract, it is far from reality to make a request and acceptance as the basis, because it is obvious that the parties do not include all their previous contracts and agreements in the form of request and acceptance when organizing the contract. Therefore, the interpretation of the contract is subject to simultaneous consideration of the contract with the preliminary talks.

B. Customary Implied Condition

Article 344 of civil law mentions the term customary condition. If no condition is mentioned in the sale contract, or if there is no fixed deadline for the delivery of the goods or the payment of the price, the sale is considered final and at the present price; unless, according to local custom or business custom in commercial transactions, the existence of a condition or term is common, even though it is not mentioned in the sales contract. Article 344, like article 454, refers to the legitimacy of an implicit condition. Referring to this article, if a condition is not mentioned in the contract of sale, the sale is considered final, unless it is common for the existence of a condition in transactions according to custom and the place of the contract or commercial custom, even if it is not mentioned in the contract of sale. This article is specific to article 454 of the Islamic Law and clearly considers the customary implied condition as legal. Therefore, one should not be satisfied with the appearance of the contract in the examination of the customary implied condition, because it is possible that a contract may appear to be absolute, but it has a condition and obligation and is not mentioned for reasons of clarity. Implicit condition is the binding sign of the contract, therefore, it looks for the composition of the contract. In other words, an implied condition is a condition that is common and widespread in the custom, so that a definite relationship between that custom and the contract is created. For example, according to custom, in exchange contracts, the goods must be healthy and without defects. Now, if a contract is concluded without discussing this matter, it is inferred that the goods must be healthy, and otherwise, the possibility of defects is conceivable for the victim, because the parties are silent about it by relying on custom (Naini 2000: 408). If the customer has leased the goods, if the sale is terminated, the lease will not be void unless the non-possession of the goods is explicitly or implicitly stipulated for the benefit of the customer; in such a case, the lease is void. According to this article, if the customer has leased the sold property, the lease will not be invalidated by the cancellation of the sale, unless the non-possession of the vessel is explicitly or implicitly stipulated by the customer. This condition, which is considered to be the basis of implicit condition, is absolute and includes main and customary conditions. An important question that arises is whether the above article refers to the absolute sale or whether it also includes the cancelling options. Some jurists say that article 454 of civil law refers to the case where the contract of sale is absolute and is terminated due to one of the options other than the option of the condition, such as the option of defect, embezzlement, *tadlis*, and the like; and the case of the option of the condition is excluded (Emami 1987: 542–543). According to the second opinion, in principle, the possession of the party who became

the owner as a result of the contract is valid in the matter of possession, and the subsequent termination does not harm it, unless there is an implicit or explicit agreement to the contrary, and the provisions of articles 460 and 454 of the Civil Code are contrary to this. It is not a rule, because in the option, both parties agree that the buyer will keep the property ready to return it to the seller. In this case, the requirement of the compromise provisions is to avoid taking possession of the objectionable property by using the cancelling options. Therefore, the conditional cancelling should be included among the cases where the non-possession of the carrier is implicitly stipulated for the purpose and benefit of the customer (Katuzyan 1992: 80–89). Article 454 of civil law considers the implied condition as the basis of the legitimate explicit condition. For the correctness of the condition included in the contract, it has been argued with the evidence of the validity of the transactions, such as *Awfu bi al-Uqud*, because the condition is considered one of the functions and appendices of the contract. Therefore, any reason that validates the principle of the contract includes its appendices. Implicit condition arises in the stage of forming the contract and is involved in the formation of the contract, thus, for the validity of the implied condition, we do not need evidence of the validity of the condition such as *Al-Mu'minun inda Uqudihim* and the evidence of the validity of the contract is sufficient. The explanation is that the condition in the contract often destroys the application of the contract and causes limitations in the contract. This restriction is sometimes applied to what arises from the contract, for example, the loss cancelling based on the implicit condition causes that the property is not an absolute sale and is limited as long as the loser has not cancelled the contract. So, in such a situation, an implicit condition creates a binding and conditional obligation, and the reason for the authenticity of transactions like *Awfu bi al-Uqud* implies the necessity of fulfilling the obligation, and in the case of implicit condition, a binding and conditional obligation is formed (Tawhidi 1992: 338–339).

Another reason regarding the validity of the implied condition according to the rule of *Al-Mu'minun inda Uqudihim* is that since the time of Sheykh Tusi until now, they have considered it necessary for Muslims to adhere to any conditions and obligations they undertake. Undoubtedly, the condition included in the contract is one of the examples of this *hadith*, and the implicit condition is one of the types of condition included in the contract, and the only difference from the explicit condition is that the reason for it is not specified in the contract.

Types of Implied Terms in the English Law

An express condition is expressed in words whereas an implied condition is a condition that is not explicitly expressed by words and is inferred by legal

interpretation according to the contract or the circumstances governing it by the court of law or custom to complete and interpret the contract. There is one factor involved in distinguishing the implicit condition from the explicit condition, and that is mentioning or not mentioning the condition. In the English law, there is no term equivalent to main condition. What we call by this name, they call express condition, and it is without doubt legitimate, because the clear criterion of an express condition is from the implication of specifying or not specifying the condition. If a condition is expressed in more or less explicit terms, it is explicit, and if it is inferred from the text of the contract through legal interpretation, it is implicit. The duties of the parties to the contract are mainly defined by themselves, and it is accepted as a theory in the English law that the court in practice gives effect to the provisions that the parties themselves have determined. However, the performance of the courts has been limited for some reasons and there are some contractual obligations that have not been specified by the parties (Atiyah 1989: 214). In the English contract law, pre-contractual negotiations are divided into non-contract declarations or non-contractual declarations and contract conditions or contractual declarations. If the statement is a false statement of an existing fact and is made with the intention of persuading the other party to conclude a contract, it is called misrepresentation. Misrepresentation is a statement made by one party to the other party, before or concurrently with the conclusion of the contract, regarding the existing truth or past event that is important for the contract, which is unintentional, willful and fraudulent. In this case the contract is voidable. It means that it can be cancelled at the request of the injured party. Contractual statements are pre-contractual discussions that are part of the contract. If the condition is unimportant, the violation will result in compensation, and if the condition is important, the other party can cancel the contract. In the English law, if the obligations are due to the contract or implied terms, in addition to the compensation claim, the important terms of the contract can be terminated, while in the obligations arising from the civil liability law, the contract cannot be terminated. Also, the theory of implied condition is important because it allows the court to add something to the contract that may have been in the mind of the parties but not explicitly stated. Sometimes, the court adds conditions that, if the issue had been brought to the attention of the parties, they would have expressed it explicitly. In general, in the English law, the condition is divided into three types: thematic implied condition (court implied condition), customary implied condition and legal implied condition (judicial implied condition).

1. Implied condition of the subject (implicit condition of the court): in the subject implied condition, the parties do not include anything clearly and specifically in the contract. Such a condition is clearly accepted by the

court and the parties must intend it and it does not need to be mentioned in the contract.

Some English lawyers believe that in addition to the conditions contained in the contract, the courts can consider the conditions implicit in some contracts to compensate for the inherent and natural failure of statements. The document prepared by the parties may not leave any doubts regarding all obligations, but it may be neglected due to the negligence or lack of knowledge of the person setting up the document to cover possible incidents, and this negligence if not compensated is likely what they mean. Sometimes the court completes some of the terms of the contract to compensate for the shortcomings of the contract.

2. Statutory implied condition (implied sentence condition): such a condition is imposed by the law, even though the parties did not intend it. Like the conformity of the goods with the conventional sample, this condition is considered a legal implied condition according to the sale of goods approved in 1979 and its articles 12 to 15. In the comparison between the implicit condition of the court and the law, it can be said that in the condition of the court, the parties to the contract have intended to add a condition to the contract, and applying such a condition is considered by the court to fulfil the intention of the parties. In the legal implied condition, the condition is imposed by the law and the court is not looking for the common intention of the parties. Rather, these are the conditions that are initially imposed by the law, and the intention of the parties is effective only to the extent that they can explicitly agree against it.

3. Customary implied condition: it is not specified by the parties, but the custom dictates to consider such a condition. And, what is meant by custom is the specific custom of the place of the contract, or the custom of the specific business implicitly, unless the parties have explicitly composed it, and the inclusion of such a condition is one of the accessories and effects of the contract. In order to be able to invoke the custom, the following conditions are necessary: (1) the custom is reasonable and conventional; (2) non-contradiction of the custom with implicit and explicit conditions; (3) popularity of the custom; (4) the non-contradiction of custom with the nature of the contract. In the English law, custom is considered not only as a source of recognition of legal issues in the will of the parties to the contract, but also as a legal and main source of the English law and determining rulings and legal social relations. Treitel believes that every contract, whether written or not, is contrary to the absence of a customary implied condition with an express condition. He has the authority to accept any custom related to himself, including the market, trade custom, or the custom of the place where the contract took place; unless

it contradicts the express or implied conditions or the nature of the transaction. The main origin of an implied condition is the will of the parties in such a way that if one of the parties is ignorant of the condition or it is not clear that both of them willed it, the claim of the implied condition is rejected. While the implied legal condition does not originate from the will of the parties, but rather from the law and the consideration of public order, it is valid, even if the parties did not intend. The real implied condition originates from the assumed will of the parties, because sometimes the condition is considered as part of the contract according to the custom, even though none of the parties are present at the time. But, the customary implicit condition that comes from custom, is caused by the common practice in a contract and is not subject to the will of the parties. Implied terms contained in the Sale of Goods Act 1979, are known as terms or warranties, and breach of terms gives the innocent party the right to repudiate the contract, while the warranty only gives the party the right to compensation. Article 12 of the law is related to the right of sell. There is an implicit condition in the contracts for the sale of goods, for example, the seller has the right to sell when the ownership has been transferred, in other words, his ownership is certain. This condition is lost when either the goods belong to other persons or the goods cannot be sold without interfering with the rights of others, and the violation of such a condition leads to non-payment of exchange. This allows the buyer to refund any amount they have paid even if he has used the transferred goods. In this case, the seller must return the money to the person. Then he should file a lawsuit against the defendant for the amount he paid him. Despite the passage of time and the decrease in the value of the car, since the car was returned to the petitioner at a price lower than the original contract, the petitioner was given the right to recover all that he had paid to the respondent based on failure to pay, the total will be withdrawn. In fact, article 12 of the Commodity Law is an implicit guarantee of transfer of ownership.

Article 13 of the Commodity Law says that if the sold product does not match the description, there is an implicit condition that the product must be in full compliance with the description. The description can be from any of the parties, and all contracts for the sale of goods can be with a description unless the buyer uses a special phrase without a description during the purchase. For example, the delivery of goods in the contract for the sale of goods is in the usual commercial period, so if it is included in the contract that the delivery of the goods is on a specific day, in such a case where the parties of the contract have agreed on something, is an example of an implied condition. On the other hand, in the implicit legal condition, the agreement of the parties is not fundamental, but based on fairness in line with the efficient economy. This type of implied terms is not compatible with the principle of freedom in contracts.

A clear example of this type of condition is the employer's legal obligations in paying workers' salaries.

Comparison of Implicit Condition in Iranian and English Jurisprudence and Law

In the laws of both countries, there is an implicit legal and customary condition. In Iran, an implicit legal condition is legal if it is attributed to the intention and will of the parties. Condition refers to any type of obligation that is included in the contract according to the law, but because it is a secondary obligation and is not specified in the contract, it is called implicit, as mentioned in the legal articles of 220 and 221 civil law. In the English law, the implied legal condition does not originate from the will of the parties, but rather from the law and public order. In Imamiyyah jurisprudence and Iranian law, the position of main condition is among implicit conditions, and it is legitimate and valid in terms of civil law, and according to the opinion of famous jurists, it is not binding. However, in the English legal system, there is no such thing as a main condition, and, what we call by this name, they call an express condition and consider it legitimate without any doubt. Therefore, there is a difference of opinion regarding the condition of main in two ways between Imamiyyah jurisprudence and Iranian law on the one hand and the English law on the other hand:

1. In terms of position, with our jurisprudential and legal perspective, the building condition is placed in the category of implied conditions, while from the point of view of the English law, it is in the group of explicit conditions.
2. In terms of legitimacy, according to famous jurists, the condition of main is not binding (but it is legitimate according to the civil law), and although this condition is legal according to the consensus of English jurists, it is better to know that the two systems are similar in some ways. In Imamiyyah jurisprudence, a condition based on the assumption of legitimacy should not be alien to the contract, but must be related to it. In the English law, the condition must be part of the contract. In this regard, whatever is discussed before the contract, but not related to the contract, will not be under the name of the condition. Moreover, it could be said that the two systems are aligned. In some cases, the customary implicit condition which is explicitly accepted in popular jurisprudence and famous implicit rules, such as *Al-Ma'ruf Urfan ka al-Mashrut Shartan* is a proof of this claim. In the Iranian

law, custom is one of the rules which has gradually become customary among people or a certain group of them and is binding provided that it is general and stable. In the Iranian law, custom is absolutely not mentioned either before the contract or in the text of the contract, and on the other hand, it is related to the contract and is a secondary obligation to it. Since this type of condition is not clearly mentioned in the contract, it is an implied condition, and on the other hand, since it is one of the sources of inference of the implied condition in addition to the law of reason, its scope is more limited than the implied condition. In the English law, one of the types of implied terms and provisions of the contract, along with the judicial and legal order, is an implied term that must be conventional, reasonable, and well-known. What is specified in the laws of both countries is that the customary condition should not conflict with the express condition. The scope of custom in both legal systems is as far as the parties have not expressly excluded it or agreed to the contrary.

Conclusion

According to the contents presented in this research, the legitimacy of implied condition is accepted in the laws of both countries and the nature of these conditions are largely similar, while in some cases there are differences between the two legal systems. In the English legal system, an implied condition is part of a contract that is opposed to a description. However, in Iran's legal system, the implicit condition is not the main part of the contract, but has a secondary aspect. As a result, if a condition is violated, the conditional can terminate the contract according to the option of violation of the condition. Conversely, in the English legal system, in case of breach of condition, a party can file a lawsuit on the basis of breach of contract, and if the condition is unimportant, he can only compensate for damages, and if the condition is important, he can also terminate the contract. In both legal systems, an implicit condition is given against an explicit condition. In the English legal system, an implicit condition is a condition that is inferred from the circumstances governing the contract, custom and law and is not expressed by mentioning words; otherwise, the condition will be explicit. In Iran's legal system, a condition that is mentioned before the contract although is not mentioned in the contract, but the contract is based on it, is an implied condition. Both systems have accepted the legal and customary implied condition. In the Iranian legal system, the legal implied condition that is attributed to the intention and will of the parties, includes any obligation, but because it is a secondary obligation, it is not mentioned in the contract; like the materials of 220 and 221 civil law.

However, in the English legal system, the implicit condition is not attributed to the will of the parties, but depends on the law and public order.

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