Written Contractual Formalities as a Restriction on Freedom of Contract: A Comparative Study of Iraqi and Iranian Law

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Abstract

Written formalities constitute one of the most significant restrictions on freedom of contract imposed by legislators in different legal systems to achieve various objectives, including protecting the contracting parties, ensuring transactional security, and preserving public order. Adopting an analytical-comparative approach, this article examines the position of written formalities in Iranian and Iraqi law as a restriction on freedom of contract. In both legal systems, the principle of consensualism governs contracts, while written formalities constitute an exception to this principle. The findings indicate that the Iraqi legislature has adopted a more explicit approach to requiring specific formalities and, in cases such as the sale of immovable property, has treated written form and registration as constitutive requirements for contract formation. By contrast, under Iranian law, written form generally serves an evidentiary function, except in specific cases where the law expressly makes it mandatory. In both systems, formalities may be classified as statutory or contractually agreed formalities. Statutory formalities impose a more substantial restriction on freedom of contract because failure to comply with them results in the absolute nullity of the contract. The comparative findings demonstrate that the Iraqi legislature has adopted a more formalistic approach to protect the parties and prevent potential disputes. Conversely, by emphasizing the principle of consensualism, the Iranian legislature imposes fewer restrictions on freedom of contract and requires specific formalities only in particular cases, such as the transfer of immovable property, the pre-sale of buildings, and the transfer of company shares. This difference in approach is influenced by the historical developments, legal culture, and socioeconomic needs of each society. By analyzing practical examples, including the sale of immovable property, the sale of motor vehicles, and insurance contracts, the article demonstrates that both legal systems have sought to establish a balance between freedom of contract and the necessity of protecting public and private interests. Nevertheless, it is recommended that the Iranian legislature prescribe clearer formal requirements in cases involving a substantial risk of prejudice to the rights of the contracting parties or third parties. The Iraqi legislature should likewise provide greater flexibility in cases where excessive formalism impedes the development and facilitation of transactions.

Keywords: written formalities, freedom of contract, principle of consensualism, formalism, formal contracts, contractual restrictions.

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1. Introduction

Undoubtedly, a contract is founded on the concurrence of two wills, and for their legal effect to be manifested, those wills must appear in an objectively perceptible form through their expression. In fact, the concurrence of offer and acceptance results in the formation of a contract only when their contents correspond and each contracting party intends precisely what the other party intends. (Katouzian, 2013; Shahidi, 2007) The expression of will is governed by two opposing principles. The first is the principle of consensualism, which grants individuals the right to express their will freely, whereas the second is the principle requiring compliance with specific formalities, which obliges the contracting parties to express their will in a particular form. In modern legal systems, the prevailing principle governing juridical acts is consensualism, while the requirement of formalities constitutes an exception to that principle. Such formalities restrict individual autonomy, and juridical acts are not completed unless those formal requirements are observed. The rationale underlying these restrictions is the protection of important social interests that are considered more deserving of protection than individual interests. (Nassif, 1998) These exceptions have been established by different laws to restrict the freedom of contracting parties in concluding contracts, thereby protecting the parties to the contract, safeguarding public interests, and ensuring the security and circulation of transactions. The legislature determines and imposes the required form by law, such that failure to observe or the absence of that form results in invalidity affecting all stages of the contract, from its formation to its performance and legal effects. It may therefore be stated that the legislature has accepted consensualism as the foundational principle of contracts while simultaneously recognizing the requirement of formalities. (Manahi, 2023)

Under Iranian and Iraqi law, the principle of autonomy of will is accepted as a fundamental basis for the formation of contracts. Nevertheless, this freedom is not absolute, and the legislatures of both legal systems have imposed limitations on it, one of the most important of which is the requirement to comply with particular formalities in the conclusion of certain contracts. These limitations, commonly referred to as “formalism” or “written formalities,” reflect legislative concerns regarding the protection of public order, transactional security, the prevention of fraud, and the protection of the weaker party in contractual relationships. The conflict between the principle of consensualism and the requirement of particular formalities is a classical yet continuously relevant issue in contract law. This conflict has arisen with varying intensity across different legal systems, and diverse solutions have been proposed to address it.

The importance of conducting a comparative examination of this issue under Iranian and Iraqi law may be considered from several perspectives. First, both countries share common jurisprudential foundations in the field of transactions, and the legislatures of both systems have drawn upon principles of Islamic jurisprudence in formulating their rules. Second, both legal systems have been influenced by European legal systems, particularly French and Egyptian law, and this influence is also evident in the regulation of contractual formalities. Third, a comparative examination of these two systems may provide practical solutions to existing problems in each legal system and contribute to greater legal convergence within the region.

This study adopts an analytical-comparative approach to examine the position of written formalities as a restriction on freedom of contract under Iranian and Iraqi law. The principal research question is as follows: How have the Iranian and Iraqi legislatures established a balance between the principle of freedom of contract and the necessity of complying with specific formalities? Furthermore, has this balance been established in a manner consistent with legitimate legal objectives, such as protecting the contracting parties, ensuring transactional security, and preserving public order?

To answer this question, the concept, foundations, and necessity of written formalities in both legal systems are first explained. The different types of formalities, namely statutory and agreed formalities, and their respective functions are then examined. Finally, the findings and recommendations of the study are presented. It is hoped that this comparative examination will contribute to a better understanding of the philosophy and functions of written formalities and offer solutions for improving the legal systems of both countries.

2. The Writing Requirement

Writing is regarded as one of the means of proof under Iraqi law. Article 18 of the Iraqi Law of Evidence provides: "A matter that must be proved by writing may be established by all other means of proof in two cases: First, where the written instrument has been lost for a reason beyond the control of its holder; and second, where a material or moral impediment prevented the procurement of written evidence." This is because the subject matter of proof generally concerns a particular event that may constitute either a juridical act or a material fact. Material facts are perceptible occurrences and, because they are generally not highly complex, may be established by all methods of proof. In relation to juridical acts, however, the Law of Evidence requires proof by writing because such acts ordinarily involve substantial deliberation and precaution. Accordingly, the law requires them to be proved in writing. In a juridical act, the will is directed toward producing a particular legal effect, and that effect is manifested through the expression of will. As a general rule, the law requires that such expression be proved in writing because the parties are capable of preparing written evidence at the time the act occurs. (Al-Abadlah, 2022) Iraqi law requires juridical acts with a value exceeding 50 dinars to be proved in writing, whether the act concerns the creation, extinction, or modification of a right. (Al-Nadawi, 1990)

Iranian law does not provide a precise statutory definition of "written" or "writing." In certain legal systems, however, writing is defined as any recorded data having a tangible and relatively durable form. In traditional Islamic jurisprudence, writing alone was not considered sufficient to constitute a contract, understood as a juridical act involving the agreement of two or more wills to produce a legal effect. (Katouzian, 2005) Writing was accepted only where verbal expression was impossible because writing was regarded as subordinate to spoken words rather than equivalent to them. This view has, however, changed in more recent periods. Jurists such as Muhaqqiq al-Ardabili placed writing on the same level as verbal expression and identified "indication of intention and consent" as the governing criterion. Accordingly, writing, words, and gestures are valid whenever they demonstrate the parties' genuine intention. In the contemporary period, with the spread of literacy, the development of written instruments, and the increasing role of writing in social life, jurists and legislators have attributed greater importance to writing and have even regarded it as more precise and explicit than oral expression. (Hosseini Iji, 2019)

Consequently, the "writing requirement" is not a general and absolute rule under Iranian law. On the one hand, the general principle of consensualism and Articles 190 and 191 of the Civil Code constitute the foundation of contract formation. On the other hand, the legislature has required writing or a specific form in certain cases for evidentiary reasons, the protection of public interests, the protection of the weaker party, or other considerations. Furthermore, under Iranian law, the principles of autonomy of will and the subordination of a contract to the parties' intention permit the parties to choose the method by which they express their will. The general rule is therefore that no specific form is required for the expression of intention, and the will may be expressed in any manner indicating an intention to create legal effects. Nevertheless, where the parties expressly or impliedly agree that the contract must be made in writing, compliance with the writing requirement is mandatory for as long as they have not abandoned that condition, and a non-written expression of will will not be valid. An exception applies where an examination of the parties' intention and conduct indicates that writing was intended merely to facilitate proof and document their will, rather than to constitute a condition for the formation of the contract. In such circumstances, the absence of a written instrument does not affect the validity of the contract, and writing performs only an evidentiary function. (Soltan Ahmadi, 2017) In other words, written form may sometimes constitute an element necessary for the existence of a contract, where the law treats it as constitutive, while at other times it merely serves as an evidentiary rule, in the absence of which proof becomes more difficult. Writing increases provability and reduces the risk of disputes concerning the interpretation of the parties' will. Accordingly, in contracts involving substantial financial or social consequences, the legislature may require written form to prevent transactional instability.

In certain cases, Iranian law does not prescribe writing as a constitutive element of the contract but requires it as a condition of proof or for particular legal effects, such as in certain transfers of rights relating to immovable property, certain commercial contracts, or transactions governed by special legislation. A distinction must therefore be drawn between cases in which the law makes form a constitutive element of the contract and those in which writing has only an evidentiary function. Under various regulations, including laws relating to immovable property, official instruments, and certain commercial rules, an

official or written instrument may be required for enforceability against third parties or for the transfer of ownership. Where the law makes writing a constitutive element of the contract, its absence results in the "invalidity" or "non-formation" of the contract, which is a substantive legal effect. The legislature generally makes form constitutive where required to preserve public order, prevent fraud, protect a weaker party, or ensure the stability of transfers. Where writing is required merely for proof, the contract may have been formed without writing, but proving it becomes more difficult. The law or judicial practice may accept other forms of evidence, such as admission, testimony, or presumptions, in certain circumstances. Nevertheless, the evidentiary burden increases, and the contract's effects against third parties or its capacity to register rights, such as the transfer of ownership of immovable property, may be limited or entirely absent. In practice, the preferable approach is to strengthen the provability of transactions. Thus, even where a contract is consensual, reducing disputes and lowering dispute-resolution costs justify recommending that it be recorded in writing. Overall, consensualism remains the general rule in Iran.

To explain each of the two forms of formalities, they are examined separately under two independent headings: first, statutory or official formalities; and second, agreed formalities.

3. Statutory Formalities

Before addressing this subject, it is necessary to analyze the meaning of form—*al-shakl*—both linguistically and terminologically. Linguistically, the word "form" derives from *shakkala al-shay'*, meaning "to give something a form," and refers to the tangible or imagined configuration of an object. The expression generally denotes appearances and configurations. (Maalouf, 1973) In legal terminology, certain authors define form as the mandatory manner in which will must be expressed. Others describe it as a mode of juridical disposition in which the will must be manifested in a specified form, or as the formalism imposed by the legislature on certain juridical acts to connect the will with the legal effect produced by the act. In this sense, form represents a method imposed by the legislature and constitutes an essential element in the creation of a contract. (Abdel Hafez, 2000)

Official formalities essentially require a legally competent person acting in an official capacity to examine and verify specified facts and place the instrument in an official form. The requirement of official formalities as a constitutive element of certain contracts arises from the fact that such contracts may remain in effect for a considerable period before their completion. Examples include commercial contracts containing matters and clauses whose protection and enforcement cannot easily be secured without such formalities. Moreover, these contracts are connected with public order, prompting the legislature to establish specific procedures and formalities for their regulation and protection. (Belkadi, 2005)

Under Iranian law, for a formal contract to be validly formed, the parties must express their will precisely in the form and manner prescribed by the legislature. (Safaei, 2005) In other words, a formal contract is one whose formation depends upon compliance with special formalities determined by the legislature. If those formalities are not observed, no contract comes into existence. For example, the transfer of shares in a limited liability company is valid only if executed through an official instrument and is otherwise void. Similarly, under the Law Governing Relations Between Landlords and Tenants, a lease of immovable property must be made in writing, whether by an official or private instrument. Where it is made by a private instrument, it must also be signed by two witnesses trusted by the parties. (Abhari & Ahmadi Koochaksaraei, 2018)

Such formalism restricts individual autonomy to the extent that it reduces the parties' freedom of choice. Nevertheless, individuals may agree to express their will in a particular form that has not been imposed by the legislature. This is referred to as contractual or agreed form, and its purpose may be either to prove the contract or to establish a condition for its formation.

In some cases, contracts whose essential elements—including agreement, subject matter, and legal cause—have been completed also require a specific form. The legislature may prescribe a particular form that it considers appropriate for the formation of the contract, in which case failure to observe that form renders the contract void. Compliance with such form is mandatory for the valid formation of the contract and is directly connected with contract formation. It is therefore described as a "direct formality." Where such a formality is required, the parties must record the contract in writing, which may take the form of either an official or a private instrument. These formalities constitute an exception to the general rule governing the expression of will, namely consensualism. Formalities require the contract to be expressed in a specified form, in the absence of which the contract is absolutely void.

The principle of consensualism is the general rule governing the form of contracts. It is one of the consequences and manifestations of the principle of autonomy of will, which constitutes a foundation of contract law. Nevertheless, the legislature has imposed limitations on this principle by subjecting it to particular formal requirements. Among the considerations prompting the legislature to require such formalities are matters concerning the public interests of individuals. Accordingly, the required formality is not viewed merely as a restriction on will but as a means of protecting and safeguarding the contracting parties' will. Moreover, formalities provide a reliable mechanism and guarantee for proving rights in the future and reflect considerations of public interest through governmental intervention in directing economic and social systems. (Ben Saadia, 2022) Contractual formalities are manifested in compliance with a particular form prescribed by law, which most commonly consists of a written instrument in which the contract is recorded. In modern law, only a limited number of formal contracts remain, and the purpose of those formalities is generally to warn the contracting parties of the risks underlying the obligations they undertake. One example of a formal contract is the sale of immovable property, for which the Iraqi Civil Code requires a written instrument bearing a certified date. Article 90(1) of the Iraqi Civil Code provides: "Where the law prescribes a particular form for a contract, the contract shall not be concluded unless that form is observed, unless another provision stipulates otherwise." (Manahi, 2023)

Iranian civil law accepts consensualism as the general rule governing contracts. Article 190 enumerates the essential conditions for the validity of a transaction: intention and consent, legal capacity, a determinate subject matter, and a lawful legal cause. Article 191 further provides that "a contract is formed by the intention to create legal effects, provided that it is accompanied by something indicating that intention." Accordingly, as a matter of statutory interpretation, the expression of will is necessary for contract formation, but that expression may be oral, written, or communicated through any medium indicating intention. Writing is therefore not a general condition unless expressly required by the legislature in a particular case.

The purpose of prescribing a particular form that the legislature considers necessary for the formation of a contract is to ensure the contract's valid formation. These requirements are referred to as "direct formalities" because they are directly connected with contract formation. The required form must therefore exist as a fourth constitutive element, in addition to agreement, subject matter, and legal cause. On this basis, the parties are obliged to record the contract in writing, whether in the form of an official or a private instrument.

Formalities require the contract to be expressed in a specific form; otherwise, the contract is considered void. Direct formalities are manifested in the writing requirement applicable to formal contracts or in the requirement of delivery applicable to real contracts. (Al-Sayrafi, 1992)

For writing to qualify as official, the following elements must be present in the instrument:

1. **The instrument must be issued by a public employee or a person entrusted with a public service.** Article 21(1) of the Iraqi Law of Evidence No. 107 of 1979 provides: "A public employee is any person entrusted with a permanent position within the organizational structure of the State." The law requires the instrument to be issued by a person entrusted with a public service. Such a person includes anyone who performs a public service, irrespective of whether that person is governed by public-service legislation. Examples include an expert acting within the scope of an assigned task, a local community representative, members of popular councils, and a priest. It is immaterial in which ministry, governmental department, or socialist-sector institution the employee serves, provided that the instrument relates to the official duty entrusted to that employee.
2. **The instrument must be issued within the authority and jurisdiction of its issuer.** Article 22(1) of the Iraqi Law of Evidence provides: "Official instruments constitute evidence against all persons in relation to matters performed by a public employee or a person entrusted with a public service within the scope of that person's authority, or matters occurring before that person in the presence of an interested party, unless forgery is established by the method prescribed by law." Subject-matter jurisdiction means that each employee is authorized to issue instruments of a particular type. For example, employees of the Real Estate Registration Department issue instruments concerning the registration of immovable property, while judges issue judgments. Territorial jurisdiction means that the employee is

authorized to exercise official powers only within a particular geographical area and may not exceed it, as in the case of a notary public.

3. **The statutory conditions and procedures governing the issuance of the instrument must be observed.**

Every official instrument is subject to statutory conditions and procedures that must be observed when it is issued. For the preparation or authentication of an instrument by a notary public, the Notaries Public Law No. 27 of 1977 prescribes procedures that must be followed. These include the following requirement: "The notary public shall clearly state the full three-part name, surname, commonly known name, and place of residence of each interested person, shall state the date of preparation or authentication both in words and numerals, and shall affix the official seal." This requirement is contained in Article 19 of the Notaries Public Law.

4. **Arabic is the official language for preparing or authenticating instruments.** A notary public may authenticate instruments written in a foreign language after becoming acquainted with their contents through a sworn translator. (Al-Nadawi, 1990)

Islamic law maintains that contracts emerged only after human beings experienced a need for them. Early humans did not require contracts because all their needs were readily available. With population growth and the development of social life, however, the need for binding relationships between communities emerged. Such obligations were embodied in contracts intended to facilitate the exchange of goods exceeding the needs of each party within society. The various forms of exchange were therefore brought within the general theory of contract. (Al-Zuhayli, 1987) The Holy Qur'an also contains verses establishing the legitimacy of contracts and emphasizing the fulfillment of promises and adherence to agreements between the parties. God Almighty states: "O you who believe, fulfill your covenants" (Surah al-Ma'idah, verse 5), and also states: "Fulfill the covenant, for the covenant will be questioned" (Surah al-Isra, verse 1). Although a unilateral will may also create an obligation or contractual commitment, the general rule is that contracts involve multiple parties and are formed through offer and acceptance. Offer and acceptance must satisfy three conditions: clarity of meaning, correspondence between the offer and acceptance, and firmness of the parties' wills. The contracting parties' will is principally expressed orally or verbally, although gestures or writing may substitute for spoken words. Thus, where one of the parties is unable to speak, such as a mute person who is capable of writing, the use of writing becomes necessary for contract formation. A contract may be concluded in writing regardless of whether the parties are capable of speech or experience a speech impairment. Written contracting is permissible both where the parties are present in the same contractual session and where they are absent, and the contract may be drafted in any language comprehensible to both parties. Jurists have stipulated that writing must be clear and must remain stable and durable after the contract has been completed.

With the advancement of society, technological development, and the availability of automated means of communication, the question arose whether contracts could validly be concluded through modern communication technologies, such as telephones, electronic mail, or the Internet. It was ultimately concluded that contracts may be concluded through modern means of communication because such means perform a function similar to that of traditional correspondence. Certain Islamic jurists maintain that the original rule governing contracts is permissibility unless the transaction is prohibited by Islamic law or conflicts with its authoritative texts. In transactions, it is sufficient that the transaction not be prohibited by Islamic law because the objective of transactions is to protect people's interests, and whatever serves those interests is permissible. Accordingly, transactions through new contractual forms, analogy, juristic preference, or a customary principle that neither conflicts with the principles of Islamic law nor contradicts the foundations of Islam are valid. Compliance with Islamic law, particularly in the field of transactions, concerns ultimate objectives and purposes, whereas contractual mechanisms and formalities may change where doing so serves people's interests in life. Islamic law has not confined contracts to particular subject matters in a manner that prevents their extension to other matters. Its limitations concern only the prohibition of harm, injustice, and exploitation. (Al-Khatib, 1989)

In Iran, transactions governed by Articles 46–48 of the Registration Act—including transactions concerning the corpus or usufruct of registered immovable property, transactions involving registered real rights, the corpus and usufruct of unregistered immovable property, settlement instruments, deeds of gift, and partnership agreements—together with the transfer of commercial tenancy rights, the exchange of registered immovable property, transactions and rescissions concerning the corpus

and usufruct of ships under the Iranian Maritime Law of 1964, transactions concerning patents and trademarks under Article 40 of the Registration of Trademarks and Patents Act of 1931, the registration of marriage, divorce, and revocation of divorce under the new Family Protection Act, and the transfer of registered shares under Article 40 of the 1958 Amendment to the Commercial Code are among the matters whose registration is mandatory by law. (Hosseini Iji, 2019)

Certain Iranian scholars also maintain that, given the principle of statutory formalism, where the legislature prescribes specific formalities for the preparation of an instrument, failure to observe them renders the instrument invalid. Nevertheless, formalities are not all equal in terms of their significance and legal effects. For this reason, the law expressly provides that failure to comply with stamp-duty requirements does not deprive an instrument of its official character. An important principle governing formalities is therefore that the validity and effect of each formality must be evaluated according to its degree of importance. Some formalities constitute essential elements of an instrument, whereas others perform a secondary and less significant function. (Riahi, 2020)

In this context, certain contracts that must be expressed in an official form are discussed below.

3.1. Sale of Immovable Property

Under Islamic law, Article 342 of *Murshid al-Hayran* defines sale as follows: "A contract of sale is the transfer of property by the seller to the purchaser in exchange for consideration constituting its price." Accordingly, Islamic law provides that:

1. Ownership is transferred directly to the purchaser upon conclusion of the contract.
2. The majority of Islamic jurists require the seller to own the subject matter of the sale as a condition for the effectiveness of the sale, while certain jurists regard ownership as a condition for the formation of the sale. According to the first view, the sale of another person's property is suspended pending the owner's authorization; according to the second view, it is void. Under both views, an unauthorized transaction involving another person's property produces no legal effect, and no property may lawfully be transferred without the owner's authorization. (Manahi, 2023)

The contract of sale is among the formal contracts for which registration is mandatory. Article 90(1) of the Iraqi Civil Code provides: "Where the law prescribes a particular form for a contract, the contract shall not be concluded unless that form is observed, unless another provision stipulates otherwise." Article 508 of the Iraqi Civil Code further provides: "The sale of immovable property shall not be concluded unless it is registered with the competent authority and the form prescribed by law is observed." In addition, Article 1126(2) of the same Code provides: "A contract transferring ownership of immovable property shall not be concluded unless the procedure prescribed by law is observed." Article 3(3) of the amended Real Estate Registration Law No. 43 of 1971 likewise provides: "A disposition involving immovable property shall not be concluded except through registration with the Real Estate Registration Department."

The foregoing provisions demonstrate that registration constitutes one of the essential elements of a contract for the sale of immovable property under Iraqi law. This contract is among those for which the law prescribes a particular form that must be observed for the contract to be formed or registered with the Real Estate Registration Department. Otherwise, the contract is void, is treated as legally nonexistent, and the seller remains the owner of the immovable property until the contract is registered. The seller may refuse to register the contract, and the purchaser has no power to compel registration. It is therefore necessary to consider the rights granted by law to enable the purchaser to obtain redress from the seller, as the Iraqi legislature has granted the purchaser the right to claim compensation for losses caused by the seller's refusal to register.

Under Iraqi law, opinions differ concerning the legal basis for compensating a purchaser where the seller refuses to register the transaction. The Court of Cassation has ordered the restitution of the amount specified in the contract, together with the agreed guarantee in the event of non-registration, basing its judgment on the penalty clause contained in the contract. The Iraqi legislature intervened through Resolution No. 1198 of the dissolved Revolutionary Command Council, dated November 2, 1977. Paragraph (a) of that resolution determines the compensation payable to the purchaser where the seller refuses to register as the difference between two amounts: the value of the immovable property at the time of sale and its value at the time of refusal. Following the adoption of this resolution, judicial practice proceeded on the same basis. The Baghdad Court of Appeal, sitting as a court of cassation, held that: "The purchaser is entitled to claim from the seller compensation assessed as the difference between the value of the immovable property specified in the undertaking and its value at the time of refusal." It

also held that: “Proof of the obligor’s refusal to transfer ownership of the immovable property constitutes a ground entitling the purchaser to claim compensation assessed as the difference between the value of the immovable property specified in the undertaking and its value at the time of refusal.” An award of compensation under Resolution No. 1198 does not require the obligor to be the owner of the immovable property. The provisions of Resolution No. 1198 concerning compensation for failure to register a contract for the sale of immovable property have replaced Article 1127 of the Iraqi Civil Code, which provides: “An undertaking to transfer ownership of immovable property shall, where either party breaches the undertaking, be limited to an obligation to pay compensation, whether or not compensation was stipulated in the undertaking.” (Manahi, 2023)

Under Iranian law, written or official formalities also perform a cautionary function by alerting the contracting parties to the consequences of undertaking substantial obligations. This is particularly important in contracts relating to immovable property or contracts having major legal consequences. In certain fields, including real estate registration, official mortgages, and companies, the requirement of writing or registration follows public policies aimed at market transparency and economic order. The writing requirement therefore functions as a regulatory instrument through which public policy may be directed. In addition, writing generally performs an evidentiary function, and without an instrument, proof of the transaction may become difficult or depend upon circumstantial evidence and witness testimony. Procedural laws and judicial policies have also taken account of this function. The contemporary rule is that a contract is valid when concluded through any means that clearly manifests the parties’ will, and writing, like spoken words, may clearly communicate their intention. Moreover, the Iranian legislature requires writing or official registration in certain contracts to protect individual rights. One example is the obligation to execute an official instrument for the pre-sale of a building under Article 24 of the relevant Act, which even criminalizes the preparation of a private instrument for such a transaction. (Hosseini Iji, 2019)

3.2. Sale of a Motor Vehicle

A contract for the sale of a motor vehicle is not regarded as concluded where the statutory registration formalities have not been completed before the competent Traffic Directorate, and the parties must be restored to their pre-contractual positions. Article 10 of the Traffic Law No. 8 of 2019 provides: “The sale of a vehicle shall not be concluded unless it is legally registered with the competent Traffic Directorate.” Article 10(2) further requires the seller and purchaser, or both, to appear before the registration officer at the registration offices and formally declare the transaction. Article 10(3), however, establishes the following exceptions to the seller’s personal appearance before the registration officer in governmental authorities: (a) the initial registration of a vehicle pursuant to a letter from the General Customs Authority, the General Company for Automobile Trading, or the General Company for Automotive and Machinery Industries; (b) the issuance of a final and binding judgment by the competent judicial authority concerning vehicle registration or a sale conducted by enforcement offices or authorities responsible for minors’ affairs; and (c) the sale of a vehicle by governmental bodies or mixed-sector entities.

Article 10(4) introduces a new rule that did not appear in previous legislation. It provides: “Where the transfer of ownership or registration of the vehicle in the name of the possessor or purchaser cannot be completed at the competent registration offices within 30 days from the date of signing the traffic contract, for reasons beyond the purchaser’s control, the possessor shall have the right to bring an action before the competent judicial authorities for the transfer of ownership or registration in that person’s name.” It should be noted that paragraph 4 constitutes an exception to the general rule governing the formalities of contracts for the sale of vehicles. This exception provides an important solution to difficulties associated with the transfer of vehicle ownership and also serves a security function by making it possible to trace the potential use of the vehicle in the commission of an offense. (Al-Fadhli, 1977) It is therefore clear that a contract for the sale of a motor vehicle is a formal contract requiring both a written record and registration with the competent authority.

Under Iranian law, the majority view is as follows: “Given that the vehicle ownership card, commonly known as the green card, constitutes the vehicle’s certificate of ownership and is classified as an official non-registration instrument, it gives rise to a presumption that its holder is the owner unless the contrary is established through lawful means. Nevertheless, pursuant to Article 46 of the Registration of Deeds and Property Act, the general rule is that registration of instruments is optional except where the legislature expressly requires the parties to register their transactional instruments. Under Article 29 of the Traffic Offenses Act of 2010, the legislature has made the transfer of a vehicle conditional upon registration of the transaction at a notary public office. Article 20 of the corresponding regulation also confirms this obligation. Advisory Opinion No. 2910/94/07

of the General Legal Department of the Judiciary, dated January 16, 2016, considers the green card an official instrument under Article 1287 of the Civil Code, but, in light of Article 29 of the Traffic Offenses Act, considers the transfer of a motor vehicle conditional upon execution of an official instrument before a notary public. This conclusion is also supported by General Assembly Unification Decision Nos. 421 and 422 of the Administrative Court of Justice, dated September 23, 2013, the decision of the Supreme Registration Council, and Decision No. 9420/2251 of the Notaries' Unification Commission, dated July 13, 2015, issued pursuant to Article 66(2) of the Law on Notary Public Offices and the Association of Notaries and Assistant Notaries. Accordingly, because the records of all vehicle-transfer instruments registered at notary public offices since September 2013 are available in the electronic system of the Registration Organization, courts hearing an action to compel the execution of an official instrument must obtain information concerning previous official transfers of the disputed vehicle from the Software Development and Electronic Services Office of the National Organization for Registration of Deeds and Property. Consequently, because replacement of the license plate is primarily an administrative and law-enforcement matter falling within the responsibility of the Traffic Police, whereas transactions and contracts are juridical in nature and registration law assigns the registration of such juridical acts to notary public offices, courts may order the defendant to execute an official instrument only where the previous notarized vehicle instrument is registered in the defendant's name."

The minority view is as follows: "Because Article 1287 of the Civil Code provides the criterion for determining whether an instrument is official, and because the vehicle green card is issued by an official governmental authority in accordance with applicable regulations and within the scope of that authority's competence, it constitutes an official instrument. Furthermore, Article 46 of the Registration Act does not establish a mandatory registration requirement but instead recognizes optional registration as the general rule. Article 29 of the Traffic Offenses Act likewise does not require the registration of vehicle-sale instruments. In addition, under the amended Article 22 of the Law on the Transit and Transportation of Foreign Goods Through the Territory of the Islamic Republic of Iran of 2009, authority to register vehicle ownership has been assigned to the Traffic Police. The principle of consensualism governs transactions, and a person who becomes the holder of the license plate following a plate replacement consequently acquires ownership of the vehicle. On this basis, the green card alone establishes ownership of the vehicle. Where the green card is already issued in the claimant's name but the claimant brings an action to compel execution of an official instrument, the action seeks an already achieved result. Because the green card is an official instrument, the court must therefore issue an order declaring the action inadmissible. Otherwise, the defendant must be required to facilitate the procedure necessary for issuing the official green-card instrument through replacement of the license plate. The defendant's ownership may also be verified through an inquiry addressed to the Traffic Police. Furthermore, Judgment No. 4514 of Branch 24 of the Administrative Court of Justice, dated January 11, 2020, regards the green card as equivalent to a legally recognized instrument."

4. Agreed Formalities

This type of form requirement reflects a broader concept of contractual formalities under which the parties enjoy complete freedom to select the means through which the required form will be realized. Under this approach, form is not limited to formalities imposed by the legislature. Rather, it is manifested in the parties' agreement on matters intended to protect their interests, irrespective of what the law expressly provides. This is reflected in the expression of will because the external manifestation and communication of will itself constitute a formality necessary for contract formation. Under this approach, form is regarded as the framework within which the juridical act is placed and to which legal effects are attached, because no juridical act exists unless it appears externally and is embodied in a particular form. (Al-Sanhuri, 1954)

Agreed formalities reflect an agreement between the parties to perform their juridical act in a particular form selected by them. The requirement may be intended either to prove the juridical act or to constitute a condition for its formation. Two principal views have been advanced in this regard.

According to the first view, form in its legal sense is determined by the legislature. Therefore, a form selected by agreement between the contracting parties cannot be regarded as a statutory form because the requirement to comply with that form does not transform the juridical act from a consensual act into a formal act. The juridical act remains consensual. Statutory form, by contrast, is created exclusively by the will of the legislature and not by the will of individuals.

The second view maintains that every expression of will constitutes a formal manifestation of the juridical act. It may therefore be stated that agreed form is not form in its statutory sense and does not constitute a restriction on will. Form in its statutory sense is imposed by the legislature and applies to certain juridical acts. (Qasim, 2011)

A condition requiring particular formalities between the contracting parties may also be express or implied. Where it is implied, the parties bear the burden of proving the contents of their agreement, meaning that they must establish their intention in imposing the condition. Where the parties agree on a form but do not clarify the purpose of that condition, the judge must ascertain their common intention by examining the terms of the agreement and the surrounding circumstances and factual context. (Qalada, 1955)

Certain legal systems expressly address this matter in their statutory provisions, including the Lebanese Code of Obligations and Contracts. French law, however, contains no specific provision establishing a clear boundary in this regard, and the same is true of Egyptian law. Egyptian legal doctrine and judicial practice have concluded that, in cases of doubt, a form agreed upon by the parties is required only for proof of the contract and not for its formation. This approach is based on the application of general rules and the principle of consensualism.

Although the Iraqi Civil Code contains no specific provision expressly governing agreed formalities, reference may be made to Article 86(2), which provides: "Where the parties agree on all essential matters of the contract and leave subsidiary matters for subsequent agreement, without stipulating that failure to agree on those matters will prevent the contract from being formed, the contract shall be deemed complete. Where a dispute subsequently arises concerning the outstanding matters, the court shall determine them in accordance with the nature of the subject matter and the provisions of law, custom, and equity." By analogy with this provision, the Iraqi Civil Code may be understood as following the same approach as Egyptian and French law, under which form is generally required for proof rather than for formation. Ultimately, however, the circumstances and surrounding indications accompanying contract formation determine the matter because the parties' purpose in requiring formalities may be inferred from those circumstances and indications.

The concept of "agreed formalities" under Iranian law similarly indicates that the contracting parties, within the framework of autonomy of will, may agree upon a particular form or framework for expressing their will. Although that form is not imposed by the legislature, the parties may consider it necessary to protect their interests, create confidence, or increase certainty in their contractual relationship. Such formalities fall outside the conceptual scope of statutory formalities because the legislature plays no direct role in imposing them. Rather, their binding force derives from the parties' will. Under Iranian law, as under Iraqi and Egyptian law, this analysis is founded upon the principle of consensualism. Agreed formalities are therefore one of the effects of autonomy of will, provided that they do not contravene public order or mandatory law. The parties may agree to make a particular form a condition for producing a legal effect, and their agreement has the force of law between them. Consequently, agreed formalities may either perform a merely evidentiary function or constitute a condition of contract formation. In this respect, the structure of Iranian law is closely comparable to that of Iraqi law. Advisory Opinion No. 7/1402/100 of the General Legal Department of the Judiciary, dated June 25, 2023, provides: "The term 'condition' ordinarily refers to ancillary and subsidiary agreements or obligations incorporated into a contract. From an evidentiary perspective, and in view of prevailing practice, the general rule is that agreements incorporated into a contract are ancillary and subsidiary, meaning that, by their nature or by agreement of the parties, their existence or extinction depends upon the principal contract. In certain cases, however, the circumstances establish that an agreement reached within a contract is not dependent upon the contract in terms of its continuation or extinction, such as an arbitration agreement concerning the resolution of disputes between the parties following termination of the contract. In that situation, because the dissolution or termination of the principal contract constitutes the occasion for applying the condition, treating the condition's continuation or extinction as dependent upon the contract would be unreasonable and contrary to the parties' common intention. Such agreements must therefore be analyzed under Article 10 of the Civil Code rather than as conditions incorporated into a contract, because describing them as 'conditions' is metaphorical rather than literal."

On the basis of the foregoing discussion, agreed form may be required either for proof or as a condition upon which contract formation depends. Each of these two situations must therefore be examined separately.

4.1. Requiring Agreed Formalities for Evidentiary Purposes

In this situation, the agreed form plays no role in the formation or conclusion of the contract because the contract becomes binding regardless of whether the obligation arising from the agreed form is performed. This concept differs from statutory formalities imposed by the legislature as essential conditions for the formation of a formal juridical act. Here, the form serves as a means of proving the juridical act and does not prevent that act from being performed. The contract is formed merely through the parties' agreement on its essential elements, such as the subject matter and price in a sale, even where the agreed form has not been observed. The obligation to record the sale in the agreed form is treated as an obligation arising from a contract that has already been formed and is therefore characterized as an obligation to perform an act. A particular form required for proof of a contract, whether imposed by the legislature or agreed upon by the parties, does not alter the consensual nature of the contract because the parties' consent gives the contract its consensual character, even if the legislature or the parties require writing for evidentiary purposes. (Al-Sayrafi, 1992)

Under Iranian law, the contracting parties may agree to observe a particular form or special formalities in concluding their contract. Provided that the agreement does not conflict with mandatory law or public order, it is valid under Article 10 of the Civil Code. The basis for this possibility is the principle of freedom of contract expressly recognized in that article. Article 10 protects freedom of contract in comprehensive terms and leaves no substantial doubt that all agreements are valid and enforceable except where they expressly contravene the law. Importantly, where the parties agree upon particular formalities for evidentiary purposes, that agreement does not change the consensual nature of the contract. The contract continues to be formed through agreement on its essential elements, although proof of the contract in the event of a dispute may require compliance with the agreed form. Written documentation is not generally prescribed by law as a condition for contractual validity. Accordingly, where the parties or their representatives reach an agreement and determine the details of the contract between themselves, whether that agreement is written has no effect on the existence of the contract. The contract is formed and becomes binding upon the parties as soon as agreement is reached. In practice, agreed evidentiary formalities may include recording the contract in writing, obtaining witness signatures, obtaining confirmation from a particular expert, or even registering the contract at a notary public office. Contract formation requires only the parties' agreement and consent and does not require additional formalities such as the execution of an official instrument. Nevertheless, the parties may include such a condition to facilitate proof. The fundamental difference between this type of formality and statutory formalities is that non-compliance with a statutory formality renders the contract void, whereas failure to comply with an agreed evidentiary formality merely makes proof more difficult and does not invalidate the contract. Under Iranian law, contracts are generally consensual, including transactions involving immovable property, gifts, and settlements.

4.2. Requiring Particular Formalities for Contract Formation

The definition of contract under Islamic law reflects the objective tendency that has dominated Islamic jurisprudence and has had a significant effect on the fundamental principles of contract and the detailed rules governing it. One consequence is that Islamic law gives effect to the apparent or manifested will rather than the internal will, relying on the principle that contractual formulae should primarily be interpreted according to the manifested will. (Bou Dinar, 2012) The contractual formula, whether verbal or non-verbal—such as correspondence, writing, gestures, conduct, or any other position indicating consent, including silence as a purely passive position—does not fall outside this framework because it is governed by a general rule. By referring to the elements of a contract, including consent, legal cause, and subject matter, it becomes apparent that the term "agreement" refers to the concurrence of the parties' consent. (Al-Sayrafi, 2000) There is no doubt that consent is valid only when it is free and informed. It must be unrestricted, unaffected by pressure or duress, and not impaired by anything preventing informed understanding, such as mistake, fraud, or exploitation. Consent therefore consists of the parties' wills being directed toward producing the desired legal effect, or the correspondence of offer and acceptance as expressions of the parties' respective wills. Expression of will is manifested as a determination to undertake the juridical transaction forming the subject of the contract. In Islamic jurisprudence, expression of will is known as the contractual formula. The Maliki and Hanbali schools hold that contracting may be accomplished through any means by which the other party understands the intended meaning of the contracting party. In the chapter on sale, Sheikh Khalil states: "A sale is concluded through anything indicating

consent, including exchange by conduct." Ibn Taymiyyah of the Hanbali school states: "Contracts are concluded through anything that communicates the intended meaning, whether words or conduct. Whatever people regard as a sale or lease is a sale or lease. Where people's terminology differs in words and conduct, the contract is concluded within each group according to the formulae and conduct they understand among themselves." (Bou Dinar, 2012)

In law, contract formation may sometimes depend upon compliance with a particular form or formalities. This creates a degree of ambiguity between agreed form and statutory form, and distinguishing between them requires considerable precision. Although legal doctrine generally agrees that statutory formalities prescribed by the legislature differ from agreed formalities required for proof, some scholars maintain that agreed formalities stipulated as a condition of contract formation are legally comparable to formalities imposed by the legislature and ultimately transform the juridical act from consensual to formal. Other scholars reject this similarity and recognize a distinction between the two types of formality. (Al-Sharqawi, 1956)

The foregoing discussion demonstrates that the first approach in legal doctrine gives priority to freedom of contract, on the basis that a contract constitutes the law of the contracting parties, over the statutory rule according to which a contract is formed through the parties' agreement on essential matters, namely the constitutive elements of the contract, as provided in Article 86(1) of the Iraqi Civil Code. It may therefore be argued that agreed formalities cannot be treated as an essential contractual element or as one of the constitutive elements of contract formation. This distinguishes them from statutory formalities because a formality prescribed by the legislature is treated as an element necessary for contract formation.

Although Articles 191 and 193 of the Iranian Civil Code clearly affirm the principle of consensualism under Iranian law, the status of form and its role in contractual validity remain ambiguous. The Civil Code does not directly address this issue, and a considerable number of special statutes restricting individuals' freedom concerning the manner in which they express their will are themselves characterized by ambiguity and lack of clarity. (Zare & Pishnamaz, 2022)

In general, contemporary Iranian legal scholars agree that consensualism is the governing principle for juridical acts and accept formalism only by way of exception. Nevertheless, it must be acknowledged that, despite the acceptance of consensualism, modern formalism has also expanded under Iranian law, reducing the traditional opposition between consensualism and formal requirements. (Chemi et al., 2023)

5. Conclusion

The comparative examination of written formalities under Iranian and Iraqi law demonstrates that, despite their shared jurisprudential foundations and common exposure to European legal systems, the two legal systems have adopted relatively different approaches to balancing freedom of contract against formal restrictions. These differing approaches reflect historical developments, socioeconomic needs, and distinct legislative policy choices.

The Iraqi legislature has adopted a more formalistic approach by making written formalities a constitutive element of contract formation in numerous cases. Article 90 of the Iraqi Civil Code expressly provides that where the law prescribes a particular form for a contract, the contract is formed only if that form is observed. This approach is clearly illustrated by transactions such as the sale of immovable property under Article 508 and the sale of motor vehicles under Article 10 of the Traffic Law, where official registration is required not merely for proof but for the formation of the contract itself. Although such formalism enhances legal security and the protection of the contracting parties, it may, in certain cases, slow the circulation of transactions and increase transaction costs. By contrast, the Iranian legislature has remained more faithful to the principle of consensualism and has adopted a more flexible approach. Under Iranian law, Articles 190 and 191 of the Civil Code emphasize formation through an intention to create legal effects and the expression of will, without establishing writing as a general requirement. Written formalities are mandatory only in particular cases expressly determined by the legislature, such as those governed by Articles 46–48 of the Registration Act, Article 24 of the Building Pre-Sale Act, and the provisions of commercial law governing the transfer of shares. Although this approach preserves freedom of contract, it may generate ambiguity and inconsistency in judicial practice where the distinction between writing as a constitutive element and writing as a means of proof is unclear. Both legal systems recognize a distinction between official or statutory formalities and agreed formalities. In statutory formalities, the legislature directly requires a particular form for the conclusion of the contract, and failure to observe that form results in absolute invalidity. In agreed formalities, however, the parties may require a particular form for their contract on the basis of autonomy of will. Importantly, agreed formalities in both systems generally perform an evidentiary

rather than a constitutive function unless the circumstances and indications surrounding the transaction demonstrate that the parties intended compliance with the form to be necessary for contract formation.

Although the formalistic approach of the Iraqi legislature may be justified from the perspective of protecting the parties and ensuring transactional security, it has certain weaknesses that require consideration:

1. **Conflict with economic efficiency:** Requiring official formalities for a large number of contracts makes the contracting process slower and more costly. In a modern economy requiring speed and flexibility in transactions, excessive formalism may impede economic growth and adversely affect the free market.
2. **Incompatibility with technological developments:** The Iraqi Civil Code of 1951 and its subsequent amendments predominantly emphasize traditional formalities, such as registration in official offices and physical presence, while giving comparatively little attention to the use of electronic means and digital signatures. This creates a need to review and update the legislation.
3. **A legislative gap concerning the consequences of non-registration:** In cases such as the sale of immovable property, where the seller refuses to register the transaction, the purchaser may claim only compensation and cannot compel registration. This may enable abuse by the seller and prejudice the purchaser's rights because monetary compensation does not necessarily provide complete redress for the loss of the subject matter of the transaction.

The more flexible approach adopted by the Iranian legislature also faces several challenges:

1. **Ambiguity in distinguishing writing for formation from writing for proof:** In many cases, the Iranian legislature has not expressly clarified whether writing constitutes a requirement for contract formation or merely a means of proof. This ambiguity is particularly evident in the controversy surrounding the vehicle green card, in relation to which judicial practice has been divided. The majority view regards the green card as an official non-registration instrument and makes the transfer of a vehicle conditional upon execution of an official notarized instrument. The minority view, however, treats the green card itself as an official instrument and considers replacement of the license plate sufficient. This disagreement reduces legal certainty.
2. **An imbalance in the protection of the contracting parties:** Because Iranian law does not require official formalities for many contracts, the likelihood of disputes concerning proof and interpretation of contractual terms increases. This may particularly prejudice individuals with limited literacy or legal knowledge who do not adequately understand the legal consequences of their transactions.
3. **Limited protection of third parties:** The absence of official registration makes it difficult for third parties to determine the legal status of property and rights. This may result in conflicting rights and numerous legal disputes.

Written formalities are therefore a double-edged instrument capable of strengthening legal security while also restricting freedom of contract and economic efficiency. Legislative success in balancing these conflicting objectives requires a thorough understanding of societal needs, technological developments, and international experience. The Iranian and Iraqi legislatures should review existing laws and adopt modern approaches to adapt their legal systems to contemporary conditions, thereby protecting the rights of the contracting parties and third parties while also facilitating a dynamic business environment. This article seeks to contribute to a better understanding of the philosophy and functions of written formalities and to provide practical solutions for reforming the legal systems of both countries.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

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Conflict of Interest

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