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Comparative Study of Employment Contract and Contracting

Seyed Azizullah Mousavi

Graduated in Private Law from Al-Mustafa University, Qom, Iran

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Abstract

Employment contracts and contracting agreements are two types of legal entities pertaining to the lease of persons. Despite their similarities, each has its own specific characteristics that distinguish them from one another. The most important difference lies in the fact that in an employment contract, the worker is entirely subordinate to the employer, whereas this is not the case in a contracting agreement. In the latter, the contractor independently manages the work and delivers it to the client upon completion. This article attempts to highlight the criteria for distinguishing between these two types of agreements and to explain the benefits and outcomes associated with each.

Keywords: *Contract; Employment Contract; Contracting Agreement; Construction Contract; Contractor*

Introduction

Employment contracts and contracting agreements are important and practical topics within the realm of personal lease agreements. In Islamic jurisprudence and law, lease contracts are addressed in three forms: leasing objects (such as houses, land, gardens, machinery), leasing animals (for various uses like carrying loads, milking), and leasing persons. Within the context of leasing persons, there are many significant and debatable issues. However, this concise work will focus on a comparative analysis of employment contracts and contracting agreements, attempting to highlight the differences between employment contracts and contracting agreements, and to explain the effects and benefits of distinguishing between these two types of contracts.

The following questions can be raised regarding employment contracts and contracting agreements: What is the nature of employment contracts and contracting agreements, and what is their place in legal classifications? What are their characteristics? What laws govern employment contracts, and under which law is contracting governed? What are the commonalities and differences between employment contracts and contracting agreements? What are the criteria for distinguishing between employment contracts and contracting agreements? And what is the benefit and outcome of distinguishing these two contracts from each other? And some other questions that arise in the context of comparing these two types of contracts.

In this short article, an attempt has been made to answer the above questions, albeit in a cursory manner. In this regard, each of the employment contract and contracting agreement is first briefly

discussed, and the nature and characteristics of each are briefly described. After that, the criteria for differentiating these two contracts are raised, and finally, the benefits and outcomes of distinguishing an employment contract from a contracting agreement are explained.

1. Employment Contract

One of the important legal institutions is the employment contract, which has been formed to protect the working class. There is debate about the legal nature of this contract, specifically whether it falls under the branch of public law or private law. On the one hand, like other contracts, it is subject to the independent will of the employer and the worker, which suggests it belongs to the branch of private law. On the other hand, the government plays a significant role in these types of contracts to protect the worker, and by enacting special regulations, it prevents employers' excessive demands and provides a degree of peace of mind and relative comfort for the worker. From this perspective, labor law falls within public law. Therefore, labor law has a dual nature.

1-1. The Concept of an Employment Contract

Before defining an employment contract, it is necessary to briefly and casually examine the two words Employment Contract so that, considering the literal and technical meanings of these two words, a comprehensive and relatively flawless definition can be presented.

1) Contract

The word "contract" is a derivative noun (passive participle) derived from the word qarar, meaning promise, condition, and covenant. qarar bastan means to make a commitment and make a covenant. The root meaning stability and settlement, firmness and persistence, as well as promise, condition, word and emphasis - is also common in Arabic, but the word qarardad is considered a Persian word and is only used in Persian literature. (Dehkhoda, Dehkhoda Dictionary, entry "qarar")

In legal terminology, Many legal scholars have considered "contract" synonymous with aqd and meaning the connection of one decision to another decision or the connection of two transactional decisions. Although some jurists have not accepted the theory of synonymy; some of them have considered "contract" to be more general than aqd and have said: A contract is an agreement between two or more people about something that has legal benefit. The subject of the contract may be the recognition or creation or modification or waiver of an obligation or the transfer of a right. A contract whose subject is the creation of an obligation is called a aqd In other words, aqd is a specific type of contract, and "contract" is a general term that includes aqd. (Amiri Ghaem Maghami, 1387 AH, Vol. 2: 29) Others, in explaining the difference between aqd and "contract", have said: The meaning of uqod is the same as the specific contracts in the Civil Code, by which legal relations are established between two or more people, and the meaning of "contracts" is the rest of the cases that, under other titles than the titles of specific contracts mentioned in the Civil Code, legal relations are established between two or more people. (Emami, 1380, No. 175: 154 et seq.) And others, while admitting the synonymy between "contract" and aqd, have thought that in many cases the word aqd is used only in named and specific contracts, and the word "contract" includes all contracts, both named and unnamed. (Emami, 1384, 1: 169)

Due to the similarity in the literal meaning between aqd and contract, as well as the existence of mutual will, which is considered a fundamental condition in both, the opinion of synonymy seems closer to the truth. This is why other legal writers have explicitly stated the absence of any difference between them in this respect and have said that both terms are synonymous and apply to all contracts, both named and unnamed. (Katouzian, 1383, 1: 11) According to this theory, any interpretation of "bilateral agreements based on the intention to create" is irrelevant, and whether it is called aqd or contract, it has the same legal rules and effects. It is worth mentioning that in conversations, sometimes the written

document itself, in which the contract and agreement of the parties are written, is called contract (Mohaghegh Damad, 1379, 1: 90).

2) Work

In the dictionary, it has meanings such as action; that is, what is done by someone; occupation; that is, an activity that a person is engaged in on a daily basis and usually receives wages for it; and pastime; what keeps someone busy. (Anvari, 1381, 6: 5641) And in legal terminology, it includes any manual, industrial, scientific and artistic act, and it consists of a part of the human force that leads to a return that can be valued in money. Therefore, the intellectual work of authors and artists is included in this definition. (Jafari Langroudi, 1381, 4: 2984, No. 11159).

3) Employment Contract

After reviewing the concepts of "contract" and "work," as a summary of the points mentioned, the definition that the labor law of the Islamic Republic of Iran has made of the employment contract is mentioned. Article 7 of the Labor Law states: "An employment contract is a written or oral contract by which a worker, in exchange for receiving wages, performs work for a temporary or non-temporary period for an employer."

According to the above article, there is no difference between a written and oral contract, and they have the same legal validity. Yes, a written contract is superior to an oral one in some respects, such as if a dispute arises between the two parties to the contract, it facilitates the process of investigation and problem-solving, but this does not mean that the legal validity of a written contract is higher than that of an oral contract.

3-1. Characteristics of an Employment Contract

An employment contract has important characteristics that distinguish it from other contracts, and some of these characteristics are mentioned below:

1) Consensual

An employment contract does not require special legal formalities; rather, the mere agreement of the two parties to the contract is sufficient, and it is not necessary for this agreement to be formed in legal centers and in compliance with pre-determined regulations, or to be registered; because the silence of the laws in this regard is itself evidence of the non-formal nature of the employment contract.

2) Personal with Respect to the Worker

The worker is obligated, according to the contract he has with the employer, to perform the desired work himself and cannot appoint another person in his place. Therefore, the employment contract is personal with respect to the worker, meaning that if a problem arises for the worker that prevents him from continuing his work, the contract will be terminated with respect to him (Article 21 of the Labor Law[1]). But the employment contract is not personal with respect to the employer, as stated in Article 12 of the Labor Law: "Any legal change in the ownership status of the workplace, such as sale or transfer in any form, change in the type of production, merger with another institution, nationalization of the workplace, death of the owner and the like, shall not affect the contractual relationship of the workers whose contracts have been finalized, and the new employer shall be the successor to the obligations and rights of the previous employer."

[1] Article 21 of the Labor Law: The employment contract is terminated in one of the following ways: a) Death of the worker b) Retirement of the worker c) Total disability of the worker and ....

3) Onerous and Binding

An employment contract is onerous and binding; that is, the worker undertakes to perform work for the employer, and in return, the employer undertakes to pay the worker's wage. Therefore, the employment contract is based on two fundamental pillars: the obligation to perform work by the worker and the payment of its consideration (wage) by the employer.

4) Necessary

An employment contract is one of the necessary contracts; because the characteristic of a necessary contract[2], in which neither party has the right to unilaterally terminate it, exists in the employment contract, and the legislator has stated in Article 25 of the Labor Law: "If the employment contract is concluded for a temporary period or for the performance of a specific work, neither party has the right to terminate it unilaterally."

5) Limitation of the Rule of Will

Although the employment contract is based on the will of the parties or the parties to the transaction, "due to its nature and characteristics and its connection with public social order, it is not entirely dependent and in accordance with the will of the parties to the contract. Rather... the law and public power closely supervise the manner of its conclusion and implementation. Many of the regulations that should generally be determined based on the wishes and desires of the parties to the contract have been determined by the legislator and also have a mandatory aspect, meaning that the intention and consent of the parties to the contract cannot be formed against the direction of those rules and prevent their implementation." (Ranjbari, 1385: 75)

2. Contracting

Contracting is another type of personal lease that is distinguished from an employment contract based on its characteristics; including the fact that the law governing the employment contract is labor law, while contracting is subject to civil law, and the rules and regulations of labor law do not include contractors. The differences between these two types of contracts will be mentioned in the next section.

2-1. The Concept of Contracting

In the dictionary, a contractor is synonymous with a moghate'eh-kar, and in the expressions of jurists and laws, these two words have been used interchangeably a lot; the word moghate'eh is Arabic and the infinitive of the mofa'aleh conjugation form of ghata'a yoghate'o and from the root ghata'a meaning to cut and create distance (Mostafavi, 1360, 9: 325) and it has also been used in the sense of commitment and guarantee (Jafari Langroudi, 1381 AH, 5: 3462, No. 13199), but some have considered this usage metaphorical. (Wasti, Zubaidi, Hanafi, 1414, 11: 388) In any case, one of the common meanings of moghate'eh is commitment and guarantee, and considering this meaning, the contractor is called moghate' in Arabic. (Rajabi Nosh abadi, 1386: 114)

The jurisprudential use of the word moghate'eh is exactly the same meaning of commitment and guarantee. For example, in the early days of Islam, the word moghate'eh was used for the tax on Kharaj lands; that is, those who took Kharaj lands, by contract (deed, commitment or acceptance) in return for the government, were committed to pay a certain amount annually to the government, which was called moghate'eh-ye arazi-ye kharajiyeh, and also the tyrannical rulers called the tax that they imposed unjustly on the people moghate'eh.

[2] Article 185 of the Civil Code: A binding contract is one in which neither party to the transaction has the right to terminate it except in specific cases.

In narrations, too, moghate'eh has been used a lot in the sense of commitment and guarantee. For example, in a narration from Muhammad ibn Muslim, it is narrated that he said: I asked him about a man who gives food to the miller and makes a deal with him that he gives his companion twelve flour for every ten pounds? He said: No... (Kulaini, 1407, 5: 189) And it is also narrated from Ubaid ibn Zurara: I asked Abu Abdullah (peace be upon him) about a man who has a hundred dinars with the money changer and the money changer has a thousand dirhams with him, so he makes a deal with him on it? He said: There is no problem with it. (Tusi, 1407, 7: 103) Mr. Jafari Langroudi, after presenting these two narrations, writes: From the combination of these two hadiths, which have used moghate'eh and zaman - guarantee in the same subject, it is clear that the meaning of moghate'eh is the same as guarantee and commitment (Jafari Langroudi, 1388, 5: 167).

In legal terminology, too, moghate'eh is used in the sense of bilateral commitment and guarantee. Therefore, contracting is a commitment to a known action in a known time in exchange for a known consideration. This contract obliges the aforementioned obligor to deliver the result of the action and obliges the obligee to give the consideration in return (Jafari Langroudi, 1382 AH: p. 527).

The Civil Code and the Labor Law have not defined contracting, but in Article 12 of the "Income Tax Law" approved on 5/10/1332 AH, the contractor is defined as: "A contractor is referred to persons who, within the contract or agreement or the minutes of the tender, undertake to perform any action or sell a commodity with the conditions contained in the contract or agreement or the minutes of the tender, in exchange for wages or price and for a specified period."

In short; a contract moghate'eh is an agreement that two or more people make to do a job or have a commitment to each other or to someone, and a contractor moghate'eh-kar is a person or company that undertakes to perform a task, especially construction and installation matters, in accordance with a contract, and contracting is the contractor's action (Anvari, 1381, 2: 1532).

2-2. Characteristics of Contracting

Contracting, like an employment contract, has characteristics that distinguish it from other contracts. Of course, it should be known that there are generally common characteristics in all contracts, such as the rule of Article 190 of the Civil Code, which states the conditions for the validity of transactions. However, transactions also have unique characteristics that distinguish them from other contracts and obligations. The characteristics of contracting, according to the definition of a contractor, are as follows:

1) Consensual

Since contracting is a branch of civil law, and civil law is based on the principle of respecting the freedom of will of individuals (Ranjbari, 1385: 30), it can be said that the requirement of the rule of will of the two parties to the contract is the consensual nature of contracting, and observing a specific form and formalities in it is not necessary. However, in some cases, the contractor is required to comply with conditions that have been established by the legislator, and in such cases, the will of the contractor plays no role. For example, Article 13 of the Labor Law states: "In cases where the work is carried out through contracting, the client is obliged to conclude his contract with the contractor in such a way that the contractor undertakes to apply all the provisions of this law to his employees." And in Note 1 of the same article, the executive guarantee of this condition is also stated and it is stated: "The workers' claims are among the preferred debts, and the employers are obliged to pay the contractors' debts to the workers equal to the opinion of the legal authorities from the contractor's claims, including the guarantee of good performance."

2) Onerous and Binding

In contracting, the opposition of two obligations is raised; because just as the contractor is committed to performing an action or delivering something at the appointed time to the client, in return, the client is also committed to paying the price and wage of the contractor's work according to the pre-determined agreement and contract. Therefore, in cases where there is no bilateral commitment that can be considered as a substitute for each other, there will be no contracting. Some, considering the onerous nature of contracting, have thought that contracting is not a lease; because a lease is ownership, while contracting is a bilateral commitment, not ownership. (Jafari Langroudi, 1380, 2: 253) But perhaps it can be said: In the case where the lease is related to the work of the hired person or to the benefit of the general property, its onerous nature is clearer. (Mohaghegh Damad, 1388, 2: 10)

3) Necessary

Contracting is a necessary contract that is based on the parties or parties to the transaction, and neither of the parties to the contract can unilaterally terminate it, but the termination of the contract depends on mutual consent or the exercise of the right of option.

4) Independence of the Contractor's Action

The action of the agent in contracting is free from the restriction of subordination (between the agent and his party), meaning that the agent has a kind of freedom in the quality of the execution of his commitment and does not take permission from the orderer. For example, in terms of choosing the time of execution of his commitment, he acts like a mowassa' - flexible obligation, meaning that within the time specified in the contracting contract, it can be moved: he can choose the beginning of the time or the middle of the time or the end of the time to execute his commitment. (Jafari Langroudi, 1382: 527)

3. Criteria for Distinguishing an Employment Contract from a Contracting Agreement

There is no doubt that an employment contract differs from a contracting agreement, and each is responsible for explaining a part of the lease of persons. However, different and varied opinions have been expressed as to what criteria can be used to distinguish between these two legal institutions. Below are some of these theories:

3-1. How Wages Are Paid

According to this view, in an employment contract, wages are calculated based on the number of working hours, while in contracting, working hours are not important, but the completion of all the work undertaken is important; that is, in an employment contract, the employer considers the worker's wage based on the working hours, and the worker becomes the owner of the wage for the amount of hours he has worked, and the volume of work is no longer considered. For example, if a tailor is hired for a week to sew for someone, or a carpenter is hired for a day to make doors and windows for the employer, he will only be entitled to wages for the hours and days he has worked, and he cannot claim that he should be paid for the clothes he has sewn or the doors and windows he has made.

But in contracting, the goal is to complete the work undertaken, and it does not matter whether it is done in one hour or in several hours. For example, if a tailor undertakes by a contracting agreement to sew a dress for the employer within a week, or a carpenter undertakes to make six doors and eight windows for someone within a month, it does not matter whether he sews this dress in one day or in four days, and also whether he finishes the doors and windows in one week or in two weeks, he will be entitled to the entire wage that he has contracted with the employer, and the employer has no right to say that since less time has been spent, you should receive less pay. Therefore, the quality of payment and determination of wages is one of the criteria for the difference between an employment contract and a

contracting agreement, in which quantity plays a fundamental role in the employment contract and quality in the contracting agreement.

The above criterion has not been accepted by some, and in rejecting it, it has been said: Although most workers work as daily wage earners and salary earners in workshops, and contractors receive wages in proportion to the work they have done and do not count working hours, it is difficult to choose this factor as a criterion for distinguishing the nature of the contract; because the purpose of labor laws is to protect workers against employers, and it is not clear why someone who receives wages in proportion to the work should not benefit from this protection (Katouzian, 1384: 562).

3-2. Contracting Party in Contracting and Employment Contract

Another difference that has been stated between contracting and the employment contract is that, in society, a group of people, by employing a group or person as a worker, want to reach capital from the result of their labor and benefit from their work, and in such cases where a person puts his labor force at the disposal of professional employers, the contract is subject to labor laws; (Katouzian, 1384: 562) that is, if the contracting party is a professional employer, the contract will be an employment contract. For example, if a carpenter contracts with a door and window making shop to engage in making doors and windows for him, and in return for the work he does - it does not matter whether it is in the form of a time calculation such as daily, monthly or annual, or in the form of a result of the work such as the number of doors and windows - he receives a wage. Or a doctor who contracts with a hospital to treat patients in that hospital, and in return for the service hours (daily, monthly or annually) or the number of patients he examines or operates on, he receives a wage. Such contracts are considered employment contracts.

But in cases where a person proposes to provide a service to the public at the community level and, based on this proposal, undertakes to do the work, the contract will be a contracting agreement. (Katouzian, 1384: 563) For example, if a doctor contracts with a patient or those who are responsible for treating the patient, according to which he undertakes to treat and improve the patient and in return for this action reaches a specific and determined wage, or a carpenter who contracts with a customer to build several doors and several windows for his house, and in return for the service hours (daily, monthly or annually) or the number of doors and windows, he becomes the owner of the wage, such a contract is a contracting agreement and is not covered by labor laws.

The difference between this criterion and the first criterion is that, in the first, the criterion is the method of payment and determination of wages; that is, if it is in the form of a specific result of an action, it is a contracting agreement, and if it is calculated hourly, it is considered an employment contract, but in the second, the important thing is the contracting party; that is, if the contracting party is a professional employer, it is an employment contract, and if it is the general public, it is considered a contracting agreement.

The second criterion has also been criticized by some jurists with the statement that, although this criterion seems to be compatible with the social purpose of labor laws, it is not clear and sufficient from a legal point of view and cannot reveal the legal nature of the employment contract; because sometimes we encounter contracts that are undoubtedly contracting in the eyes of the public, and from a social point of view, there is no need for the hired person to be protected, but based on this criterion, it must be an employment contract. For example, if the owner of a factory concludes a contract with a contractor who himself employs numerous workers to create or repair the electrical installations of the factory, although neither the contractor is under his economic influence nor the owner of the work supervises the details and how the work is carried out, the relationship between the two becomes subject to labor laws (Katouzian, 1384: 563, quoting Planiol and Ripert and Rouast, Practical Treatise of French Civil Law, 11, No. 771).

3-3. Subordination of the Worker in the Employment Contract and Independence of the Worker in Contracting

Another criterion that is almost agreed upon by all jurists is that the worker works under the employer's instructions and for him, and is forced to perform his duties according to the instructions that the employer gives and as he wishes (Katouzian, 1384: 563). In other words, the agent's action is bound by the restriction of subordination, meaning that the agent works under the supervision of the person paying the wage and has absolutely no freedom in choosing how to act and when to act. (Jafari Langroudi, 1380, 2: 255, No. 406) For example, someone who hires a worker to work in building a house is forced to act as the employer wants, for example, first build the wall, then put the roof, or first put the roof and then start building the wall, and also start the work from the beginning of the week or from the end of the week, etc. But the contractor is free in the way of performing the service that he has undertaken. The employer determines the result he wants, and the contractor also tries to achieve the same result, but he is free in drawing the plan to achieve the desired result of the employer and organizes his activities as he wishes. (Katouzian, 1384: 563).

Conclusion

From the foregoing, several points can be extracted, which, as benefits and outcomes of distinguishing an employment contract from a contracting agreement, are presented below in a cursory manner:

1. The employment contract is subject to special labor laws, while civil law governs various types of contracting agreements.

2. Since the worker works under the employer's instructions and supervision and is subordinate and obedient, labor laws provide special protection for the worker: working hours, the minimum wage, worker's leave, and termination of the employment contract, dismissal and resignation of the worker are subject to rules that laws or collective agreements have established, and the rule of will has no way in it. But in contracting, the will of the parties is governing, and labor laws play no role.

3. The employer is responsible for accidents that occur during work and must insure the workers and bear a share of the social security costs. However, in the case of contracting, since the hired person works for himself and has relative independence in this way, the relationship between him and the employer is basically subject to the lease contract.

4. The employer is responsible for compensating the damage caused by his administrative staff or workers during or due to work, unless it is proven that he has taken all the precautions that the circumstances of the case required, or if he had taken those precautions, it would not have been possible to prevent the damage from occurring (Article 12 of Civil Liability). The legislator, based on the authority and supervision that the employer has over the worker and the method of production, has presumed negligence for him, while such a presumption does not exist for the employer in contracting. The contractor himself is responsible for the damages that he causes to others due to negligence.

5. The contractor's being attributed to some professional titles is possible, while the worker cannot be attributed to them. For example, the contractor may be a merchant, while the wage-earning worker can in no way have such a description.

6. In the employment contract, the hired person is committed to placing his labor force at the disposal of the employer, while the contractor works under his own responsibility and will. Therefore, if

an accident makes the work impossible, the worker can receive the wage for the work for which he was hired, but if the goods that are the subject of his work are destroyed by an accident, the loss of the property he has provided is also with him. (Katouzian, 1384: 565, No. 402)

Note

Whenever the work that the hired person undertakes is a public service (such as carrying passengers by taxi or airplane) that public authorities have granted permission or privilege to the hired person, the amount of wages and their duties and responsibilities towards each other are determined by government regulations. The contract with the passenger has a private aspect, but it is like an employment contract whose conditions are limited to collective labor agreements. For this reason, some have said that the conditions that the government imposes in the contract of permission or granting a monopoly to the implementers of these services for the benefit of consumers are a condition for the benefit of a third party. However, it should be noted that the consumer does not directly and freely benefit from this condition. His use is subject to concluding a contract and paying a wage to the privilege holder, and the nature of the limitations he has does not correspond to the condition for the benefit of a third party. Therefore, it should be said that what happens between the government and the authorized institution or privilege holder is a collective contract in which the government plays the role of the representative of the tenants (Katouzian, 1384: 566, No. 403, quoting: Boudry la Cantinerie and Val, Lease, 2, No. 2054 - Planiol and Ripert, Vol. 11, by Rouast, No. 913).

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