



RULES OF SILENCE IN ELECTRONIC TRANSACTIONS-A COMPARATIVE STUDY

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Article history:		Abstract:
Received:	10 th February 2025	<p>The rules concerning silence are governed by two conflicting principles. The first considers silence as a purely passive stance, the opposite of acceptance, and not an expression of intent, essentially equating it to non-existence. This is reflected in the rule "Silence does not imply speech." This issue is contentious in both positive law and Islamic law, which views silence as a neutral stance that does not indicate anything. Therefore, silence is never considered an offer but may be regarded as acceptance in certain cases.</p> <p>The second rule considers silence as an indication of consent, directly contradicting the first. Silence, in this context, expresses acceptance, as articulated in Article (81), paragraph (1) of the Iraqi Civil Code: "Silence in a situation requiring a statement is considered as acceptance." Thus, the interpretation of silence depends on the context. In some cases, the first principle applies, while in others, the second is more appropriate, such as in situations involving silent acquiescence or silent agreement.</p> <p>It is important to note that the issue of silence is inherently connected to acceptance, and it is not applicable when discussing offers. An offer requires a clear, positive expression indicating key aspects of a legal action or proposed transaction, regardless of whether the offer is made through traditional or electronic means. The question raised in this research is whether silence can exist in electronic transactions in the same way as in traditional dealings, and this is addressed through the study.</p>
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INTRODUCTION:

In order to form any legal act, it is essential to express one's will, which refers to demonstrating the intention of the individual and conveying it to others. Therefore, the expression of will is the procedure through which a person informs others of the decision they have made. This expression can be explicit, implicit, or even silent, but it must communicate the intention to accept an offer, thus completing the legal act.

Due to technological advancements, many legal acts are now conducted electronically, meaning that offers and acceptances are made through electronic means. This raises the need to define cases where electronic silence does not produce any legal effect, as in the case of mere silence, and the instances where electronic silence is considered acceptance, as in the case of "silence by behavior," where silence has legal consequences. The same applies to "described silence," and the question arises whether these forms of silence exist in electronic transactions.

It is also important to note that silence is considered a form of acceptance in specific cases, as outlined in Article (81) of the Iraqi Civil Code. The article stipulates that silence constitutes acceptance when there has been prior dealings between the contracting parties, when the offer provides a clear benefit to the person to whom it is addressed, and when the goods have been received by the buyer. This type of silence is referred to as "silence by behavior." The same article also describes another form of silence, referred to as "described silence," which occurs when a legal rule—whether derived from legislation, custom, or agreement—requires a person to speak or express their will. In such cases, silence is considered acceptance: "Silence in a situation requiring a statement is considered acceptance"

Research Problem:

Silence represents a passive stance, a concealment and suppression of what a person holds within themselves. This is reflected in Islamic law, which states, "Silence does not imply speech." Therefore, the research problem can be summarized in the following questions:

1. Can silence be considered acceptance despite representing a passive stance that does not indicate anything?
2. When does silence serve as evidence of consent and acceptance?
3. How is silence treated in electronic transactions?

4. What are the forms of electronic silence, and what are the legal effects resulting from them?

Importance of the Research

The importance of this research lies in examining the stance of comparative legislations regarding different forms of silence, such as when silence is merely silence, silence by behavior, or described silence. The research explores the legal effects of each form of silence and identifies the cases in which silence can be considered as acceptance in a legal action. Additionally, the research delves into the forms of silence in electronic transactions, clarifying when silence remains mere silence without producing any legal effect, and when it becomes acceptance—specifically in cases of "silence by behavior," which are special instances of acceptance, and "described silence," whether it constitutes acceptance or rejection.

Research Methodology:

The study adopts an analytical approach to analyze the legal texts related to silence and its various forms as prescribed by comparative legislations. It examines how silence can be considered an expression of will, whether in traditional legal actions or remote (electronic) legal transactions. The research also aims to adapt the forms of electronic silence to their corresponding forms in traditional silence. Additionally, the study employs a comparative methodology to compare the civil laws of Iraq, Egypt, and France, particularly after the amendments to the theory of obligations in the French Civil Code.

Research Plan:

The research is divided into two main sections. The first section is dedicated to the concept of silence and is divided into two subsections. The first subsection focuses on the definition of silence, while the second subsection addresses the forms of silence.

The second section is dedicated to the legal effects of silence, divided into two subsections. The first subsection discusses silence as an indication of rejection, while the second subsection explores silence as an indication of acceptance.

First Section:

The Concept of Silence

Silence is a passive stance, and scholars of Islamic law have expressed this by stating, Silence does not imply speech. Therefore, silence is not suitable for expressing one's will, as it signifies non-expression and does not indicate either acceptance or rejection. This distinguishes it from an implicit expression of will, which can be either an offer or acceptance. Despite its passive nature, silence can be used as a means to express will, but it is limited to acceptance and has no effect in the case of an offer. An offer must be clear, specific, and include the essential elements of a legal act⁽¹⁾ Some argue that silence plays a role in a form of offer, as is the case with the display of goods in stores or showrooms. This constitutes an offer, as the buyer knows that they have not received the exact item displayed (the model). This offer, which is not explicitly or implicitly expressed, is understood by the buyer, and some consider this form of silence to have significance or meaning in the context of the transaction⁽²⁾

Therefore, we will define silence in the first subsection and explain the forms of silence in the second subsection as follows:

- **First Subsection: Definition of Silence and Its Legal Nature**

- **Second Subsection: Forms of Silence**

First Subsection: Definition of Silence and Its Legal Nature

A legal act is created through the expression of will, which can be explicit, implicit, or, in another form, represented by silence. This is agreed upon by comparative laws and legal scholars. Therefore, we divide this subsection into two parts: the first part will be dedicated to defining silence, and the second part will focus on the legal nature of silence, as follows:

- **First Part: Definition of Silence**

- **Second Part: The Legal Nature of Silence**

First Part:

Definition of Silence

Silence, in its linguistic sense, refers to deliberately refraining from speaking. It is the opposite of speech, meaning quietness, stillness, and the absence of verbal expression. This definition aligns with its legal meaning, where silence is the opposite of expressing one's will, which involves revealing and manifesting one's intent. Thus, silence represents concealing and hiding what a person holds inside regarding their intention. This is consistent with the civil law doctrine and what comparative legislations state: "Silence does not imply speech," because silence is a lack of expression and

¹) Abd al-Fattah Abd al-Baqi, Sources of Obligation, Theory of Contract and Unilateral Will, No Publisher, 1983, p. 84.

²) «l'exemple le plus classique est celui du magasin qui aménage une vitrine dans laquelle un mannequin porte un costume dont le prix est indiqué par ailleurs : il y a bien ici une offre de vendre ce costume, mais avec cette réserve tacite que le client ne saurait exiger celui-là même qui est présenté, mais un autre, en tous points identiques à celui-là, conservé dans les rayons. >> Boyer. O, « Le silence et le contrat: approche comparée », Thèse présentée en vue de l'obtention de la Maîtrise en droit, Université McGill, Montréal, Septembre 1991, p.9

cannot be interpreted as an expression of will⁽³⁾"Unless accompanied by circumstances or conditions that make it indicate a specific meaning, in which case it becomes an exception to the general principle.

The general principle is that silence does not play a role in creating legal acts. However, comparative legislations have considered silence as acceptance in exceptional cases, because acceptance is merely an expression of will, and the will is the translation of intent, with expression being the evidence of that intent. In the absence of specific conditions or forms, anything that indicates the presence of a valid will can serve as its expression.

Although expression of will is necessary, legal acts rely on the purposes and meanings rather than the words and forms used. This is because expression is what reveals the will to the external world. Consequently, two contradictory rules govern silence: "Silence does not imply speech" and "Silence is a sign of consent." Therefore, the original position is that silence signifies nothing, with the exception being when silence is interpreted as acceptance due to specific circumstances.

In electronic transactions, silence occurs when there is no explicit and clear response from one party to an offer made by the other party. The question that arises is whether the other party has accepted the offer or not. Electronic transactions are conducted using specific means, such as email and data exchange⁽⁴⁾.

Silence in electronic transactions represents a challenge because it does not provide the same clarity as traditional transactions. Silence in electronic transactions can occur for various reasons, including, but not limited to, the failure of messages or electronic data to reach their intended recipients due to technical errors, or the message being received but not read by the recipient, or the recipient lacking the intention to accept. Therefore, electronic silence is not considered acceptance unless there is an indication of an intention to accept, or unless a commercial offer governs the transaction, or there is a prior agreement between the parties involved in the electronic transaction that considers silence as acceptance⁽⁵⁾Therefore, it is essential to study the forms of silence in both traditional and electronic transactions, and this will be addressed in the second subsection.

Second Part: The Legal Nature of Silence

There has been significant doctrinal disagreement regarding the legal nature of silence. Some scholars have considered silence as an implicit expression of will, because the surrounding circumstances can make it a sign of the intent the person seeks. However, implicit expression consists of positive behavior that, by itself, does not reveal the intended will. It can be interpreted, but there is no assumption of that will's existence. The means by which the will is manifested were not originally intended to disclose it, meaning the indication of will is indirect. It can be inferred based on the circumstances that point to its existence. Therefore, silence cannot be considered an implicit expression of will⁽⁶⁾.

Referring to the definition of silence, it is defined as the absence of speech, stillness, and lack of verbal expression. It represents the concealment and suppression of what a person holds within themselves, meaning the absence of any conduct indicating a specific intent. Some legal scholars have argued that silence is not an implicit expression but rather a presumed expression of a negative nature, making it of a lower rank than implicit expression of will. Silence, being a mere absence, does not constitute acceptance unless accompanied by a circumstance or context that supports the presumption of a particular intent. In contrast, implicit expression is considered a positive act from which intent can be inferred, even if it does not directly indicate it, and it may serve as both an offer and an acceptance⁽⁷⁾.

Another opinion, which is the more prevalent one, holds that silence is an exceptional case and does not constitute a method of expressing will. It falls outside the scope of both explicit and implicit expressions of intent. This view aligns with French jurisprudence, which agrees that the principle regarding silence is that it does not constitute acceptance due to its negative nature, as it is impossible to ascertain the full intent of the silent party. However, silence may be permitted in a manner that allows for exceptions, and such exceptions are confirmed by circumstantial evidence⁽⁸⁾ As for comparative laws, they have unanimously agreed that silence, in principle, does not represent anything and does not impose any obligation on a person merely for failing to respond, except in cases explicitly stipulated by law.

Second Requirement

Forms of Silence

³) Explanatory Note to the Egyptian Civil Code: "Silence alone is not considered as an expression or manifestation of will," The Preparatory Works, Vol. 2, p. 56.

⁴) Lafitah Hamel Al-Ajili, *Electronic Dispute Resolution*, Al-Mu'assasah Al-Hadithah for Publishing, 1st Edition, Beirut, 2024, p. 349.

⁵) Ahmed Sharaf El-Din, *Offer and Acceptance in Electronic Contracting and Its Dispute Resolution*, Paper Presented at the Conference on Legal and Security Aspects of Electronic Transactions, Dubai, 2003, p. 17.

⁶) Abdulrahman Jumaa, *The Effect of Silence in Expressing Will*, *Journal of Sharia and Law Sciences*, University of Jordan, Vol. 36, Issue 10, 2009, p. 232.

⁷) Abdel Fattah Abdel Baki, *Op. Cit.*, p. 81.

⁸) Kazem Hammadi Youssef, *Implicit Will and Expressive Silence*, *Middle East Research Journal*, Issue 55, Vol. 2, 2020, p. 67.

In order to clarify the legal effect of silence, whether in traditional or electronic transactions, it is essential to identify its forms. Referring to the provisions of the Iraqi legislator in Article (81) of the Civil Code, it states: '1- Silence cannot be attributed as a statement, but silence in situations where an explicit response is required shall be considered acceptance. 2- Silence is particularly regarded as acceptance if there is a prior course of dealing between the contracting parties and the offer is related to this dealing, or if the offer is evidently beneficial to the offeree. Similarly, the buyer's silence after receiving the goods purchased constitutes acceptance of the terms stated in the price list.' A corresponding provision can be found in Article (98) of the Egyptian Civil Code⁽⁹⁾ Article 1120 of the French Civil Code states: 'Silence does not constitute acceptance unless otherwise provided by law, custom, business relations, or circumstances⁽¹⁰⁾.

From this, it can be concluded that silence takes three forms. The first is pure silence, which the legislator expressed by stating, 'Silence cannot be attributed as a statement.' The second form is qualified silence, which is described as 'Silence in situations where an explicit response is required shall be considered acceptance.' The third form is implicit silence, which is explicitly provided for in certain legislations.

These forms will be examined sequentially as follows:

- Section One: Pure Silence.
- Section Two: Qualified Silence.
- Section Three: Implicit Silence.

Section One: Pure Silence

Silence is considered pure when a person does not express any words, gestures, writings, or actions indicating an intention to accept. In other words, it is a purely negative state that signifies nothing. Therefore, as a general rule, pure silence is not sufficient to express intent, whether for acceptance or rejection, as it lacks a clear indication of a specific will. Legal scholars unanimously agree that the expression of intent does not produce legal effects unless it is manifested externally through various possible means of expression⁽¹¹⁾The jurist Dinier defined it as 'a behavior devoid of any indication, an absence and obscurity from which no sign of acceptance can be discerned⁽¹²⁾ Professor Al-Sanhouri believes that 'pure silence is a negative state—it is nothingness, and it is more logical for nothingness to indicate rejection rather than acceptance⁽¹³⁾.

The expression of intent is a positive act, whereas pure silence is merely a purely negative stance. Thus, it also differs from implicit expression, which is based on a positive action taken by the contracting party, even if it does not directly indicate their intent.

Moreover, pure silence is subject to various interpretations. The person may be indifferent to the offer directed at them, or they may not have reached a final or decisive decision regarding the contract. These interpretations represent personal reasons related to the contracting party, which cannot be known by others.

Pure silence in electronic transactions occurs when an email or text message containing relevant data fails to reach the other party in the legal transaction due to technical errors on the sender's part. It can also be considered pure silence when an email reaches the recipient's inbox but remains unread due to indifference to the offer or a lack of intent to accept. Therefore, pure silence does not constitute any expression of intent, as it is mere nonexistence, and nonexistence can only produce nonexistence.

Section Two: Qualified Silence

Silence is considered qualified when a legal rule, custom, or agreement requires a person to speak or explicitly express their intent if they do not wish to contract. In this case, if the person remains silent, their silence is deemed acceptance, as the legal rule or custom favors the presumption of acceptance. This type of silence is referred to as qualified silence. Qualified silence applies in both traditional and electronic transactions. An example of this is a sale subject to trial, where the buyer's silence after being given the opportunity to test the item is considered acceptance, based on the provisions

⁹) Article (98) of the Egyptian Civil Code states: 1- If the nature of the transaction, commercial customs, or other circumstances indicate that the offeror did not expect an explicit declaration of acceptance, the contract shall be deemed concluded if the offer is not rejected within a reasonable time. 2- Silence shall be considered acceptance if there is a prior course of dealing between the contracting parties and the offer is related to such dealings, or if the offer is solely for the benefit of the offeree.

¹⁰) Art 1120 « Le silence ne vaut pas acceptation, à moins qu'il n'en résulte autrement de la loi, des usages, des relations d'affaires ou de circonstances particulières

¹¹) Barrault (J.), *Essai sur le rôle du silence créateur d'obligation*, thèse précitée; p 63 : Godé (P) Violoné et manifestations tacites. Thèse précitée .p22 , Aubert (J). *Notions et rôles de l'offre de l'acceptation dans formation du contrat* . thèse précitée .

¹²) As cited in Ghada Al-Saghir, *Silence and Contract*, Master's Thesis, Faculty of Law, University of Tunis El Manar, 2012, p. 18.

¹³) Abdel-Razzak Al-Sanhouri, *Al-Wasit fi Sharh Al-Qanun Al-Madani* (The Intermediate Commentary on Civil Law), Theory of Obligation, Dar Ihya Al-Turath Al-Arabi, Beirut, 1949, p. 137.

of Article (524/1) of the Iraqi Civil Code⁽¹⁴⁾In this case, silence is deemed acceptance by virtue of the law once the specified trial period has expired and the buyer has not explicitly declared acceptance or rejection. If the buyer remains silent despite having had the opportunity to test the goods, their silence is considered acceptance.

The law may also consider silence as an indication of rejection, as stipulated in Article (340/2) of the Iraqi Civil Code⁽¹⁵⁾, which regards the silence of the assignee in a debt transfer after the expiration of the specified period as a rejection. Similarly, Article (316) of the Egyptian Civil Code follows the same approach, considering the creditor's silence in a debt transfer as a rejection.

Qualified silence may also be based on customary rules. For example, in property leases, if a tenant does not notify the landlord of their intention not to renew the lease, their silence is considered acceptance of a lease extension. Similarly, the landlord's acceptance of rent payments is deemed acceptance of lease renewal.

Qualified silence can also arise from an agreement. For instance, if two parties enter into an employment contract for a fixed term and agree that it will be renewed unless one party notifies the other of their intention not to renew before the contract expires, their silence is considered acceptance of renewal.

A definition of qualified silence appears in the preparatory works of the Egyptian Civil Code, stating: 'Qualified silence is imposed when the law obliges a party to speak, leaving no room for doubt, as the law itself regulates its provisions⁽¹⁶⁾. As explained in the definition of qualified silence, when a legal rule or custom is associated with an action, silence is then considered acceptance or rejection. In many cases, commercial custom dictates that electronic silence constitutes acceptance.

For example, when a bank sends an electronic message containing an account statement to a customer via email or text message, and the customer, after reviewing the message, remains silent and does not object within the timeframe specified by the bank, this silence is deemed acceptance of the statement sent.

Here, electronic silence is considered acceptance and is classified as qualified silence because it is linked to a commercial custom that assumes a response in case of rejection. Thus, the principle applies that 'silence in a situation requiring a response is considered acceptance.

This aligns with the provisions of paragraph (1) of Article (12) of the 2017 UNCITRAL Model Law on Electronic Commerce, which states: 'In the relationship between the originator of a data message and the recipient, the expression of intent or any other form of expression shall not be denied legal effect, validity, or enforceability solely on the grounds that it is in the form of a data message⁽¹⁷⁾.

It follows that electronically qualified silence is an extension of traditionally qualified silence and has the same effect. That is, when an electronic message from the originator reaches the recipient—whether in the form of an email or a text message—and the recipient does not respond, their silence is considered either acceptance or rejection, depending on the legal rule associated with it or the customary practice governing such legal transactions.

Qualified silence may also be considered rejection, as stipulated in Article (932) of the French Civil Code⁽¹⁸⁾ Article (932) of the French Civil Code states that a donation between living persons is not valid unless it is expressly accepted. In this case, silence is considered rejection, even though the offer benefits the recipient, as the legal transaction is a donation. On the other hand, the French Insurance Code considers an insurance company's failure to reject an electronically sent offer for contract renewal or modification within 10 days of receipt as acceptance. This is stipulated in Article 112-2 of the French Insurance Code⁽¹⁹⁾.

Section Three: Implicit Silence

Qualified silence with accompanying circumstances is silence surrounded by conditions that indicate an intention to accept the offer. It derives its meaning from the surrounding circumstances.

¹⁴) "Article 524/1 of the Iraqi Civil Code states: 'In a sale subject to trial, the buyer has the right to accept or reject the goods, and the seller must allow them to be tested. If the buyer rejects the goods, they must declare their rejection within the agreed-upon period. If no such period is specified, the seller shall determine a reasonable period. If this period expires and the buyer remains silent despite having the opportunity to test the goods, their silence shall be considered acceptance of the sale.'"

¹⁵) Article 340/2 of the Iraqi Civil Code states: 'If the assignor or the debtor notifies the assignee of the transfer and sets a reasonable period for accepting the transfer, and this period expires without the assignee issuing acceptance, their silence shall be considered a rejection of the transfer.

¹⁶) Collection of the Preparatory Works of the Egyptian Civil Code No. 131 of 1948, Volume Two, p. 57.

¹⁷) "A data message is information that is created, sent, received, or stored by electronic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), email, telegram, telex, or paper printouts, as defined in Article 2 of the 2017 UNCITRAL Model Law on Electronic Commerce."

¹⁸) Article 932 « La donation entre vifs n'engagera le donateur, et ne produira aucun effet, que du jour qu'elle aura été acceptée en termes exprès. »

¹⁹) Article L112-2: «< Est considérée comme acceptée la proposition, faite par lettre recommandée ou par envoi recommandé électronique, de prolonger ou de modifier un contrat ou de remettre en vigueur un contrat suspendu, si l'assureur ne refuse pas cette proposition dans les dix jours après qu'elle lui est parvenue. », Code des assurances Français

The explanatory memorandum of the Egyptian Civil Code defines it as 'silence accompanied by circumstances that substitute for expressed intent.'

Article (81) of the Iraqi Civil Code specifies cases where such silence is considered acceptance, including when the offer benefits the recipient, when there is a prior course of dealing between the parties, or when the nature of the transaction or commercial custom deems silence as acceptance.

Article (98) of the Egyptian Civil Code also refers to qualified silence, outlining three exceptional cases in which silence is deemed acceptance. These include situations where the offeror does not expect explicit acceptance, particularly when the nature of the transaction or prevailing commercial custom suggests otherwise—this case overlaps with qualified silence since custom serves as a source of legal rules. Additionally, silence is considered acceptance if there has been prior dealing between the parties⁽²⁰⁾ Additionally, silence is deemed acceptance if the offer exclusively benefits the offeree. Egyptian jurisprudence suggests that these exceptions are provided by way of example rather than limitation⁽²¹⁾ Accordingly, any other circumstances indicating that the offeror did not expect explicit acceptance may also be considered. In such cases, the offeree must promptly reject the offer within a reasonable period; otherwise, their silence will be deemed acceptance.

We find that comparative legal systems provide judges with a flexible criterion for determining the existence of implicit silence. Silence is deemed acceptance when two conditions are met: first, the offeree must be obligated to respond if they intend to reject the offer; second, the offeree must have the ability to respond, meaning they are aware of the offer. If an email or data message from the offeror does not reach the offeree, implicit silence cannot be established. Therefore, when both conditions are met, silence is considered implicit acceptance. This aligns with the Latin maxim: 'He who remains silent when obligated to respond, and when capable of doing so, his silence is deemed consent'⁽²²⁾.

In electronic transactions, we find that the conditions for tacit acceptance can be applied just as they are in traditional transactions, as the only difference lies in the means used. The use of such means does not justify deviating from general legal principles. Additionally, the U.S. Electronic Commerce Act has introduced other exceptional cases where silence is considered acceptance. These include situations where acceptance can be inferred from individuals' actions or behavior, where custom dictates that silence constitutes acceptance, and where there is a prior relationship between the parties⁽²³⁾ This falls within the discretionary power of the judge.

Section Two: The Effect of Silence

The Legal Consequences of Silence

Silence has undeniable legal consequences. It may indicate rejection, representing a purely negative stance, as expressed by the legal and jurisprudential principle: "Silence is not considered as consent." This type is known as absolute silence. On the other hand, silence may signify acceptance, but in such cases, the legal effect does not stem from silence itself but rather from the surrounding circumstances, making it a matter of fact left to the judge's discretion. Additionally, silence can sometimes have criminal implications, such as when a doctor refrains from informing a patient about a contagious disease, though this type of silence falls outside the scope of our study.

Accordingly, we will examine the legal consequences of silence in two sections:

1. Silence as an indication of rejection.
2. Silence as an indication of acceptance.

Silence as an indication of rejection.

The general principle is that silence is considered rejection, unless the surrounding circumstances indicate otherwise. Therefore, some legal scholars argue that silence should not be regarded as acceptance in electronic transactions and

²⁰) Article 98/2 of the Egyptian Civil Code states: 'Silence shall be considered acceptance if there has been prior dealing between the contracting parties and the offer is related to that dealing, or if the offer exclusively benefits the offeree.'

²¹) Helmy Bahgat Badawi, *Principles of Obligations, Theory of Contract*, Nouri Press, Cairo, 1943, p. 87.

²²) Any other circumstances that clearly indicate that the offeror did not expect an explicit acceptance may also be considered. In such cases, if the offeree wishes to refute the presumption that their silence constitutes acceptance, they must promptly reject the offer. This rejection must occur within a reasonable period, i.e., within the necessary timeframe according to the nature of the transaction. If this period elapses without a rejection from the offeree, their silence will be deemed acceptance.

Mohsen Abdel Hamid Al-Bayah, *Sources of Obligation, Voluntary Sources of Obligation*, Dar Al-Nahda, Cairo, 2017, p. 150.

²³) Khaled Mamdouh Ibrahim, "The Formation of Electronic Contracts: A Comparative Study," *Dar Al-Fikr Al-Jami'i*, Alexandria, 2011, p. 345.

that acceptance in such transactions should be explicit. This view stems from the distinctive nature of electronic acceptance, which occurs through digital means, making it different from acceptance in traditional transactions. Additionally, exceptional cases of acceptance cannot be applied in electronic transactions in the same way, due to the modernity of e-commerce and online dealings⁽²⁴⁾.

The nature of electronic transactions and the specificity of the mediums through which the expression of will occurs require distinguishing between these mediums. Silence after receiving an offer via email or text message, as in data exchanges, can have different interpretations. These include the possibility that the message did not arrive due to technical reasons, that the recipient is indifferent to the offer, or that they have not yet made a decision regarding the received offer. All of these represent personal reasons that are not accessible to others.

Therefore, the general principle in comparative laws is that mere silence does not imply any expression of will. If the offeror includes a condition in their offer stating that the offeree's silence signifies acceptance, such a condition does not bind the recipient, who may disregard it. However, setting a deadline can be effective in confirming rejection.

This aligns with Article (2-8/1) of the UNIDROIT Principles of International Commercial Contracts, which states: The time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter, or, if no such date appears, from the date shown on the envelope. If the offeror fixes a time for acceptance by means of instantaneous communication, the time begins to run from the moment the offer reaches the offeree⁽²⁵⁾.

Pure silence that is not accompanied by any positive action does not constitute acceptance. From a legal standpoint, it is well established that a person who receives an offer via electronic means is generally not obligated to reject it. If rejection were mandatory, it would undoubtedly affect the speed of legal transactions. Therefore, silence in this case is considered a rejection. Practically, an obligation cannot be imposed on a silent person; if they do not wish to accept, they must express their intention, or else they would be bound by a contract they did not intend to enter into.

The acknowledgment of this assumption would be problematic in commercial dealings and would impose a restriction on personal freedom. Therefore, pure silence is a passive state that cannot constitute acceptance, whether in traditional or electronic transactions. The exceptions that allow silence to be considered acceptance do not apply in this form of silence.

Silence can indicate rejection, as seen in qualified silence, which represents a middle ground between pure silence and implicit silence. When silence is associated with a legal or customary rule, it may indicate either rejection or acceptance. Silence constitutes rejection if the law or custom dictates that a person's silence is deemed a refusal. For instance, the silence of a creditor (the assignee) in a debt assignment is considered a rejection of the assignment.

This principle is affirmed in Article 340(2) of the Iraqi Civil Code, which states: "If the assignor or the debtor notifies the assignee of the assignment and sets a reasonable deadline for acceptance, and the deadline passes without the assignee issuing acceptance, their silence shall be deemed a rejection of the assignment.

Similarly, Article 316(2) of the Egyptian Civil Code upholds this principle⁽²⁶⁾. Additionally, Article 932 of the French Civil Code states: A donation between living persons is not binding on the donor and has no effect unless it is expressly accepted on the day it is made."

This implies that in the absence of explicit acceptance, the donation is rejected. In such cases, silence is considered rejection because a legal rule establishes that silence signifies refusal.

In legal transactions, one who says nothing does not consent. This principle is applied in suspended contracts when an agent exceeds the limits of their authority. The Iraqi legislator has addressed this practically by allowing the third party contracting with the agent to set a deadline for the principal to accept. If acceptance is not issued by the deadline, it is considered a rejection of the contract, meaning the principal's silence constitutes refusal⁽²⁷⁾. This is stated in Article (944/2) of the Civil Code, which provides that: A suitable period shall be set for the principal to approve the contract; if approval is not given within this period, the contract shall be deemed null.

An example where silence indicates rejection is the sale with a tasting condition. Failure to declare acceptance is considered a rejection. This is established in Article (525) of the Iraqi Civil Code, which states: If an item is sold with a

²⁴) Kawthar Saeed Adnan, Samiha Al-Qiloubi, Protection of the Electronic Consumer, New University House, Alexandria, 2016, p. 444.

²⁵) The Arabic translation of the UNIDROIT Principles of International Commercial Contracts, Rome, 1994, p. 59.

²⁶) Article 316(2) of the Egyptian Civil Code states: If the assignee or the original debtor notifies the creditor of the assignment and sets a reasonable deadline for approval, and the deadline passes without the creditor issuing approval, their silence shall be deemed a rejection of the assignment."

²⁷) Abdul Majid Al-Hakim and others, *Sources of Obligation*, Al-Sanhouri Library, Beirut, 2015, p. 117.

tasting condition, the buyer has the right to accept the sale if they wish, but they must declare this acceptance within the period specified by the agreement or custom. The sale is not concluded until this declaration is made. Thus, the buyer must announce acceptance unless otherwise agreed between the parties. This corresponds to Article (422) of the Egyptian Civil Code, which is identical to the provision in Iraqi law, and Article (1587)⁽²⁸⁾ of the French Civil Code, which also requires a declaration of acceptance in a sale with a tasting condition. Therefore, silence is considered an indication of rejection.

One of the judicial rulings on this matter is Decision No. 486 issued by the Court of Cassation on April 24, 1974. The court ruled that silence, when a statement is required as an exception to the rule, cannot be interpreted as acceptance, and thus, it should not be broadly applied. The case involved the plaintiff lending a shop to the defendant, who then rented it out to a third party. The plaintiff's silence and payment of property tax were considered by the Baghdad Court of Appeal as an indication of acceptance. However, the Court of Cassation had a different opinion and issued a ruling to annul the initial judgment and dismiss the appellant's claim⁽²⁹⁾.

Therefore, silence is considered a complete indication of rejection if it is absolute silence, which aligns with the legal principle "*Silence cannot be attributed as consent.*" This has been affirmed by comparative legislations and is a point of consensus among legal scholars. Additionally, silence can indicate rejection in cases of qualified silence when a legal rule or custom determines that silence constitutes refusal.

THE SECOND REQUIREMENT **Silence as an Indication of Acceptance**

Silence as an Indication of Acceptance

The general rule is that silence has no legal significance. However, the legal principle states that silence can indicate consent or acceptance: "Silence in a situation that requires a response is considered acceptance." Therefore, silence can be regarded as acceptance if it is accompanied by circumstances that imply consent or if a legal or customary rule establishes that silence constitutes acceptance.

In electronic transactions, acceptance takes different forms that directly impact the concept of silence. Examples of acceptance include electronic signatures via email, responding with an "OK" mark, or through electronic chat rooms that closely resemble a contractual meeting. Acceptance can also occur by downloading or installing a software program or electronic product on the recipient's device. Additionally, acceptance can be expressed by clicking once on a confirmation button or double-clicking to confirm agreement.

Therefore, silence has an impact in various forms of electronic acceptance. For example, remaining silent after receiving an email and responding with an (OK) symbol signifies acceptance of the email's content. Legal scholars have established that such actions constitute acceptance, allowing an e-commerce website owner to infer that the other party has accepted the offer.

Similarly, in a chat room, silence after deliberation is considered acceptance. This concept has been recognized by the French legislator in electronic commerce law⁽³⁰⁾, where silence is deemed equivalent to acceptance in specific cases, as outlined below:

- When the parties engage in ongoing business activities, silence may imply acceptance (implicit renewal).
- In business-to-business (B2B) transactions where parties exchange electronic data, this rule does not apply to consumers.
- When the parties belong to a shared professional sector, it is customary for silence to be considered acceptance.
- When the offer is exclusively beneficial to the recipient (such as partial debt relief or due installments)⁽³¹⁾.

In these cases, there is a significant similarity to situations where silence is considered acceptance under implied silence, as stipulated by Iraqi and Egyptian legislators. Additionally, the U.S. Electronic Commerce Law has introduced three exceptional cases where the other party's silence is deemed acceptance: if this can be inferred from the parties' actions, if their words or conduct indicate it, if custom recognizes silence as acceptance, or if there is a prior business relationship between the parties. However, some legal scholars reject these cases outright due to the novelty of electronic contracting and the limited role of custom in such transactions. Nevertheless, electronic transactions have become a defining feature of e-commerce, particularly in international dealings, which led the United Nations Commission on International Trade Law (UNCITRAL) to issue the Model Law on Electronic Commerce⁽³²⁾.

²⁸) ART 1587 "A l'égard du vin, de l'huile, et des autres choses que l'on est dans l'usage de goûter avant d'en faire l'achat, il n'y a point de vente tant que l'acheteur ne les a pas goûtées et agréées. »

²⁹) Judge Lafta Hamel Al-Ajeeli, Encyclopedia of the Federal Court of Cassation Jurisprudence, Vol. 2, Zein Legal Publications, Beirut, 2019, p. 224 and beyond.

³⁰) Mahmoud Abdul Rahim Al-Sharifat, *Consent in Contracting via the Internet*, Dar Al-Hamed for Publishing and Distribution, Amman, 2005, p. 24.

³¹) Bochorberg (L) Internet et commerce électronique éd encyclopédie , DELMAS 1999 P115 ,

³²) The 1996 Model Law on Electronic Commerce is based on the principle of functional equivalence, which ensures parity between written documents on paper and electronic records. Its preamble calls on legislators worldwide to adopt the rules and provisions of this law when enacting national legislation on electronic commerce or transactions. The

Silence constitutes acceptance when it is accompanied by a legal rule that deems silence as acceptance. For instance, in a sale subject to trial, the buyer's silence after testing the item is considered acceptance, as the legal rule obligates the buyer to explicitly express rejection if they do not wish to proceed with the purchase. If the buyer fails to declare their rejection within the agreed-upon or reasonable period based on the nature of the transaction, the law assumes acceptance. This principle is established in Article 524(1) of the Iraqi Civil Code, which mandates that a buyer must announce their refusal if they do not wish to keep the item. If the buyer has the opportunity to test the item but does not express rejection, this indicates that their intent is to remain silent, knowing that such silence constitutes acceptance. Therefore, by choosing not to reject the item when they had the ability to do so, the buyer is deemed to have accepted the sale.

One of the judicial rulings on this matter is the decision issued by the French Court of Cassation (Social Chamber) on February 20, 1958, which stated that the landlord's silence and failure to object to the tenant's subletting for an extended period could be interpreted as acceptance⁽³³⁾ In electronic transactions, receiving the goods and opening their packaging is considered an indication of acceptance. The same applies to customary practices in banking transactions.

When a bank sends a client their account statement, the client must respond with a rejection if they have any objections; otherwise, their silence is deemed acceptance of the statement's contents. The French Court of Cassation ruled on this matter in a 1986 judgment, stating that in banking transactions, a client's silence for more than a month is considered acceptance.

The case facts are summarized as follows: A bank client deposited a large sum of money and later received a notice from the bank regarding a securities purchase transaction, detailing the purchase price and account statement. However, the purchase price exceeded the funds available in her account. The client remained silent for over a month without objecting to or rejecting the transaction or requesting a refund. She later filed a lawsuit against the bank, seeking to annul the purchase, arguing that she had no prior relationship with the bank and lacked sufficient experience in securities trading.

The court ruled that the electronically sent notice from the bank rendered the transaction valid and legal. The court interpreted her silence as acceptance in accordance with commercial customs and the need for swift transactions. It held that the client was required to explicitly object within a reasonable period after receiving the notice, and that delaying a response for more than a month could disrupt banking services and jeopardize the stability of legal positions⁽³⁴⁾.

We find that the ruling issued by the French Court of Cassation is an application of the principle of qualified silence when silence is accompanied by a legal or customary rule indicating that silence may either signify rejection or acceptance. In this case, silence was deemed acceptance based on commercial custom, which considers a client's silence and failure to object or reject the account statement within a reasonable period as acceptance of the statement and the banking transactions conducted.

CONCLUSION:

Silence is nothingness; however, this nothingness can contribute to various legal effects if accompanied by certain circumstances or conditions, making it either acceptance or rejection in contract formation. In the offer stage, jurisprudence unanimously agrees that silence plays no role. With technological advancements and the rise of electronic transactions in e-commerce, acceptance has taken different forms. Silence plays a role in these transactions and can signify either acceptance or rejection. Therefore, we present the key findings and recommendations:

FINDINGS:

1. Most legislations related to electronic transactions do not consider silence as a valid means of expressing intent, particularly in acceptance. Instead, it remains a subjective matter within the discretionary power of the judge.
2. The fundamental rule in all legislations is that silence is nothingness and cannot serve as an expression of an offer, whether in traditional or electronic transactions. An offer cannot be inferred merely from silence.
3. Silence may play a role in legal actions through acceptance if accompanied by circumstances or conditions that render it either acceptance or rejection. It can also be a form of tacit acceptance, as in implied silence. Some legislations have introduced conditions that render silence a form of acceptance in electronic transactions.
4. Certain legislations do not explicitly recognize a specific form of silence, known as "qualified silence," which occurs when silence is linked to a legal or customary rule that deems it either acceptance or rejection, based on the provisions of that rule.

RECOMMENDATIONS:

1. We recommend that Iraqi legislators address the gap in the forms of acceptance stipulated in the Iraqi Civil Code, as it only mentions pure silence through the legal principle "silence is not considered consent" and does not include described silence as a form of acceptance.

UNCITRAL Model Law on Electronic Commerce was issued during the 85th session of the United Nations General Assembly on September 16, 1996.

³³) Referred to in: Abdel Razzaq Faraj, *The Role of Silence in Legal Transactions*, Al-Madani Press, Cairo, 1980, p. 188.

³⁴) Referenced in Rana Mohammed Safi Youssef, previously cited source, p. 1579.

2. It is essential to clearly define the forms of electronic acceptance and specify the circumstances and conditions under which silence may indicate either acceptance or rejection, ensuring that these examples are illustrative rather than exhaustive.

SOURCES

1. Ahmed Sharaf El-Din, Offer and Acceptance in Electronic Contracting and Dispute Resolution, paper presented at the Conference on Legal and Security Aspects of Electronic Transactions, Dubai, 2003.
2. Helmy Bahgat Badawi, Principles of Obligations, Theory of Contract, Nouri Press, Cairo, 1943.
3. Khaled Mamdouh Ibrahim, The Conclusion of Electronic Contracts: A Comparative Study, Dar Al-Fikr Al-Jamei, Alexandria, 2011.
4. Abdel Rahman Jumaa, The Effect of Silence in Expressing Will, Journal of Sharia and Law Sciences, University of Jordan, Vol. 36, Issue 10, 2009.
5. Abdel Razzaq Al-Sanhouri, The Intermediate in the Explanation of Civil Law: Theory of Obligation, Dar Ihya Al-Turath Al-Arabi, Beirut, 1949.
6. Abdel Razzaq Faraj, The Role of Silence in Legal Acts, Al-Madani Press, Cairo, 1980.
7. Abdel Fattah Abdel Baqi, Sources of Obligation, Theory of Contract and Unilateral Will, No Publisher Mentioned.
8. Abdel Majid Al-Hakim et al., Sources of Obligation, Al-Sanhouri Library, Beirut, 2015.
9. Judge Lafta Hamil Al-Ajili, Encyclopedia of the Federal Court of Cassation Jurisprudence, Vol. 2, Zein Legal Publications, Beirut, 2019.
10. Kazem Hammadi Youssef, Implied Will and Silence Expressing It, Middle East Research Journal, Issue 55, Part 2, 2020.
11. Kawthar Saeed Adnan & Samiha Al-Qailoubi, Protection of the Electronic Consumer, New University House, Alexandria, 2016.
12. Lafta Hamil Al-Ajili, Electronic Dispute Resolution, Modern Book Foundation, 1st Edition, Beirut, 2024.
13. Preparatory Works of the Egyptian Civil Code No. 131 of 1948, Part 2.
14. Mohsen Abdel Hamid Al-Bayeh, Sources of Obligation: Voluntary Sources of Obligation, Dar Al-Nahda, Cairo, 2017.
15. Mahmoud Abdel Rahim Al-Sharifat, Consent in Contracting via the Internet, Dar Al-Hamed for Publishing and Distribution, Amman, 2005.
16. Explanatory Memorandum of the Egyptian Civil Code: "Mere silence is not considered an expression or disclosure of will," Preparatory Works, Vol. 2.
17. Referenced in Ghada Al-Saghir, Silence and Contracting, Master's Thesis, Faculty of Law, University of Tunis El Manar, 2012.

FOREIGN REFERENCES:

1. Barrault (J.), Essai sur le rôle du silence créateur d'obligation, thèse précitée;:
2. Godé (P)Violoné et manifestations tacites. Thèse précitée .
3. , Aubert (J). Notions et rôles de l'offre de l'acceptation dans formation du contrat . thèse précitée .
4. Bochurberg (L) Internet et commerce électronique éd encyclopédie , DELMAS 1999,
5. Boyer. O, « Le silence et le contrat: approche comparée », Thèse présentée en vue de l'obtention de la Maitrise en droit, Université McGill, Montréal, Septembre 1991.

LAWS :

1. UNCITRAL Model Law on Electronic Commerce, 1996
2. UNCITRAL Model Law on International Commercial Conciliation, 2002
3. French Commercial Code, 2002
4. French Civil Code and its Amendments, 2016
5. Egyptian Civil Code No. 131 of 1948
6. Iraqi Civil Code No. 40 of 1951
7. Electronic Transactions Law No. 78 of 2012