W. L. Church
Prof of Law, U. of Wisconsin, U.S.A.

Nasser Katouzian
Professor of Private Law, University of Tehran.

LESION CONTRACTS

A Comparative Review

In every society in which individual initiative and pursuit of economic gain are recognized as desirable, there is a difficult problem which will inevitably arise in the law of contracts. This is the treatment of private, otherwise binding, agreements in which one party has secured an excessively advantageous bargain.

The reason such agreements present difficulty is that they bring into conflict two fundamental principles of contract Law: individual freedom to contract (and concomitant responsibility for completed contracts) and mutual fairness and equality. On the one hand, there is great pressure to allow the parties to deal for themselves without restriction or paternalistic protection; on the other, there is an equally great drive for social and economic «equity», a revulsion of extremely unbalanced or «unconscionable» agreements. These two policies are perhaps the most important principles underlying the law of private contracts. Thus, when they are in competition, a very difficult and interesting area of legal analysis is the result.

All societies have had to deal in some manner with lesion contracts, and all have had to acknowledge to some degree the impact of the two competing policies noted above. But within this limit there is a surprising disparity around the World in treatment of lesion contracts. Some societies have accorded dominant emphasis to policies reflecting freedom of contract and individual responsibility. Others have reached much different results, due to increased emphasis on policies reflecting mutuality and «fairness».

This article is an attempt to review the legal status of lesion contracts in four countries: France, Germany, Iran and the United States. It will be seen that each of the four treats lesion contracts differently, but that each also recognizes the importance of this area of contract law. The first section of the article defines the scope of the law of lesion contracts and describes some of the critical policy arguments that have been applied in all four countries. Section II analyzes in detail some of the ramifications of a subjective or objective approach to lesion contracts, as these are projected in the four legal systems. The article is followed by an appendix describing the treatment of lesion contracts in each of the four countries, respectively.

It is to be hoped such a presentation of the law of lesion contracts will serve to examine and explain this small facet of the law in full perspective. By exposing the different policies that are applied by different societies, the authors hope to reveal the relativity of this law, and all laws. The law of lesion contracts differs from one society to the next not because one society may have drafted its laws more expertly than others, but because each society stresses and applies different economic and social policies to the issue. Thus, the study of law ultimately becomes a study of those policies, in this instance a study of fascinatingly diverse policies.

SECTION I

Definition of «Lesion» Contracts and applicable policies

«Lesion» is «the prejudice which a party suffers in a commutative contract (at the time of the formation of the contract) because of the gross disparity between the value of the performance he owes and the value of the performance which he will receive in return.»[1]

Thus, «lesion» is present if the price one is required to pay for the goods being sold is above the fair market value, or when a tenant is required to pay an unreasonably high rent. From the above definition, the following consequences can be deduced for a better understanding of the doctrine of «lesion»:

1. The prejudice suffered by one of the parties to the K, is the difference between the K price and the FMV of the thing sold at

the time of the formation of the K. K agreements are usually induced by the parties expectations of profit making. For example, in the case of K to purchase land, the buyer hopes that his investment will be profitable in the future, expecting increase in the FMV of the land; the seller on the other hand, sells for a price he deems profitable in order to avoid an expected future loss due to decrease in value of real estate.

In the above example, both parties are taking a risk. Their expectations as to profit making might not be honored due to the unassessable market conditions at the time of performance. However, the doctrine of «lesion» is not concerned with possible changes in market conditions at the time of performance. It relates only to the reasonableness of the agreement itself at the time of formation of the K. Thus, the doctrine of «lesion» should not be confused with the theory of «imprevision» because, while the former looks at the reasonableness of the agreement at the time of the formation of the K, the latter affords a remedy for changing market conditions at the time of performance.[2]

2. «Gratuitous» Ks.[3] The doctrine of «lesion» does not apply to cases where the transfer from a donor proceeds from a detached and disinterested generosity. Thus a donor is estopped from claiming that he has suffered a prejudice under the lesion doctrine. The doctrine of «lesion» is further inapplicable to cases where the seller, having knowledge of the MFV of the goods, but in need of money, decides to sell it to buyer at less than FMV. In both of the above examples, the controling policy consideration is «freedom of K», because it does not violate either public interest or social ethics. In the better instance, exterme cases are treated also under the doctrine of duress.

3. Aleatory Ks. The doctrine of «lesion» does not apply to cases where the FMV of the things sold is unascertainable at the time of the formation of the K, because it is contingent on some unknown future event. Thus, in cases of insurance Ks, the total amount of premiums paid, and the future damage award due to loss cannot be assessed at the time of the signing of the insurance policy. Due to this, the insurer is estopped from claiming under the «lesion» doctrine

that what the insured has paid in terms of premiums in relation to what he has recived as a damage award, is grossly inadequate. However, when the amount of premiums are set by commercial custom, and the agreement calls for higher premium payments, the insured can claim recovery under the «lesion» doctrine, because his prejudice relates back to the time when the insurance policy agreement was entered into. In general, there is no common and fixed rule for the application of this doctrine in cases of aletory contracts.

4. The doctrine of «lesion» applies only to cases where there is a «gross disparity» between the K price and the FMV of the thing sold.[4] Most Ks contain some type of disparity between the value of the thing sold and its K price, but only disparity that is regarded as gross that is felt to be so intorable that it is allowed as the basis for the doctrine of «Lesion» and its remedies.

In German and Iranian law, custom dictates whether the difference between the price payed for the goods sold and its actual value is intolerable.[5] Under the French Civil Code, on the other hand, the legislature sets the standard of reasonableness. And in america, this decision is rendered by the courts in a case - by - case basis.

Public policies behind the doctrine of lesion: Legal scholars over the years have been engaged in discussing the effecto of K price versus value dispanity, in mutual Ks. They have been questioning the usefulness of theory of «lesion» in light of social economic ,legal and public policy[6]. The arguments that have been developed can be divided into two groups: These supporting and these opposed to the doctrine.

A. Arguments against the doctrine: Arguments generated in opposition to the upholding of the doctrine can be summerized in five points:

1. Freedom of contract policy: It is clear that the theory of «lesion» conflicts with freedon of contract principle which demand that every person is free to enter into Ks. These who place emphasis in freedom of K policies argue that an agreement was entered into voluntarily, it must be respected by the parties.

They also argue that the contract is the enacted law of parties and between them it has the same power as law. Law must be respected by everybody because it is the product of their ill. So by analogy it should be deduced that contract must be respected by them as a law because they wanted it themselves. Based on this, «lesion» has no effect on the agreement and the parties are free to bargain and bind in another absolutly. In the 19th century an American judge held that «Parties of sufficient mental capacity for management of their own business, have a right to make their own bargains. The owner of a thing has the right to fix the price at which he will part with it, and a buyer's own judgment ought to be his best guide as to what he should give to obtan it...»[7]

2. Slablitiy and reliance in contractual relations: Rescission of a K under the doctrine of «lesion» destroys the necessary reliance and stability which must govern the relationship of the parties. In business, everyone tries to get as much benefit and suffer as little prejudice, in entering into a K agreement as they can. As a result, discrepancy between actual value and K price is the rule rather than the exception. Opponents of the theory of «lesion» hold that, to allow those who suffer some prejudice due to price versus value disparity to rescind the agreement would undercut the reliance element vital for the stability of Ks.[8]

3. Coustruction the Market: During the time the K may be rescinded based on the theory of «lesion», both parties are in a position which limits the likelihood of their disposing of their property. Fearing a possible loss, both parties are reticent to use the property in question, causing an obstacle to increased commerce and financial exchange.

4. Problems of evaluation of promises: Before one can make use of the «lesion» theory one has to assess the value of the promises. Fluctuations in market value due to time and place render this task cumbersome. Merchants may be induced to sell their goods at a lower price than fair market value because in need of money, or beacuse entering into other bargains seems to be more profitable. This makes it very difficult and sometimes impossible for a judge to take into account all the psychological and material factors that influence the

fair market value of goods sold. An American writer described the difficulties that one encounters in attempting to assess the fair market value by saying, «Common sentiment, for instance, demands an equivalent. But what things are equivalent? It is easy to answer this in regard to goods or services that have a standard market value. But how shall we measure things that are dissimilar in nature. Or in a market when monopolistic or other factors preven at fair or just price?»[9]

A famous American writer claims that since value is the principle subject of an agreement, the parties in an attempt to determine the fair market value conscious of the fact that their estimation might be erroneous. As a result, «each party is consciously assuming the risk of error of judgment»,[10] which according to this writer is one of the important consequences of uncertainly of market value, and one of the reasons why mistake of value has no effect on K.

5. Other Remedies Available: Some writers, claim that the theory of «lesion» is not only dangerous but also unnecessary. They argue that even assuming that the law must protect the party who suffers a «lesion», the doctrines of mistake, duress and fraud are flexible enough to effectuate this purpose. They claim that a party to a K agreeing to a lower price than fair market value does so for one of three reasons: 1) mistake as to market value; 2) duress by the other party or 3) fraud by the other party in oredr to dissimulate about the nature of the goods or their fair market value.[11] They claim that as a result the independent theory of «lesion» is not needed, for there are existing legal doctrines capable of application in each of these three areas.

B. Arguments, in favour of the doctrine:

1. Mutuality and Fairness: To sustain the doctrine of «lesion» it is argued that while freedom of K may be accepted as a general principle, it ought not be given effect in every case because another, and in this instance conflicting, function of every government ought to be the maintenance of some degree of economic, fairness and equality. This function of the government requires the protection of the weak against the pewerful. The law should not give

effect to Ks where one party attempts to profit from the ignorance and lack of dicretion of another. Enforcement of such a K is thus argud to be against the public interest and «bonos mores.» The injured party, having the burden of proof as to the prejudice suffered due to the other party's fraud, in most cases is unable to carry the burden of proof unless the law merely assesses the disproportion of the discrepancy between the mutual promises and in this basis affords a remedy to the injured party.

2. Other Doctrines not available: It can be argud that the doctrines of mistake, fraud, and duress are not so broad as to encompass and substitute for the remedy the doctrine of «lesion» affords. For example, in most legal systems, mistake of value is not sufficient cause for recision of K.; taking substantial advantage of another's needs is not considered duress and fraud by a third person, not a party to the K, but inducing the injured party to enter into the K is extremely difficult to prouve and is not an automatic means for recision anyway. Thus, even with doctrines of fraud, mistake and duress, legal systems that do not honor the doctrine of lesion cannot fully protect the innocent victim who enters into a K agreement whereby he is prejudiced due to the discrepancy between the K price and actual value.

3. Practical Difficulties are not Insurmontable: It is contended by supporters of «lesion» that difficulties of assessing the mutuality of the value of the consideration given by the parties to a K are not so great as to overweigh the importance and adoption of the doctrine of «Lesion». Granted that evaluation of all the underlying conditions and circumstances at the time of the formation of the K is difficult, and that Courts will have to engage in such tasks to apply «lesion» yet in most cases custom and commercial practice will set the standard of acceptability simply and easily. Furthermore, as was explained above, the doctrine of »Lesion» is applied only in cases where there is gross disparity between K price an dactual value. In most situations, such gross disparity is evident, an is readily assessable from the facts of a given case.

Section II

Subjective and Objective Theories of lesion Contracts

European legal scholars, in order to explain the doctrine of «lesion», have relied either on the subjective or the objective theory. The subjective theory is based on the doctrine of individualism and «autonomy of will»; the objective theory, on the other hand, is based on such social considerations as public interest and «bonos mores».

Before a thorough study of the two doctrines can be undertaken, it must be mentioned that legislators of different countries, in drafting the code provisions of the doctrine of «lesion» have not exclusively followed either of the two theories. Good examples are the French, German, and Iranian Civil Codes. The French Civil Code, famous for its compliance with the subjective theory, in effect does not follow it exclusively, but takes social issues into consideration. The German Civil Code, famous for its compliance with the objective theory, does not follow it exclusively, but to an extent tries to honor the «autonomy of will». The legislators of Iran inspired by the writings of legal scholars on the subject, and the principles of Islamique law, have drafted a code section that does not really attempt to comply with either of the two above mentioned theories. Irrespective of this, the two theories are usually considered to provide the basis for the doctrine of «lesion»; and thus they serve a useful tool for the introduction of the problem.

According to the advocates of the subjective theory, the basis of the doctrine of «lesion» is lack of consent between the parties to a K, due to mistake of value, fraud or duress. Those opposing the usefulness of the doctrine argue that if the doctrine of «lesion» is to remedy the injury sustained by a party to a K, due to his lack of consent, sufficient remedy can be afforded to the injured party under either fraud, mistake, or duress. Advocates of the subjective theory counter this criticism by asserting that in cases where the injured party cannot sustain the burden of proof, or in cases where he can sustain it and the doctriens of fraud, mistake or duress do not offer a remedy, the doctrine of «Lesion» serves a very important function in protecting him.

Advocates of the objective theory claim that the doctrine of «Lesion» is an independent doctrine. They assert that lack of consent between the parties to a K needs not to be present. The remedy is forthcoming, and renders the K void for the sole reason that there is K price and actual value disparity. In justifying the validity of the rescision, the advocates of the objective theory have followed one of two lines of reasoning; either lack of consideration, or unjust enrichment.[12]

Practical consequences of selecting either the Objective or the Subjective Theories:

The application of either of the two theories results in the following important practical consequences:

1. In accordance with the subjective theory, the doctrine of «lesion» affords a remedy due to lack of consent between the parties to the K. As a result, apart from the obvious disparity between the respective considerations, the injured party has to prove mistake fraud or duress. In accordance with the objective theory the injured party has burden of proof only as to disparity of the consideration.

2. Under the objective theory, the injury occurs at the time of the formation of the K. Under the subjective theory the injury occurs at the time of the parties' declaration of intent.

Differences between the above two theories might seem unimportant at first. This is mainly because in most cases, declaration of intent and formation of K are contemporaneous; but it must be remembered that in many cases of K through correspondence there is a time difference between the declarations of intent and the subsequent formation of the K agreement. This time difference gives way to possible variations in the value of the consideration given and that received, which in turn might result in possible injury to one of the contracting parties.

3. In accordance with the objective theory, the doctrine of «Lesion» is to protect public interest. As a result, the delegation of «lesion» in a K by a harmed party or a third party renders the K absolutely void (nullité abosolue). In acordance with the subjective theory, on the other hand, the doctrine of «lesion» is to protect the reasonable ex-

pectations and intent of the harmed party. As a result, the allegation of «lesion» can be done only by the harmed party, and such allegation renders the K only voidable.

4. It is logical to apply the doctrine of «lesion» for the protection of the reasonable expectations and intent of the parties to the K. But advocates of the subjective theory have restricted its application to such cases only, thus granting the doctrine a restricitive application. Contrary to this, the objective theory, which bases the application of the doctrine of «lesion» on the protection of public interest, grants unrestrictive application of the doctrine, rendering absolute voidance of Ks based on «lesion» a general rule of K law.

The practical effects of legislative action in regard to the two theories:

As it has been mentioned before, the legislators of different countries have not exclusively complied with either of the two theories. On the whole, however, it can be said that the French Civil Code complies more with the subjective theory, the German Civil Code complies more with the objective theory, and finally, the Iranian Civil Code complies with neither, but attempts to bail out the harmed party by, as has been said by some writers, giving effect to the implied agreement of the parties to the K. Thus, the four elements that have been considered by the legislatures, in drafting the code sections of the doctrine of «lesion» have been: a) lack of consent; b) public interest; c) remedy the injury sustained by the harmed party; d) giving effect to the implied agreement.

A. Lack of consent and the «lesion» doctrine - Introduction:

The relationship between the doctrine of «lesion» and lack of consent cannot be denied. In cases where the value of the mutual promises is known, but one of the parties to the K does not mind paying more for the goods being sold than its actual known value there is no lack of consent. Such Ks ought to be enforced since they neither violate individual rights, nor are they against public interest and bonos mores.

As has been mentioned above, the burden of sustaining the proof

for mistake fraud or duress in K agreements is not an easy task, and at times the only element of proof available is the discrepancy between K price and actual value. Having this difficulty as to burden of proof in mind, and wanting to protect the injured parties as much as possible, the legislatures of different countries drafted the code sections on «lesion» in such a manner as to indicate that in case of disparity between considerations, the presumption is that there was lack of consent between the parties to the K, which renders the K void or voidable.

The real purposes intended to be achieved and the legal techniques used by the different legislators have been the same. What gives rise to the subjective and objective theories are differences in views as to whether the doctrine of «lesion» is based on lack of consent, or evidence of mistake fraud or violence, of whether the actual statutory enactment does not depend on proving lack of consent, but is an independent doctrine redering the K void for the mere fact that there is a disparity in the considerations.

Consequently, the German and Iranian Code Sections on «Lesion» provide an immediate remedy to the injured party in case of disparity in considerations. This is not to say that the German and Iranian legislators did not deem it important to honor the intent and protect the welfare of the parties to the K. What it means is that they tried to separate the doctrine of «lesion» from «lack of consent.» Examples are article 418 on the doctrine of «Lesion» in the laws of Iran which holds that «If the harmed party knew the just price, at the time of the formation of the contract, he has no right to dissolve it,» and Article 318 of the German Civil Code which holds that «... profiting from the difficulties, indiscretion or inexperience of another is what violates «bonos mores» and is the basis of the doctrine of «Lesion».

B. Lack of Consent and the French Civil Code:

Pothier, whose treatise on obligations had a great influence on the French Civil Code states that in lesion cases, «... the injured party did not give his consent, for he would not have given what he has given, except for the flase supposition that what he has received in return was of equal value; and he would not have had any disposi-

tion to give had he known that what he received was of inferior value.» (Obligations, No. 33)

In the French Civil Code, Article 1118, which regulates the effect of «lesion» on Ks, is placed under the general title of «Consent». In the case of «lesion,» the K is rescindable, which means that only the injured party can invoke the doctrine and that the K is not «void» but only «voidable».

As a result, in accordance with many of the French legal scholars, exceptional cases,[13] involving lesion, are based on lack of consent.[14] It must be kept in mind that in drafting the Civil Code provisions, the draftsmen did take public interest and freedom of K policies into consideration. For example, Napleon, in defending the provision of civil code with respect to sale of lands, said that the law of rescision is a law of mores, and is a goal to be achieved for the whole French territory.[15] This is the reason why Bigot de Preameneu, has affirmed that «lesion» renders the K rescindable by itself.

Observing the regulations relating to the effect of «Lesion» in partition actions indicates that the French legislature accepted parts of both the objective and the subjective theories. On the one hand, in accordance with Article 890, mere inequality in partition renders the act of partition rescindable, inequality in partition is to be observed at the time of the act of partition and without regard of the **intent of the parties.** In this case, however, the partition is only rescindable — not void. The injured party may renounce his right of rescision and enforce the partition agreement, and the other party, by covering up the injury, can uphold the new partition. As has been noted these rules are based on the subjective rather than the objective theory.[16]

Contrary to the above, the majority of modern legal scholars have tried to separate the doctrine of «lesion» from lack of consent, to treat it as an original and independent doctrine.[17] The French Supreme Court held for the first time, on December 28, 1932, that «Lesion» apart from the surrounding circumstances, causes automatic rescission, and as a result the injured seller of land is not required to carry the burden of proof as to lack of consent and as to lack of having

his intent honored.[18] After this landmark case, the tendency of the French Courts has been to gravitate towards the objective theory.[19] Thus it is fair to state that now the French legal scholars and Courts tend more to follow the objective rather than the subjective theory. This means that in cases where there is a lack of legislative solution, the objective theory is followed. Even writers who believe that «lesion» ought to be based on honoring the intent of the parties to the K, in order to bring together the holdings of the Courts and the subjective theory, claim that an injured party does not have to prove lack of consent because the legislature, for the purpose of the doctrine of «lesion,» holds that lesion is evidence of lack of consent; however, if the injured party can be proven to have consented to the agreement by the other party to the K, in the absence of mistake fraud or duress the K is enforceable.[20]

C. «Bonos mores» (public interest) and the German Civil Code:

According to Article 138 of the German Civil Code, the doctrine of «lesion» is to protect bonos mores. The Article holds that «a juristic act which is contra bonos mores is void. A juristic act is also void whereby a person profiting by the difficulties, indiscretion or inexperience of another, enteres into an agreement whereby what he receives as opposed to what he gives up is greatly disproportional.»

As can be seen from the first sentence in the Article, the legislature, as a general rule, has declared that juristic acts which are contra bonos mores are void. The second sentence however, without reference to decisions holds that obvious disparity between considerations renders the K void if it arises from taking advantage of the indiscretion, difficulties or inexperience of the injured party. Thus, according to article 138, two different conditions have to be met before one can claim the presence of «lesion»:

1. Obvious disparity between the considerations: This means intolerable inequality between mutual promises, inequality that is contrary to the custom of trade. This relates only to the K itself, and obviously it is based on the objective theory. In respect to this, the only difference between the German and the French Civil Codes is that in the former presence of disparity is based on custom and is

assessed by examining the facts of each case, while in the latter, the amount of disparity between considerations needed for granting relief is regulated by a legal standard appicable to all cases.

2. Profiting from the indiscretion, difficulties or inexperience of the injured party: this relates to the relationship of the parties, and their bargaining positions. In order to hold that the K, is contrary to bonos mores, one of the parties to the K has to violate or interfere with the other party's right to K, thus violating freedom of K principle. The question that can be raised is whether or not in such cases the purpose of the legislature is to protect the injured party by honoring his expectations and protecting his freedom to the K, or is to punish the wrongful party.

Some French writers, in answering this question claim that the purpose of Article 138 of the German Civil Code is to protect the injured party, who did not enter into the K agreement on his own free will. Thus the legislature, in giving protection to the injured party's intent, attempts to honor free K policies[21]. However the German Civil Code is based on the subjective theory, which is the reason why Article 138 in the German Civil Code is placed under the general title of «declaration of intent.»

When one reads Article 138 of the German Civil Code one realizes that the above interpretation ought not be given weight to. From reading the article, it becomes evident that the German legislature did not intend to base the doctrine of «lesion» on those cases where the injured party's intent has not been honored, but meant to apply it to all cases where obvious disparity between considerations was present. This holding is contrary to the subjective theory. As has been noted before, lack of consent renders the K voidable or rescindable, while Article 138 on «lesion,» renders the K void because to hold it otherwise would be contrary to bonos mores.

With respect to taking advantage of the difficulties, indiscretions or inexperience of the injured party, a number of writers and German Courts have construed the statute as to stand for the principle that the wrongful party must be restrained. As pointed out before in the introductory section of this paper, honoring the injured party's in-

tent has always been one of the underlying motives behind the enactment of the «lesion» doctrines. However in the case at hand that is not the major motivating force. What the German legislators have done through enacting article 138 of the German Civil code was to honor freedom of K policies by preventing a wrongful party from taking advantage and thus restricting the other party's right to contract as he pleases. In other words; the law directs its attention to the restraint of actions and has not regard «lesion» as an imperfection of intent.[22]

In addition, the German Courts' construction of Article 138 shows a tendency towards the adoption of the objective theory. In compliance with the act of jurisprudence, Part Two of Article 138 seems to be merely one of the applicable forms of Part One. Thus, disparity of considerations is contrary to bonos mores in itself, and as such, even if the injured party cannot prove that the other party took advantage of his difficulties, indiscretions, or inexperience, the Court, in napplying Part One of section 138, is free to hold the K void. This statutory application is based on the famous holding of the German Supreme Court, elected March 13, 1936. The Court said «Contracts involving disparity in considerations might be held to be contrary to bonos mores, in compliance with Part One of Article 138, even if one of the required elements of Part Two of Article 138 are not met»[23].

Of course, German jurispurdence is not completely divorced from all elements of the subective theory. The Supreme Court, has at the same time held that disparity in considerations is not enough to call forth application of Part One of Article 138. It must also be shown that the wrongful party's intent was against the common public sentiment. The Supreme Court, in a later decision, dated May 21, 1957, held that a K where the disproportion between the considerations is obvious is not void as a violation of public morality, unless in addition it can be shown that the wrongful party had a guilty mind, particularly evidenced by his conscious exploitation of the other party's difficulties[24].

The important thing to note, however, is the fact that in applying Part One of Article 133, the injured party invoking the Courts protection for relief is not required to carry the burden of proof with

respect of the subjective element discussed above. Rather, it is the job of the judge hearing the case, to ascertain the state of mind of the wrongful party to the K, which can be done only by taking into account the obvious disparity in consideration.

Thus, German jurisprudence does not only hold that the doctrine of «lesion» is to prevent the occurrence of all agreements that are contrary to bonos mores, without regard to lack of consent or lack of honoring intent, but also in most cases exempts the injured party from having to prove the subjective element. This manner of statutory construction renders the German law consistent with the objective theory.

D. Prejudice suffered by the injured party. The Iranian Civil Code.

There are some similarities between the subjective theory and the Iranian Civil Code provision of the «lesion» doctrine. According to the Code provision, the «lesion» doctrine may be invoked only by the injured party. In absence of such invocation, the K is enforceable, irrespective of the other party, or a third party's claim of unenforceability. Furthermore, the injured party may not have the K rescinded in case the other party to the K can prove that the party claiming injury, knew the actual value of the subject of the K at the time of the agreement.

In accordance with article 418 of the Civil Code, disparity between considerations is the principle element of «lesion». Thus, the injured party, without having to prove faulty intent, may have the K cancelled based on mere disparity between considerations. The doctrine of «lesion» is a general rule of K law. In evaluating the existence of disparity between considerations, it is the market value, at the time of the formation of the K, which is taken into account. Sanctions that are applied to «lesion» Ks are different from the sanctions that are applied to Ks based on fraud, mistake or duress.

The above contradictions might create the suspicion that the Iranian legislature was not too clear about the differences between the objective and the subjective theories. This in fact might be thought to have been the reason why the legislature has made use

of both theories. However, in fact the Iranian legislature was impressed with neither the objective, or the subjective theories as construed by the European legal scholars. As a result, the Iranian Civil Code is based on the Islamic law, particularly the Shia law, and follows the exact same doctrines that were laid down by the famous legal scholars who developed the doctrine in Islamic Law (Figh Imamiyeh).

In Fighh, some lawyers in explaining the power of cancellation in case of «lesion» have talked about lack of consent. They state that the injured party entered into the K agreement with expectations of receiving, in return for his promise, something of equal value. In cases where his expectations were not honored, it was said to be proof of lack of consent on his part to enter into the K agreement under the circumstances. However, having had a substantial object of the agreement the same as intended, except one of the qualities, it was held by these lawyers, that the K should not be held void, but only dissolvable by the injured party, who, based on lack of consent, could cancel the K agreement[25]. In spite of this, it must be observed that even these lawyers did not look at this kind of lack of consent the same way as other cases. They did not consider this lack of consent as being based on faulty intent, or due to fraud, mistake or duress. Besides, due to the basic disagreement among the majority of Islamic lawyers[26], the above explanation never had enough weight, as to inspire the Iranian legislature in enacting the Civil Code.

After extensive arguments, discussions and interpretations of the primitive principles of Islamic law by the jurists, it can be said that at the time the enactment of the first volume of the Iranian Civil Code (1928) was in progress, two theories were being expounded upon by the Islamic lawyers as forming the basis of «lesion» Ks. Thus, it is probable that the Iranian legislature was inspired by either one of the two following theories: 1) The principle of «no harm» 2) Implied stipulation in agreement.

The famous principle of «no harm» (La zarar) means depending on different doctrines that «Islamic law causes no harm,» or that «Law does not enforce harmful juristic acts,» or that «Islamic society does not tolerate unremedied harm.»

The historical origin of the «no harm» principle (La zarar) is a decision rendered by the Prophet for disposing the case in front of him. The case consisted of a dispute between the proprietor of a date palm and the owner of a house on whose land the tree had grown. The owner of the date plam, claiming a property right[27] for the tree, had gone in and out of the house as he pleased. When the facts were presented to the prophet, the prophet suggested numerous compromise solutions of the problem. When the owner of the date palm insisted of upholding his property right, however the Prophet, as judge and law-maker announced that no one in exercising his own rights may inflict harm on ohters; this is because Islamic Law causes no harm (La zarara va la zerara Fel islam). He then disposed of the case by ordering the eradication of the tree.

It is evident that the rule of «no harm» (La zarar) has a restictive function on the scope of other rules. This means that in every case in which applying a primary rule causes an illegitimate harm, the jurists must prevent the execution of the rule because of «no harm» principle (La Zarar). This is the reason why Islamic jurists call the «no harm» rule a secondary rule (Hokmé Sanavee). It is designed to control and eliminate those primary rules of law that violate the «no harm» rule. For example, one of the primary rules of the law of property is that the owner may dispose of his property as he sees fit. However, in case such disposition is exercised by the owner to the detriment of another, the primary rule of «disposing as one sees fit» can no longer be applied.

The applicable rule of law in this case is the secondary rule which holds that the owner may not dispose of his property in such a way as to cause harm to another, and as such should be restrained by the court («no harm» La Zarar). Another example is the general rule of K law, which holds that K agreements bind both parties, and neither is entitled to revoke it. However, here too, in case the K agreement is such as to cause illegitimate and unjust harm to another, the secondary rule, based on the theory of «no harm» (La Zarar) is applied, and the injured party is free to cancel the K.

Understanding the above introductory explanation as to the role of the «no harm» (La zarar) rule, sheds light to the understanding of

the «no harm» rule as it applies to «lesion» Ks. As we know, in «lesion» Ks the injured party suffers unjustifiable harm. However, by applying the secondary rule of «no harm», he acquires a right to cancel the K if he wishes. Affording such protection is the main purpose of applying the secondary rule of law, namely the «no harm» rule, which renders the primary rule of law (K agreements are enforceable) inapplicable. As a result, while the effect of «lesion» Ks is based on a subjective aim, its basis is not faulty intent or lack of consent, as is Europe, but rather the protection of an injured party by prevention of harme to him.

Thus, the vast majority of Islamic jurists considered the rule of «no harm» (La Zarar) to be the basis of the injured party's right to cancel a «lesion» contract[28], and this became the most famous theory respecting «lesion» Ks among the modern Iranian jurists[29].

Assuming the principle of «no harm» as being the basis of «lesion» all the provisions of the Civil Code can be explained, and the basis for remedying the wrong due to its violation can be pointed out. For example, in order to assess whether the injured party suffered a prejudice, disparity in considerations has to be found. At the same time, due to the fact that the prejudice is the direct consequence of the K agreement ,it is logical to assume that such evaluation of the promises has to relate back to the time of the formation of the K. On the other hand, since the purpose of the «no harm» (La Zarar) theory is to afford protection to the injured party, only he has a right to revoke the K, by relying on this secondary rule. As to others, the primary rule of K law, namely that K agreements cannot be revoked, and are enforceable, is to be applied. Furthermore, in case the injured party had actual knowledge of the real value of the consideration at the time of the agreement, he also is held to comply with the primary rule of law, and as such, the enforceability of the K. This is because in cases where the injured party has actual knowledge, he is held to have caused his own harm, and thus the theory of «no harm» does not apply to him.

Respecting the intent of the parties - implied stipulation in agreement.

One of the famous Islamic jurists, Naïny, declared in his teach-

ings, that application of the «no harm» theory, has some inconvenient consequences in regards to the «lesion» doctrine. His views on the subject, are followed by a group of lawyers and his students. The book, expressing Naïny's views in his lecture on the subject was written in two volumes by one of his students. The book is entitled **Moniatot Taleb**. What follows is a summary of Nainy's views, from this book.

In accordance with this doctrine, the right of cancelling a «lesion» K is not based on lack of consent, but is held to be the consequence of respecting the autonomy of will and intent of the parties. Naïny held that parties to a mutual K expect to receive the equivalent in value of what they promise to give. This expectation, as to value of considerations exchanged, forms the basis of their bargain, and in case of silence, equality of considerations is assumed. Agreements under such circumstances along with the assumption of equality of considerations should be deemed to constitute an implied stipulation as to equality of considerations. From this it follows that, in cases where the implied equality of considerations is absent, as evidenced by disparity in consideration, the injured party, being the recipient of the implied stipulation has a right to revoke the K (Vol. I. pp. 57-58).

✕ Upholding of the above doctrine has been approached in three different ways:

1. One line of argument holds that if in fact the right of revocation is based on the theory of «no harm» it is logical to hold that in cases where the harm had been remedied by the other party prior to the injured party's revocation, the injured party's right to revoke fails. But, il is obvious that restoration of the difference between fair market value and K price may not result in a waiver of the right of revocation. (Act 421, Iranian Civil Code).

The above objection to the treatment of «lesion» Ks has been countered by asserting that, since the right of revocation is created at the time of the formation of the K, a subsequent compensation for the harm does not waive the formerly acquired right of revocation. This argument, while logically acceptable, is inconsistent as to

the spirit of law deduced from general principles. This is because the general rule of law, namely that Ks are binding, is the primary rule and is to be applied in all cases, except where due to legislative motive of compensating an injured party for the harm he sustained, the right of revocation as an exception to the general rule is applicable. Thus in cases where the injury has been remedied, subsequent to the creation of the K agreement, is it still valid to claim that right of revocation has not been extinguished, because the injured party's right to revoke came into existence at the time of the K formation?

While it is true that a majority of the Islamic jurists have upheld that the power of revocation remains intact, and the drafters of the Civil Code, influenced by this holding, declared that compensating the injured party for the difference between the fair market value and K price, subsequent to the formation of the K does not extingush the power of revocation, we feel that this holding is inconsistent with the general principles of K law, and is in violation with the stablity of contractual relationships.

2. It has been said before that in cases where the injured party had actual knowledge as to the real value of the considerations, he is barred from claiming right of revocation. Assuming that the right of revocation is based on the implied agreement of the parties, this rule lends itself to easy explanation. This is because in such cases, the assumption that equality of considerations formed the basis of the agreement can no longer be upheld. But, if the right of revocation is based on the principle of «no harm,» the question that arises is «Why should the prejudics suffered by this party remain unremedied,» (the response to this objection is noted above).

3. One may not invoke the principle of «no harm», unless it is evident that the right of revocation is not based on the parties' agreement. This is because enforcing the agreement between the parties is a primary rule of K law, while the principle of «no harm» is a secondary rule, to be invoked only as a last resort.

Selecting one of the two doctrines: Either the principle of «no harm» or the principle of «implied stipulation» is more or less capable of substantiating consequences of «lesion» Ks and the provisions

of the Iranian Civil Code. Nevertheless it, seems to me that the application of the principle of «no harm» is more advisable. This is because, due to the nature of K agreements, whereby the parties enter into them in order to benefit, the parties to the K have a tendency to attempt to take advantage of the other, the result of which is often inequality of considerations. In other cases, one of the parties to the K might be so eager to obtain the object of the K that he pays no attention to the equality of considerations at the time of the agreement. Thus, how can it be claimed that in mutual Ks the agreement is always based on the assumption of equality of considerations? In particular, assuming that the idea of equality of considerations is separately intended by both parties, as a personal motive, it is still difficult to claim that the agreement was in fact based on it, and that as a result, there is an implied stipulation in accordance to the common intent of the parties. This is especially so, since bargaining is based on mutual incentives for legitimate benefit, with both parties normally able to perceive and defend their respective interests.

Apart from the above analytical argument and historical account of the Islamic Law, in view of social interests, social problems created by «lesion» Ks lend more useful results, if based on the social principle of «no harm» rather than the subjective rule of the «autonomy of will.» The principle of «no harm» is very flexible and lends itself to various constructions applicable for remedying numerous social broblems.

Unconscionable Contracts. The U.S. Uniform Commercial Code:

The United States, of course, is not a Civil Law jurisdiction. For the most part, the decision whether to apply objective or subjective standards to lesion contracts remains not with a legislature but with the courts. And the courts have not responded with a clear-cut description of the U.S. position. Indeed, it is possible to argue that for many courts, the doctrine of lesion itself, whatever its basis, is open to considerable question.

However, the issue of a subjective or objective approach to the law of contracts in general has long been disputed in the U.S. There

are adherents of both positions, but in recent years the objective theorists have tended to prevail, on the practical ground that this is the only way to make the law definite and systematic.

Superimposed on this background is the relatively new Uniform Commercial Code, adopted in the last two decades in all the states but one. The Code does not cover all contracts. However, its Article 2 does apply to ordinary contracts relating to the sale of goods. Section 302 of that Article introduces the notion — or at least part of the notion — of lesion contracts to U.S. legislation. Section 302 provides that if a court finds a sales contract to be «unconscionable», it may cancel the entire contract, excise the unconscionable part or re-interpret the unconscionable part to avoid it.

This section does not state on its face whether «unconscionable» is to be defined objectively or subectively. But the comments to it by the draftsmen indicate that it should be applied objectively. The test is stated to be whether, in the light of commercial practices, the contract is excessively «one-sided» as of the time of the making of the contract. Thus it would appear that the section is not based on consent or its absence, but on objectively measured degrees of disparity between consideration offered and received. This is consistent with the over-all trends toward objective theories in American contract law, as noted above, and also with the general purposes of the Uniform Commercial Code.

However, it must be recognized that the final answers concerning the «proper» interpretation will be given by the American courts themselves. In addition, it should be recalled that the notion of a lesion doctrine is to some extent alien to American jurisprudence. Thus, it seems unlikely that the doctrine will be imported through Section 302 unless, at the very least, it is the injured party who is seeking to raise it for his own protection, even if in other respects it is viewed as an objective standard. And finally, it should be reiterated that the remedies afforded are considerably more flexible than those under orthodox objective theories.

Conclusion:

In examining the different theories proposed to find the basis of the «lesion» doctrine, we have observed some of the advantages and disadvantages of each. Many practical advantages call for the separation of the «lesion» doctrine from lack of consent. This is because by requiring the injured party to prove both disparity in consideration, and a lack of honoring his intent, the doctrine would become almost futile. This is because it would be easier for the plaintiff to allege the doctrines of fraud, duress or mistake rather than alleging «lesion» as evidence of these doctrines. For example, in cases where a buyer forces the owner to sell his land at a lower price than fair market value, assuming that disparity in considerations is not enough to hold the contract void, it is indeed duress which renders the K unenforceable. Thus, it would be more advantageous to allege duress rather than «lesion» because the former only requires proof of lack of consent, while the latter, in addition to lack of consent, also requires proof of disparity between considerations. This is the reason which prompted the French legal scholars and the Courts to construe the French Civil Code in such a manner as to exempt the injured party from having to prove lack of consent.

The objective theory, on the other hand, based on «bonos mores,» provides the awful consequence of having the K void (not voidable or rescindable or even merely amendable in case o f«lesion»). Thus, in addition to the injured party, the other party to the K, and third parties ,all have a right to rescind the K based on «lesion». This is quite unreasonable, since what it does in effect, is to allow the party who profited from difficulties, indiscretion or inexperience of the injured party, to demand recision of the K. This absurdity has prompted advocates of the objective theory to explain the basis of «lesion» in such a manner as to claim that only the injured party is protected by the law[30] (We will later see that the German legal scholars have a tendency to construe Article 138 of the German Civil Code, in a similar manner.)

Thus, it seems to be more advisable to hold that in cases where the dependent theory of «lesion »is used, a flexible principle of «no harm» rather than public interest or «bonos mores» ought to be used

as to constitute the basis of the doctrine. By such usage, the advantages of both the objective and the subjective theories will be at the law's disposal; «lesion» will not be dependent on lack of consent and at the same time only the harmed party will be granted the right to cancel the contract.

APPENDIX

THE REALM AND EFFECTS OF LESION

1. The Realm of the Doctrine.

A. Lesion as an exceptional rule in the French Civil Code: In the French Civil Code, lesion is to apply to the following exceptional cases:

1. Ks made by minors: In accordance with the court's interpretation of article 1305 of the Civil Code, Ks that are entered into by a guardian, for the benefit of a minor, (without requiring the permission of the family counsel) are void, in case the minor sustains injuries due to lesion. In cases where such injury is not caused by lesion, the K is only rescindable[31].

2. Partition: In accordance with article 888 section 2 of the Civil Code, partition where a co-heir receives less than 1/4 of the share which he deserves are rescindable. This holding is the result of legislative inspiration of the old customary law, which held that «equality is the spirit of partition.»

3. Sale of land: In accordance with article 1674 of the Civil Code, a seller of land, suffering prejudice by receiving less than 7/12 th' of the fair market value of the land, has a right to rescind the K. Drafters of the French Civil Code did not extend the same protection to the buyers of the land. The result is that buyers, purchasing land at above fair market value, (even in cases when the prejudice suffered is more than 7/12) may not rescind the K. on the grouds of lesion. This discrimination between buyer and seller is borrowed from the Roman Law. It is based, and has found support by Napoleon before

the final enactment of the code, on consideration that while the seller is likely to be compelled to sell his land due to difficulties, needs, or necessities, the buyer is free and not forced to buy the land[32]. Furthermore, in accordance with article 1684, the parties are forbidden to invoke the lesion doctrine in case of judicial sales.

Up until the 19th century, French law accurately followed the French Civil Code. Since the beginning of the 20th century, however, due to continuous economic crises, price instability, and perhaps the influence of socialism, the inequities of the application of the doctrine began to be recognized. As a result, statutes were enacted that extended the scope of the doctrine of lesion to the following cases:

Acts passed on July 8, 1907 and March 10, 1937 prescribe that with respect to the sale of manure, seeds and slips (substances specified for feeding animals) if lesion exceeds 1/4 of the fair market value, the buyer may request reduction of the purchase price and compensation for his prejudice. This holding only applies to buyers, and exemplifies legislative protection of farmers.

Acts passed on June 29, 1935 and July 17, 1937, relating to the sale of «good will,» grant buyer the right to discount price in cases where lesion is more than 33% of the fair market value.

Contrary to the above, Article 37 of the Act passed on March 11, 1957 relating to literary and artistic property, grants a right of recision and discount of price to the seller of the property, in cases where lesion is more than 7/12 th of the fair market value.

Judicial extension to exceptional cases: French Courts still regard the doctrine of lesion as an exceptional rule. The French Supreme Court has held that the doctrine of lesion is not applicable to cases involving sale of movables[33] or labor Ks[34], and refused to extend Article 1674 as to apply by analogy. Nevertheless, the Courts have indirectly extended the doctrine of lesion whenever the necessities of justice have so required. The following examples clearly indicate this tendency of indirect extension on the part of the Courts.

1. The Courts have applied the doctrine of lesion to sales by invoking the effect of lack of consideration in Ks. They have argued

that price, being one of the principal elements of a K, if missing, is sufficient to hold the sale void. In such cases, the promise of the buyer misses its object and the obligation of the seller remains without cause (consideration). Therefore, if the mentioning of the price is somehow simulation, the K is void[35]. The above holding has been extended to sales where the sales price was not proportionate to the value of the object sold. The Courts have held them void, based on lack of price (Example: monthly payments to seller for price of land is less than monthly benefit accured to buyer[36]).

2. By expending the scope of duress and fraud, the Courts have indirectly limited the need for application of the doctrine of lesion. In accordance with French jurisprudence, if one of the parties to the K profits from the necessities of the other, even in casese where such necessities are not caused by him, it is held to constitute duress[37]. Similarly, in cases where one of the parties to the K in keeping the voluntary silence is not acting in good faith, and the other has a right to rely on such good faith, it is held to constitute fraud[38]. Thus, in cases such as the above, the French Law is similar to German Law. The Courts will not enforce Ks by which one of the parties attempts to profit from the necessities, inexperience and indiscretion of another.

3. Ever since the middle of the 19th century French jurisprudence has held that Courts may adjust Ks relating to salaries of agents and attorneys and restrain payment of high salaries in which Ks, where the agreement is based on perfect reliance. Legal scholars have supported the position of the courts, and argued that Court intervention prohibits taking advantage of the inexperience of clients in order to obtain higher salaries[39]. But, due to the fact that the legal basis of the judgments are not clear enough, some jurists claim the jurisprudence is based on the application of the doctrine of cause (consideration) in Ks[40]. Others explain the behavoir of the courts on equity principles[41]. Some scholars, however hold that this intervention by the Courts is one example of extention of the doctrine of lesion in the Ks[43].

B. Lesion as a general rule in German Law: As has been previously pointed out, Article 138 of the German Civil Code adopts the doctrine of lseion as a general rule of law. In cases where the court ascertains

that there is obvious disparity between considerations, and that one of the parties to the K profited from the difficulties, indiscretion or inexperience of the injured party, the K is held to be contrary to «bonos mores» and as such, it is held void. The lesion doctrine is held to apply to all K's, without it being restricted special relationships, such as Ks made by minors in French Law. Also, the voiding of a K based on lesion can be alleged by anyone.

Wide application of the rule does not mean that the doctrine of lesion (Act. 138) also extends to cases involving gifts and unilateral acts. Reasons for not extending the rule to these types of cases has been explained in the first section of this paper. With respect to the refusal of this extension, there is no difference between German, Iranian and French Law.

As has been pointed out in sec. I of this paper, Article 138 requires plaintiff to sustain the following burdens of proof: (1) obvious disparity between considerations, (2) the other party has profited from the difficulties, indiscretion or inexperience of the plaintiff. There is no difficulty in sustaining the burden of proof as to disparity between the considerations. The Court, by assessing the value of the considerations at the time of the formation of the K, and by taking into account the custom of trade and other circumstances surrounding the relationship of the parties conerned, is to ascertain whether or not the disparity of considerations is so great and obvious that its enforcement would be contrary to bonos mores.

However, sustaining the burden of proof that the defendant has acted in bad faith, and has thereby profited from the difficulties, indiscretion or inexperience of plaintiff, is somewhat more difficult. Due to this, the literary interpretation of Article 138, requiring the injured party to carry the burden of proof, restricts the scope of the lesion doctrine, and as such frustrates the intended broadscope of the provisions of the article. This is the reason why the German Courts have striven to construe the article in such a way as to grant effective protection to the harmed party. In achieving this goal, the Courts have made use of two different methods:

1. In cases where the plaintiff fails to sustain the elements of

burden of proof required by section 2 of Article 138, the Court may invoke Section 1, and hold the K void based on it being contrary to bonos mores (Supreme Court, March 13, 1936 — July 11, 1917 — October 14, 1921 — Rieg. op. cit. no. 189).

2. Since the purpose of Article 138 is to protect the public interest, the Court may on its own assess presence of bad faith, and intent on the part of defendant to take advantage of the injured party's position, or may simply hold that the disparity in considerations is sufficient evidence to render the K void based on bad faith.

As a result, German jurisprudence has resolved, not only the difficulties that harmed party might encounter in trying to meet the burden of proof, but also the difficulties encountered by a harmed party in his attempt to come under the restrictive provisions of Article 138, which, read literally, only applies to situations whereby one of the parties to the K takes advantage of the difficulties, indiscretion or inexperience of another. This has been achieved by a broad interpretation of the Article, which is read to include all illegitimate pressures exerted by one of the parties to the K on the other. In other words, as has been said by El Basouni and Rieg, the German Courts have interpreted and applied Article 138 (1) in such a way as to hold invalid all agreements whereby excessive pressures are imposed upon the economic liberty of a party to a K. (Rieg, op. cit. no. 190).

This interpretation of Article 138 has been extended to apply even to those cases where one of the parties to the K uses his superior bargaining position or status in such a way as to impose excessive obligations on another. The following two examples indicate the courts approach in carrying out this principle:

1. In all cases, where the liberty or economic autonomy of a debtor is destroyed or in any way restrained, so as to benefit a creditor, the courts hold the agreement immoral and therefore void (May 29, 1906, R G Z 63-336. BGH, March 4, 1955 - Rieg, no. 190). This rule is applied for the protection of the employees against the employers in labor contract cases, and for the protection of minority shareholders against the disproportional distribution of profits to majority shareholders by the corporation.

2. In accordance with the rule handed down by the German Supreme Court «every person, including the Government, who improperly makes use of his superior bargaining position and status, in such a way as to cause inequitable disproportional results in trade or commerce, will not be legally protected.» BGH, May 25, 1954 — BGH No. 18, 1955, RG March 21, 1923). This principal is mostly applied to cases involving Ks of adhesion. For example, K clauses drafted by transportation companies so as to disclaim liability for injuries sustained by passengers have been held void by the Courts based on immorality.

C. Lesion as a general rule of contract law in the Iranian Civil Code:

In the Iranian civil law, the doctrine of lesion is considered to be a general rule of contract law. This means that the right to make use of the doctrine of lesion for dissolving a K is not restricted to cases involving special relationships or spectific K agreements (Art. 416 and 456).

However, it must not be assumed that the application of the rule is not restricted at all. Apart from cases involving gift law, and cases where it is held that the lesion is tolerable (less than 1/5th of the fair market value), the scope of lesion is further restricted in the following situations:

1. The right to revoke the K applies to cases where the harmed party, at the time of the formation of the K, did not know the actual price of the goods. But since the harmed party does not need to prove his ignorance concerning the fair market value of the good, lack or presence of such knowledge does not constitute a real obstacle to remedying the prejudice suffered by the harmed party. In conformity with a famous legal principle (Asle Adam), the court presumes that the injured party had no knowledge of the fair market value. This presumption may be rebutted only by either the other party's proof that the injured party had knowledge of the fair market value, or by proof that the surrounding circumstances were such that the injured party must have had such knowledge. For example, a rug dealer, in the business of selling rugs, is estopped, without presenting additional evidence, to claim that he had no knowledge as to the fair

market value of the rug he sold, and the above presumption will not apply to him.

2. The Administration of document registration requires that all notary publics include the following clause in all documents relating to transfer of land: «The right to revoke the K in case of probable lesion is waived by the agreement of the parties.» Therefore, since all and transfer agreements must be drawn by a notary in accordance with Article 22 of the Registration of Documents Act, and since the parties in land transfer agreements are required to contract away their possible rights to revocation based on lesion, this clause creates a real obstacle to the application of the lesion doctrine as a general rule of contract law. The result is that the doctrine of lesion has no application to contractual relationships involving land transfers.

3. Upon acquiring knowledge of the disparity in considerations, the harmed party is under a duty to revoke the contract immediately (Art. 420, Iranian Civil Code). Voluntary delay on the part of the harmed party waives his right of revokation. However, the time with which such right of recovation may be exercised is subject to the particular custom or trade of the business. Thus, if the injured party makes use of the first opportunity he has to revoke the K, he must be held to have taken the necessary immediate action without delay even if he makes his decision to revoke known only two days subsequent to his becoming aware of the lesion.

D. The Scope of Lesion in the United States. The courts in the United States have long championed the principle of freedom of contract, perhaps more so than in any other judicial system. It should be expected, therefore, that the doctrine of lesion would not receive expansive acceptance in the United States. For to the extent that it is applied, it operates as a restriction on the freedom of contracting parties to enter into and be bound solely by their own terms. For this reason, the doctrine has tended to be viewed as an unwelcome constraint on the free market, and it has generally been restrictively applied.

At the same time, however, the American courts pride themselves on their ability to deal equitably with all cases and parties, and in

this respect they have been obliged to recognize the existance and worth of lesion and similar doctrines. Thus there are a number of instances in which the courts have allowed modification or rescission of badly one-sided contracts, despite the principle of freedom of contract. These include the following:

1. **Duress.** Where one party has taken advantage of the economic or other weakness of the other to drive an outrageously hard bargain, the courts have intervened. The amount of pressure wielded by the dominant party, and the degree of unfairness of the resultant «agreement» must be extreme, but if these conditions are present, the courts will say that the parties never really mutually consented to the contract, so that the contract can be upset. In one famous case, the United States Government claimed that it was forced to enter into an unfair contract during the Second World War by a ship-builder whose ships the country desperately needed. The Government lost the case, but the very fact that it could have been brought exemplifies the possible uses of the doctrine of duress in the American courts.

2. **Mistake.** As a general rule, the doctrine of mutual mistake has not been an adequate substitute for lesion in the United States. Most courts hold that even extreme mistakes of value will not allow a contract to be tampered with. For instance, in one well-known state case (**Wood. v. Boynton**, supreme court of Wisconsin) both parties thought they might be dealing with a topaz, which was purchased by the buyer for $1.00. The stone was actually a diamond, worth $100. The court refused the seller's request for recission, on the grounds that this would violate freedom of contract.

However, other courts have held that if the mistake relates to the «nature» of the item contracted for, then recission may be permitted. Thus in another state case, (**Sherwood v. walker** Suprem Court of Michagan) the parties thought they were dealing with a bearren cow. When the cow turned out to be with calf, the courts allowed recission to the seller. This is really a holding inconsistent with the **Wood** case, although the two cases employ different terms in their discussions. However, the **Wood** holding is followed by most American courts, so that the doctrine of recission for mutual mistake is not an adequate substitute for lesion.

3. Fraud. As nearly everywhere else, fraud by one of the contracing parties may be grounds for recission of the contract in America. However, the definitions of fraud is somewhat restrictive — mere «puffing» and reasonable exaggeration are expected and condoned as a part of normal sales efforts. If the statements of the seller (or buyer) go beyond this, however, and the contract is lopsided as a result, the courts will allow recission.

4. Leases. The doctrine of lesion does not technically apply to contracts respecting land. (Nor does the Uniform Commercial Code apply to sales of land. See Section 2-102 of the Code.) However, particularly in urban slum housing, lease contracts have long been regarded as systematically unfair to tenants. Because of this, considerable legal pressure has developed for remedies in favor of tenants. This pressure has recenlty begun to result in new rules of interpretation for leases, some of which are in actuality analogous to the doctrine of lesion. For instance, both state and federal courts have held that a landlord must prepare the premises thoroguhly before contracting for rent and that he must maintain them afterword. If he fials to carry out this non-contractual burden, the tenant may rescind. It has even been suggested that the courts should refuse to enforce any provision in a lease which is the result of the lessor's superior bargaining position. This would bring lease agreements well within the doctrine of lesion.

5. The Uniform Commercial Code. The implications of Section 2-302 of the Uniform Commercial Code, the «unconscionability» section, are discussed above in Section II. As noted there, this Section of the Code is potentially the equivalent of a doctrine of lesion, sufficient to replace the other substitutes discussed above. (See, e.g., **Extension of the U.C.C.'s Unconscionable Contract Provision to Exculpatory Lease Clauses,** 5 American Business Law Journal 287) However, as noted, the Code is too recent to have attained its full potential in the courts. We will have to wait for the future to discover the extent to which Section 2-302 is used to supeecede, and perhaps to extend, the other principles discussed as substitutes for lesion.

II - The effects of lesion.

French Law: In accordance with the French Civil Code, lesion renders the K voidable. This menas that only the injured party may rescind the K. The statute of limitations is two years, and begins to run at the time of the formation of the agreement (Art. 1676). The statute of limitations in cases involving partition agreements of inherited property, starts running at the time of descendant's death (Art. 1080).

The rescission relates back to the time of the formation of the K. Thus, all benefits subsequently acquired belongs to the seller.

The injured party's right to rescind the K may be prevented by the other party's willingness to make the K good by paying the required additional sum of money. In cases involving contracts of sale, the required additional sum of money is the difference between the fair market value and the K price with a 10% discount (Art. 1681 Civ. C.). For example, assuming that the fair market value of land at the time of sale was $10,000, and the K price was $5,000. The required additional sum of money to prevent rescission of the K would be $4,000. This 10% deduction does not apply to contracts involving partition agreements, where in order to prevent rescission based on lesion the full sum between the fair market value and the K price must be payed. Considering such cases, the Supreme Court has held that the just price is the fair market value at the time of payment rather than the value at the time of the partition. (Ass. Plen. Civ. March 9, 1961, D. 1961, 505; Civ. 1e civ. March 12, 1963. S. 1963 228)

It must be remembered, however, that the French Legislature, in statutes enacted after the Civil Code, did not provide for rescindability of the K, as constituting the sanction in costs involving lesion, but merely provided a right to the harmed party to request the Court to reduce the excess of his consideration. French jurisprudence has upheld the above, and thus in cases which call for an extension of the scope of the doctrine of lesion, the available remedy is no longer a right to rescission but rather a mere right to request reduction of the excessive consideration. As a result, with the exception of cases specifically enumerated, and covered by the Civil Code, the opinion

of the present writer in conformance with the opinion of modern French legislation and French jurisprudence, is that the doctrine of lesion is not based on lack of consent, but rather on remedying the prejudice suffered by the harmed party.

Although the purpose of the lesion doctrine is the protection of the harmed party and not that of the public interest, the seller may not, by a clause in the sale agreement disclaim his right to a remedy, in case of lesion. Such clauses, if in fact incorporated in the sale agreement, are held to be unenforceable, and the seller may request the Court to render the K void (Art. 1674). The reason for holding such disclaimer clause unenforceable, is based on the legislative concern of restraining buyers, with knowledge of the disparity in the considerations, to force sellers to renounce their right to a remedy. This is the reason which prompted some French jurists to hold that Article 1674 is to be construed as a general principle, not restricted to cases involving sales, but applicable to all cases involving lesion[43].

After the formation of the K, the parties may enter into any agreement to dispose of the lesion. Thus, a seller of land may renounce his right to take advantage of available court remedies in consideration for receiving for example, 2/3 of the actual difference between the fair market value and the K price.

German law: In conformity with Article 138 of the German Civil Code, lesion renders the K void. This is based on the policy consideration of protecting the public interest. This means that anyone concerned may invoke the voidance of the K, and that even the injured party does not have a right to confirm the K. Holding such solution undesirable, a number of German legal writers, among them Enneccerus Nipperdey, have suggested that Article 138 ought to be interpreted in such a way as to prevent anyone but the injured party to invoke the voidance of the K. Such construction is inconsistent with the provisions of Article 138, since it reduces the K not void but only voidable. This inconsistency is what prompts the courts and the majority of legal scholars to look at the problem in terms of the reasons for the voidance of the K rather than in terms of who may have a reasonable course of action. The majority of jurists hold that the effect of voidance of the K is to restitute the parties to the posi-

tion they would have been in had the K never been entered into. A void K is incapable of creating obligations, and thus, the parties must return the considerations they have received based on an apparent but nonexistent K. Consistent with this interpretation, the judgment that renders the K void further indicates the absence of any obligations occured by the parties. To further sustain the above interpretation of the doctrine, it has been argued that, following the common intent of the parties the contract is made as an inseparable total which involves the two mutual promises. Thus it has been held that since the fraudulent party receives a benefit only in exchange for his promise, in case the Court holds receiving such benefits to be contrary to bonos mores and hence void, the fraudulent party's promise is also rendered void[44].

Contrary to the above, German jurisprudence along with a number of legal scholarrs hold that in conformity with Article 138, only the injured party's promise is void because it is only the performance of this promise is contrary to bonos mores. The result of this holding is that only the injured party has a right to invoke the voidance of his part of the agreement and to request restitution. In case the injured party's demand for restitution is held to be legally acceptable, the other party to the K has a right, based on unjust enrichment (sec. 1. Article 812) to request restitution of the consideration given by him to the injured party[45].

American Law. Under Section 2-302 of the Uniform Commercial Code, the courts have a choice of three remedies in the event that they find a sale contract containing any «unconscionable» clause. They may refuse to enforce the contract, which amounts to recission of the whole agreement. They may delete the offending provision and enforce the remainder of the agreement, which is partial recission. Or they may limit the application of the offending clause, which is modification. Thus, the Code gives maximum flexibility to the courts in their treatment of contracts found to be grossly unfair.

The usual remedies allowed by the courts in cases dealing generally with fraud, mistake and duress has been recission. It is extremely rare that any other remedy has been allowed in such cases. It is also very unusual for American courts to strike down offending agree-

ments as void; rather the courts will allow recission only on the request of the injured party.

Iranian Law: According to the Iranian Civil Code, in cases involving lesion, the injured party has a right to either revoke or confirm the K. Thus, the Iranian and French Civil Codes are similar in that they both give an exclusive right of revocation to the harmed party. However, the existing difference between rescindability of the K in French law and recovability of the K in Iranian law must be mentioned. Recision of K in French law has a retroactive effect. This means that in case the injured party's claim is legally acceptable, the Court renders the K absolutely void. Recovability of the K in Iranian law, on the other hand, only has a prospective effect. This means that in the time interval of formation and revocation the contract is enforcable. The logical result of holding the revocation to have a prospective effect is that the parties until the time of revocation are deemed to be the legal owners of the object of the K they have obtained, but after revocation the object is to be restored to the original owners. Also, the benefits received follows the transfer of the object and vests henceforth in the original owner.

Receiving the diffierence between the fair market value and the price does not waive the injured party's right of dissolution in absence of the injured party's agreement to accept the difference (Art. 421). Agreements as to the right of dissolution between the parties is enforceable. As a result, the parties may waive their right of dissolution either at the time of the formation of the original K or in any subsequent agreement.

Critical considerations and suggestions:

As has been pointed out above, the doctrine of lesion in Iranian law, independent from public interest and lack of consent and considerations is stricitly based on the principle of remedying the injury suffered by the harmed party. The lesion doctrine is further separated from the doctrines of mistake, duress or fraud. However, it must be mentioned that certain provisions of the Iranian Civil Code concerning the lesion doctrine are not consistent with its foundation, at least in the light of every day life requirements. Two analytical considera-

tions that follow are to illustrate the correcetness of this claim:

1. The dissolution of the K, at least in some cases is not enough to remedy the prejudice suffered by the injured party, because, as has been pointed out before, such dissolution has only prospective application. As a result, an injured seller, for example, who cancels a sale only after a long period of time, having not been informed of the real value of the things sold previous to the time he cancels, any past benefits received from the object of the sale remains the property of the buyer. While it is true that the seller, having the use of the money received by the buyer has received some kind of a benefit, it must not be forgotten that the actual benefit of the seller had been less than deserved due to the discrepancy between the fair market value of the thing sold and the actual price received for it by the seller. Thus, since the K is held to be enforceable until the time of cancellation by the injured party, and all benefits received in this time period are to be retained, it is unfair to claim that the right of dissolution is sufficient to remedy the harm suffered by the injured party.

A just remedy for the prejudice suffered by the injured party calls for holding the dissolution of the K to have a retroactive effect. The flexibility of the «no harm» doctrine provides for such possible construction. Presuming that the principle of the «no harm», as a secondary rule, governs the primary rules of contract law, there is no differrence between the primary rule that relates to the binding effects of contracts, and the primary rule relating to the transfer of the objects of the obligations. Having this in mind the possibility of holding that in cases when the injured party revokes the K, the «no harm» rule prevents the creation of any obligation, becomes obvious. Thus, more just results would be obtained if the Iranian legislature would, similar to French law, hold that the effects of revocation are retroactive.

2. Stability of contractual relationships requires that contracts remain binding on the parties, hence power of K dissolution ought to be resorted to only after all other possible remedies have been exhausted. Thus, in cases where remedies, short of K dissolution, are available to cure the wrong, dissolving the K ought not be used

because of its futility and danger. Having this consideration in mind, injured parties ought be barred from using their right of revocation in cases where the other party agrees to remedy the prejudice by paying the additional sum that is requried to make up the difference between fair market value and K price. This solution is sufficient to remedy the injury suffered. Presuming that the right of the injured party is based on the «no harm» doctrine, and the power of revocation has been created to remedy the harm, how may one claim that in cases where right of revocation has failed at its foundation, due to the other parties willingness to make the K good, the injured party is free to revoke the contract?

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1) Aubry et Rau, Cours de droit civil français T. IV 6e. par Barin $343 a - Julliot de la Morandière, preçis de droit civil d'après le traité de Droit Civil de H. Capidant et A Colin 3e ed. no. 341, Paris 1964.

2) Mazeaud (Henry, Léon et Jean) - leçons de Droit Civil, No. 218 - Julliot de la Morandière, preçis de droit civil, T. II. no. 341.

3) In Iranian law and in civil law sytems, gifts, are considerd to be ks. For example, in French law ks are divided into two groups: contrat à titre onereux et contrat à titre grtuit. (Article 1150. Mazeaud op. cit. no. 100.)

4) This concept of inadequacy is called «Lesio enormis» in Roman law and «ghabné Fahesh» in Islamique law.

5) In Iranian civil law, if the difference between value and price is more than 1/5 it can be said tha tthere is a lesion, but if the difference is less than 1/5 custom determines presence of absence or absence of lesion (Article 417 Civil Code).

6) As to the discussions on «lesion» at the time of the enactment of the French Civil Code, see Mazeaud, T. 2 p. 181. Gaudement, Théorie général des obligations, p. 80.

7) Hardesty v. Smith, 3 Ind. 39, 41-43 (1851).

8) Baudry - Lacantinerie et Barde, Traité de Droit Civil Français, 3e ed. Obligations. T. 1 no. 121.

9) Cohen, The basis of Contract, 46 Harvard L. Rev. 553, 582 (1933).

10) Corbin on Contracts, 605.

11) See Gaudemet, Théorie Générale des Obligations, p. 80. - Mazeaud, op, cit. p. 181.

12) Alfred Rieg, op. cit, no. 192 - Art. 138 German Civil Code.

13) In accorance with the French Civil Code, the doctrine of «Lesion» is not a general rule but gives rise to exceptional cases such as sale of land (for the seller) and partition where renders the K rescindable.

14) Baudry - Lacantinerie et Barde, op cit. No. 122 - Demolombe, t.v. No. 28 bis - Gaudemet op. cit. pp. 79 et 80.

15) «ne voit on pas que la loi de la rescission est une loi de moeurs qui a pour objet le territoire» (Mazeaud, op cit. t2 No. 211).

16) Alfred Rieg, op. cit. no. 193.

17) Josserand, Les mobiles, No. 100 - Planiol, Ripert, Hamel, Traité pratique de droit çivil français T. X. no. 325 - Lalou, note au D. P. 28-2-113-Rieg. op. cit. no. 198 e tsui.-Aubry et Rau, Cours de Droit Civil T. V. obligations, page 319-320.

18) La Lesion legalement constatée est Par., elle-meme et à elle seule une cause de rescission independammant des cironstances qui ont pur l'accompagner ou lui donner naissence.»

19) Roq, - 12 mars 1933, s. 33-1-36 - civ. 21 Avril 1950 J.C.P. Rapport et note de conseiller R. Cavarroc - A. Rieg. op. cit. no. 195 et sui.

20) Mazeaud, Leçon de Droit Civil, T. II, Obligations, no. 219 no. 219 et 220 - Julliot de la Morandière, op. cit. no. 375.

21) Le legislateur sanctionne un abus de droit contractuel recouvrant une contrainte de la volonté (Planiol et Ripert, op. cit., t, VI par Esmein no 216 - Ripert et Boulanger, t. 11 no 265 — EL Bassouni, cité par Rieg, op. cit. n 198.

22) Salleilles, Declaration de la volonté. Art. 138 No. 98 — Alfred Rieg op. cit. no. 199 et 200.

23) Un contrat esionnaire est toujours nul: mais le contrat dont les prestations sont desquilibrées alors que l'un des élements de l'aliéna 2e manque, néanmoine être contraire aux bonnes mœurs, c'est à dire nul d'après l'aliéna Ier du § 138.

24) Rieg, op cit, no. 197

25) Allameh hellee. Tazkereh, Khyar ghabne. This is based on the Koran, which prohibits taking possession of another's property without having an agreement to that effect.

26) Sheikh Morteza Ansari, Makasib, Volume 2, Page 234.

27) Islamic law of Property holds that the owner has sovereign rights in his property, which means that he can dispose of it as he sees fit.

29) Shaheed sani, Sharhé Lomeh, Volume 1 p. 285, Masalek, Volume 1, p. 97 - Sheikh Morteza Ansari, Makasib volume 2, p. 234.

29) Hassan Imami Civil Law Vol, 1. 3e. ed p. 497. Mohammad Abdoh, Civil Law p. 246 — Nasser Katouzian, Course in Civil Law 1969-70 Law School of Tehran. Grade 3.

30) Alfred Rieg. op. cit. no 204-205.

31) Mazeaud, op. cit. no. 212 — Julliot de la Morandière op. cit no 334

32) Mazeaud, op. cit. no. 212 — La Morandière, op. cit. no. 366.

33) Civ. 17 May, 1832. S. 23-1-849.

34) Civ. 20 Dec., 1852. D. 53-1-95.

35) Civ. 28 Feb., 1951. 1951-1309.

36) Paris 22, Jan., 1953 (Gaz. Pal. 1953-1-73).

37) Req. 27 April 1887, s. 1887-1327, D. 1888-1-263-Mazeaud op. cit p. 152.

38) Paris 22 Mars 1952 Gaz Pal 1952-2-102. Rieg. 29 Dec. 1931-53.

39) Mazeaud, op. cit. no. 213 - Alfred Rieg, op. cit. no. 186.

40) Henri Capitant — La cause, no. 98 — Julliot de la Morandière, op. cit. no. 345.

41) Planiol and Ripert. T. XI. by Savatier no. 1484.

42) Beudant, Cours de droit civil t. XII no. 319 - Ripert et Boulanger, t

II. no. 271-Mazeaud, no. 213-Rieg, op. cit. no. 186.

43) Mazeaud, op. cit. t II. obligations no. 223.

44) See Alfred Rieg, op. cit. p. 210.

45) Orteman, R. G., Feb. 19, 1904 RGZ 57-59-RG, Dec 17, 1910, RGZ 75-76, RG Nov. 18, 1924, RGZ 109-202 — cité par Rieg. op. cit, page 210.