

## A Sociological Study of the Evolution of the Death Penalty in Iran and America

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### Abstract

Regardless of the time, historical developments of the death penalty in America and Iran, is indicative two fundamental transformations in execution modes of the death penalty. On the one hand, capital punishment was removed from the public arena and went behind the prison walls and on the other hand, application of new methods of killing is considered by policy makers to reduce the risk of pain. Such alterations are typically attributed to achievements of penology, the primary task of which is to identify the most effective sanctions for criminals in order to better serve the purposes of punishment. Although the most studies of death penalty are carried out in penology area, these examination has an internal approach to criminal developments and these fundamental changes has nothing to do with society. But the sociology of punishment claims that better understanding punishment needs investigate the relationship the idea of punishment and other social phenomena and forces and trace its social roots. Punishment, which in criminal law is considered as state's response to violations of law, sociologically is studied as a phenomenon which must be explored in the broad context of community.

In sociological study of punishment, as in other disciplines, different approaches to society could produce different analyzes of the criminal response. A Durkheimian structural and holistic view, perceives deep relationship between punishment and social values and refers to the effective role of community's sensibilities in the developments of methods of penal practice. The Durkheimian perspective interprets punishment as a cultural pheromone. Roughly speaking, Norbert Elias's ideas of civilization process can be considered a kind in line with the Durkheimian theory. From Elias's point of view, evolution of individual sensitivities gave rise to transformation of culture and these developments can be clearly seen in the mirror of punishment. In sum, Durkheim's and Elias's ideas are "cultural explanations of punishment".

On the other hand, sociologists such as Michel Foucault and Max Weber, are not so optimistic about penal alterations. According to Weber, the scientific advancements, development of bureaucratic institutions, and the human distancing

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from spiritual values have led to instrumental rationality - the use of the instruments to achieve the highest benefit - in all aspects of social life, including the type of imposition of criminal sanctions. Thus, the method of executing of the death penalty is not the result of cultural developments; rather, these new methods are the result of the development of new technologies and distancing from the basic questions about the nature of punishment. In the same vein, Foucault argues that punishment is important part of more broad strategy power and social control. Accordingly, evolution in methods of punishments is indication of change in the form and content of discipline and control, and it should not be interpreted as humanization penal practices. Likewise, Foucault argues that modes of punishment did not change just because of the humanitarian concerns of reformists, the use of knowledge and technologies in modern methods of punishment are all in line with the preservation of power relations in modern society, which in turn masked the real aims of punishment. This recent analysis in the sociology of punishment is known as "punishments and technologies of power."

**Keywords**

Transformations in execution, Sociology of Punishment, Cultural Approach, Power Technologies, Death Penalty.

## Re-thinking of the Validity Conditions and Consequences of Reservation in the Bill of Lading

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### Abstract

Evidential value of bill of lading concerning the cargo specification is confirmed by all international conventions. This function works unless the carrier insert reservation in the bill of lading. The validity of reserve is an issue which is less addressed by Iranian doctrines, as one may infer from reservation non-liability clause which itself is declared to be null and void by the international conventions. So, does the validity of reserve depends on agreement by the consignor? Or shall it be reasoned in a way that the grounds for the reserve shall also be inserted in the bill of lading in order to be effective?

On the other hand, the carrier might refuse to insert reserve in the bill of lading either personally or per request of the consignor and receiving a letter of indemnity from the latter. Is carrier liable vis-à-vis the consignee for ignoring the reserve and concealing the truth and shall the letter of indemnity be considered as valid and effective?

The legitimacy and validity of conditions of reserve on one hand, and the effects of reservation on the other hand are among the issues which are analyzed in this article in view of comparative study of English and French legal systems and international transport conventions.

It is concluded that the carrier's reserve in the bill of lading is a unilateral act which does not require the consent of the consignor except under CMR Convention under which the effectiveness of reserve is dependent on the consignor only vis-à-vis the latter and not towards the third parties, i.e. the BL holders. However, the reserve shall be justified in order to be valid and the cause of reservation shall be specified together with the reserve as well, under the later international regulations (Hamburg Rules).

In terms of consequences of reservation, it is worth noting that by reservation the burden of proof shall lie upon the BL holder while without it the carrier himself should have proved that the damage had been incurred before his taking delivery of the cargo. Also, the agreement not to insert reserve in the BL is effective between the carrier and the consignor unless they have an intent to defraud the third parties. However, the above agreement or the Letter of Indemnity in substitution of reservation could not be adduced by its parties against the third parties.

### Keywords

Reservation, bill of lading, letter of indemnity, carrier.

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## Sharing Credit Information in Iran with Regard to the World Bank Doing Business Indicator

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### Abstract

Nowadays, most countries worldwide have chosen the improvement of their business environment and removing barriers to private sector's activity as one of their economic development strategies; such approach clearly paves the way toward attracting investment and boosting employment. Accordingly, the World Bank measures the improvement of the business environment in countries with the aid of some indicators, among which getting credit is of utmost importance. It is obvious that credit is one of the most fundamental sources of financing economic activities. Iran's rank in this index in 2020 was 127th out of 190 with a score of 58.5. This rating was based on the average rank of countries in the business elements. In the Business Report for 2019, Iran was ranked 128th with a score of 56/98

Giving credit, like other types of economic activities, needs valuable information which can principally be achieved by joining information sources and by using the intermediaries of credit information sharing (credit rating agencies). Credit information sharing in the form of credit rating agencies is relatively a newborn legal issue in Iran and its legal history is not so week. Although, the legal status of such agencies needs to be preferably determined by the statute, currently a bylaw, the so called Credit Rating Regime Bylaw, discusses its relevant issues. However, it seems that the improvement of the Iran's business environment ranking and economic development necessitates to establish the institutional, economic, and more importantly legal framework of such credit rating agencies. The importance and novelty of this subject matter as well as its relevant recently issued bylaw requires its research and scrutiny by the experts.

It should be noted that in Iran, unlike in many developed countries, the sharing of commercial credit information was limited to communications between banks and some insurance companies, and it is not too late to establish a database for collecting credit data and credit rating companies.

Indeed from 2007 In some laws a few articles have been devoted to the point. "The law on Comforting Banking Facilities and Reducing Project Costs and Accelerating Implementation of Production Plans and Increasing Banking Resources and Banking Efficiency" was initiated in this regards.

Credit ratings largely depend on the administrative arrangements of the countries as well as their laws and regulations. As we know, Iran has not had much experience

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in sharing credit information except for limited actions of banks and insurance companies prior to 2007 and the adoption of the bylaws. Based on this, the rating obtained by the depth of credit information indicator was zero until the 2010 report, which reached 4.5 by the launch and operation of Iran Credit Rating Consulting Company. The activity of the company along with the launch of the Electronic Portal of Corporate Registration and the Judiciary Electronic System has improved the ranking of Iran's Doing Business in 2011.

The depth of credit information measures the rules and practices that affect coverage, scope and access to information available through the credit bureau or institution, the amount of credit bureau coverage or credit rating company and the number of natural and legal entities listed in the credit registry.

It is Notable that the credit costs are one of the most important costs that can be considered as one of the fundamental issues of the Iranian economy and sharing information leads to asymmetric information reduction and, consequently, to a reduction in the cost of screening applicants and consequently the cost of obtaining credit which could improve business environment.

Since laws and regulations are important business contexts and there is a particular focus on the World Bank's indicator, the present article examines the regulations governing credit ratings in Iran and conclude that the Recent bylaw- if it is implemented correctly- can lead to the improvement of Iran's rank in the coming years.

**Keywords**

Credit Rating Regime Bylaw, Credit Information Sharing, Credit Rating Agencies, Information Asymmetry, Doing Business.

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## The Impact of European Court of Human Rights on National Legal Order

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### Abstract

After the World War II, European countries decided to establish a convention which protects fundamental human rights in a comprehensive way. This act roots in two main reasons; first of all, as the war was initiated in Europe, it had to ratify a convention which reduces the probability of atrocities' repetition, it also provides the opportunity for European countries to supervise each other. It should be noted that at the time of the ratification, European countries did not have the same condition from the human rights law's point of view. For instance, Ireland was the only country that ratified a national document which obligates the government to protect its citizens' different human rights. In addition, many countries did not have any constitutional court in order to evaluate the consistency between constitutional law and other national laws.

European Court of Human Rights was established with the aim of protecting European citizens' rights by the convention's content. This court permits the citizens of European countries to lodge their applications against the implication of governments in human rights field. Although this organization does not have a direct mechanism to change national legal orders, it can affect the legal system of European countries indirectly. The research on the case law of European countries indicates that judges in national courts refer to the procedure of European court of human rights in many cases, which are dealing with human rights issues. It should be noted that if the court finds out that the human rights of an individual is breached according to the convention, it forces the governments to pay the compensation. After decades, governments realized that they can change their national laws in accordance with the convention in order to avoid paying compensation. This solution leads to the process which is called the Incorporation of European Convention of Human Rights in national legal orders.

As it mentioned before, European countries implicated convention in different ways; this difference is based on the legal position of European Document in European countries. Convention in some countries such as Austria has the same hierarchical position as the constitution. In other countries like France or Portugal,

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the convention is placed upper than normal laws and lower than the constitution. At last in some countries like Britain, the convention is considered the same as normal laws. From another point of view, the approach of European governments to international law affects their behavior with convention as an international document. Some countries like Italy, has a monistic approach, which means that they adapt international law sources such as convention into their national legal order. But the other countries for instance France by choosing dualistic approach have different mechanism for the implication of international documents in comparison with national legal orders. Choosing each of these approaches leads to the different incorporation process of the convention.

Usually national judges use two main solutions in order to incorporate convention in the national legal procedure. They try to interpret their national laws in the light of the convention, or they refuse to apply the implication of laws which are in conflict with the convention. The procedure of national courts indicates that incorporation of convention is a gradual process which is continued up to now. In spite of the different positions of European national legal orders, this convention is considered as an enforceable law. However, high number of applications which is lodged in European court of human rights, indicates that in many cases governments ignore this enforceable position.

**Keywords**

European Convention of Human Rights, Consistent interpretation, Displaying Conflicting Norms, European Court of Human Rights, Incorporation.

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## A Comparative Study of Duty to Retreat from the Position of Self-defense in Common Law and Imamiyah Jurisprudence

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### Abstract

Self-defense is a defense that is often raised by defendants in a criminal trial who were involved in a fight with the victim that resulted in the victim's serious injury or death. The law recognizes the right that someone has to protect his or her own person. but there is some situations which sometimes appears in the criminal defense of self-defense, and which must be addressed if criminal defendants are to prove that their conduct was justified One of these situations in self- defense is that the attacker has started his attack but yet Necessity condition has not existed and the defender has ability to retreat and escape. The key question is whether he has to retreat against the offensive attack or he can continue based on the right to defend himself? This article explores the doctrine of self-defence within the context of the challenges about duty to retreat. This principle requires that someone who found themselves in a violent confrontation had to try to defuse the situation and retreat. In fact the general principle behind the duty to retreat laws is that the use of force - lethal or otherwise - is not justified until a person has made a reasonable effort to avoid confrontation, either by de-escalation or an attempt to leave the area where the threat is occurring. common law in the recent centuries based on the lesser evil and more benefit as a society theory, would require the defender to retreat, since escape is a way to realize the survival of the attacker (more benefit) and reduce the probability of crime (less evil). Failure to do so, despite the achievement of all other conditions of defense, causes rejecting the defense principle. English common-law doctrine strictly limited the cases to which Stand Your Ground applied and earliest American

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self-defense doctrine imposed a general Duty of Retreat, but now also admitted exceptions such as "Castle Doctrine" it is named for the axiom that "a man's home is his castle. In the imamiyah jurisprudential texts, the issue of duty to retreat is stated after the defense principal and is only intended to emphasize the protection of the defender during his inability to attack the attacker. Therefore, if the conditions of defense are achieved, the principle of the defense is dominant, and his failure to escape has not a legal effect. German criminal law, based on the individualist theory of the rights to defense, rejects duty to retreat. this theory states that a person "who is attacked" anywhere he is lawfully present has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he believes it is necessary to do so to prevent death or great bodily harm. But based on the principle of the responsibility of the attacker in the private defense in German criminal law, in the defense against the invasion and children the defender has to retreat or it is considered as a duress defence. Therefore, the defender in these cases is required to retreat. Because he, in the absence of a retreat with the possibility of doing so, he himself is guilty of creating his own duress condition and this is a case of defying his defense.

**Keywords**

duress, duty to retreat, possibility to escape, self-defense.

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## General Rules of Inopposability in Commercial Law

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### Abstract

"Inopposability" is a situation contrary to the principle and exception to "opposability" whereby the indirect effect of the legal element is disappeared against third parties, meaning that third parties obtain the right to reject and ignore the inopposable legal element. In the scope of Iranian commercial law, there are numerous examples in which "inopposability" is mentioned. In spite of these many instances, it is unclear who, against whom, and how can take advantage of the inopposability, what are the effects of inopposability and how is this situation disappeared. In general, it can be said that the general rules governing inopposability in Iranian law have been ignored.

To answer the above questions and provide general rules of inopposability in commercial law, we should start with the examples of inopposability and then classify them. Numerous examples of this notion in commercial law, can be categorized, based on the legislator's intent to establish the inopposability, to inopposability due to non-disclosure, inopposability due to defect in form, inopposability due to clandestinity, inopposability of nullity and inopposability with the aim of maximizing third party protection.

In order to analyze the general rules of inopposability, in answering the question of who is in favor of the inopposability situation, it should be said that the beneficiaries of inopposability are third parties affected by the legal element, that the legislator grants them the right to choose or right to criticize such a legal element and in principle their "goodwill" is a condition for using it. In answering the question of against who this legal situation is opposable, it should be said that inopposability is opposable before everyone, either to the direct or third parties in such a way that in the assumption of conflict of interest between third parties beneficiaries of inopposability and other third parties, the interest of first persons

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must be prioritized. In examining how to use this legal situation, it can be said that interested third parties can suffice to present their right in the form of objection. That is, if the third party is the defendant of litigation, it is sufficient to refuse the action brought against himself and, if the third party is the plaintiff of litigation, it is sufficient to refuse the objection due to the opposability of legal element with inopposability.

The effects of this legal situation on third parties include the disappearance of the harmful effects of the legal element on said persons. Therefore, if the legal element is not harmful to the third party but vice versa is in his favor, the inopposability is disappeared. In the case of the effects of this legal situation on direct parties, since the direct effects of the legal element on its direct parties are not harmful to third parties, such effects are retained and in fact towards direct persons, theoretically, the situation is as if there is no inopposability.

Finally, it should be noted that, contrary to absolute nullity, inopposability is a deteriorating situation. In cases where the inopposability is due to the failure to comply with the formalities, this situation is generally resolved by subsequent observance of required formalities. Since the legislator has in principle considered the goodwill of third parties as a condition in establishing inopposability, this situation has also been disappeared in the assumption of third party awareness. In addition, due to the right to choose, as a result of the inopposability, for third party, one of the disappearance of the inopposability may be the waiver of the said persons from inopposability, or in other words, waiver their right to criticize.

**Keywords**

Goodwill, Indirect Effects, Inopposability, Supportive Sanction, Third Parties.

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## Comparative Study of Rehabilitation of Terrorist Criminals as a new Counter-Terrorism Strategy in Islamic Republic of Iran and Singapore

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### Abstract

Nowadays, rehabilitation is considered as a legal strategy in dealing with criminals in the criminal justice system and it has left significant positive effects; but the question is whether this approach can yield the same positive results in the face of perpetrators of serious crimes, such as terrorist crimes? After the 9/11 terrorist attacks, the attitude towards terrorism changed so that the United States used the word war to fight. A word that has brought with it a lot of problems, and brought a new challenge in international law and community. Because the war, according to international definitions, required its own circumstances and could not accommodate this struggle under its umbrella. In practice, terrorism has become to a security crime in the politics and law of countries, and this change in the nature has led to governments to introduce terrorism more than a crime. Terrorist criminals were excluded from the category of criminals, and the fight against terrorism became the primary policy of governments. In a legal analysis, it can be concluded that to convert to a security crime, means make more security for society. This point of view of social defense movement that knows a criminal as a patient, and pay attention to their reform, and in the school of realism that knows a criminal as a victim of physical and social factors offers moral responsibility instead of social responsibility and punishment instead of supply measures, has distanced. And again the classical view, or the idiom "orbit crime", has been taken into consideration. In this case, the perpetrator is a danger to others that has threatened the security of society. For this reason, securityism emphasizes to hard and disproportionate punishments with crime committed to control the danger has been created by the offender. Therefore, the terrorist criminals are the destructive security agents who suffer the most severe punishments because of the nature of their crime and the many incidents that have so far caused human society. Terrorists are people who feel alien at their community, which may be the result of different community situations such as economic, social, political and psychological conditions or a combination of

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these. As a result, they start protesting and revolt when they feel dissatisfied and alien, but because these revolts cannot quell their outrage, they eventually launch terrorist operations.

The fight against terrorism in the shadow of the military tool has done in many forms to date. But the important point is that in this type of campaign, terrorism may soon be destroyed and its perpetrators eliminated, but the lifetime of this success is short and countries will fail in the long run. Whereas the use of rehabilitation tools on terrorist criminals is a new and useful strategy to counter terrorism that guarantees countries success in the long run, and so far it has been able to provide excellent stability and security in its implementing countries.

Iran has experienced many terrorist incidents throughout its history, and as one of the active countries in the counter-terrorism has used different strategies in this struggle. As compared to Iran, Singapore has used of terrorist rehabilitation as a new strategy alongside other strategies in its counter-terrorism, and it has been able to prevent eventual attacks and the resulting damage so far. The present study, in the form of a qualitative research, and with use comparative research has investigated rehabilitation of terrorist offenders and it compared them to the conventional methods of counter-terrorism in Iran and Singapore. Finally, the findings of this study are as follows; despite the positive results of rehabilitation of terrorist criminals in Singapore, Iran has not used this method so far in its counter-terrorism. Due to the current situation in Iran, the need for this strategy is more evident than in the past.

**Keywords**

Terrorism, counter-terrorism, new strategy of counter-terrorism, rehabilitation, terrorist criminals.

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## A Comparative Study of Unconscientious Testimony in Iran's Criminal Procedure and the International Criminal Court, with an Emphasis on William Ruto's Case

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### Abstract

In all legal systems, testimony is one of the most important reasons to prove. Witness one of the key actors in the criminal justice system who plays an effective role in proving the crime. The importance and role of witnesses in criminal proceedings in the field of reason goes back to one of the most widely used arguments in the judicial system, the hearing of witness statements, so that witnesses are seen as part of the criminal justice system through their participation in the criminal process. Witnesses who bear the brunt of martyrdom, especially in severe and organized crime, are subject to physical, and psychological threats. Accordingly, due to distance, job loss, administrative problems, etc., the witness may refuse to appear in court and testify. On the other hand, witness statements have a prominent role in the discovery of crime and the punishment of criminals and the provision of justice. The above considerations of domestic legal systems and international conventions seek to incorporate measures of witness protection and encourage them to participate in the process of judicial justice in criminal law. One of the measures that can provide intuitive security and sharing is the use of in-person testimony. Especially in international crimes, which are mainly witnesses to their own victims and on the other hand, the difficulty of the physical presence of the witness in court, due to the distance and the lack of material facilities. Whereas prior to the legal literature there has been no discussion of witness testimony and the majority of writers have analyzed the testimony of witnesses under the terms of witness testimony to the extent that they author an independent research paper in this field. Has not been affected. In this respect, the present research is a new topic that needs further discussion.

Untitled testimony is a general title that includes methods that the court credits to testimony taken outside the courtroom as a proof of guilt. The most important cases can be: written testimony, testimony, testimony through the internet and technology

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or non-public hearings, testimony without the presence of the defendant or his or her defense counsel. While it has benefits such as protecting witnesses, encouraging witnesses to testify, reducing court costs, etc., it may also conflict with the defendant's defense rights in some cases. Iran's criminal law has stated the legitimacy of some examples of non-formal testimony, but insists that non-personal testimony does not lead to a violation of the defense's right to be accused of equality of arms. Iran's Criminal Procedure Code stipulates that the prosecution is primarily concerned with the intent to dispose of the parties to the dispute, but the trial is primarily attended by witnesses unless its presence is proven. Although international documents and the Statute of the International Criminal Court have recognized some of the evidence of non-official testimony, in the case of Kenya's Vice President William Ruto, he referred to the intentional prosecution in connection with the violence that took place after the 2007 elections. He had presented a reason for refusing to testify in court. The prosecutor's efforts failed in this case and the court ultimately ruled that the pre-recorded testimony was rejected. After Ruto was released from trial and punished, the need to discuss extrajudicial testimony was further reinforced by the belief that how to ensure that witnesses are convicted of international crimes. Encouraged them to participate actively in the judicial process.

**Unlawful testimony** Although some of its cases have been explicitly accepted in international court and international law, its legal validity as a reason remains in doubt. On the other hand, in defense of the rights of the accused, there are cases in Iranian criminal law and international documents and the Statute of the Court which contradict the acceptance of unnecessary testimony. Some, however, have proposed methods as alternatives to unnecessary testimony, such as the method of testifying in the presence of an impartial person or entity and the method of granting judicial power. The present study, using the analytical-descriptive research method and using the library method of non-existent testimony and its cases in Iran's criminal procedure and international documents and international judicial procedure has investigated. It also, Emphasizing on the case of William Ruto, the indictment materials and international documents, in particular the Statute of the International Criminal Court and the Rules of the Court, explains how and where the abusive testimony violates the defendant's rights, and what are some ways to use both the not in person testimony method to prove the crime and the rights of the accused.

**Keywords**

Unexpected testimony, international judicial procedure, accused rights, ICC and protection of witnesses.

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## **Provisional Measures and Its Implications in the International Tribunal on the Law of the Sea's Judicial Procedure; A Manifestation of the Defendant's Human Rights Considerations with Respect to the Victim's Requirements**

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### **Abstract**

Mandate of provisional measures in international courts is necessity of fair trial and of means to realize human rights considerations in favor of accused. Provisional measures in the ITLOS's Procedure, is used to observe the accused's human rights and his provisional release until competent authority dealt and the final verdict and execution of sentence. But the Italian flag state's case against India's coastal state at the ITLOS shows human rights considerations is in favor of victims who lost their lives as a result of the accused's action. This situation is favorable and achievements of victimology science, but undermines the defendant's standing and rights in future criminal proceedings at domestic level. While there is a proportionate criminal mechanism to serve the interests of the victim and to prevent the accused escaping. Critical analysis and comparative achievements of this approach is the subject of this paper which has been done by descriptive-analytic method and has originality and innovation. The research question is: What is the position of the defendant's human rights considerations in the ITLOS's judicial procedure in issuing provisional measures? Findings of this study show that human rights considerations in favor of the victim in the ITLOS's judicial procedure are influenced by damage to the marine environment and its living resources are affected in most cases and its preference over the defendant for the protection of the interests of the human community. But in this case, both the accused and the victim are human, and the interests of one another do not take precedence over other by the above formula. Therefore, the Court's usual practice of safeguarding the victim's material (marine environment), should not ignore the human rights considerations of the accused in favor of the victim (human) at the time of his provisional release.

But in this case, it is thought that the consideration of human rights requirements in favor of the defendant in the interim measures of the ITLOS also has a negative impact on the process of dealing with the dispute. Therefore, the Court has chosen a moderate approach to avoid this situation, namely the suspension of the coastal state's criminal investigation and prosecution, without mentioning the temporary release of the accused for the benefit of the victims' families. But human rights

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considerations in favor of crime victims' families continue to appear in the ITLOS's approach to the accused. However, the minimalist approach of some judges of the ITLOS has attracted the attention and necessity of realizing human rights considerations in the interim measures in favor of the accused. The reasoning of the ITLOS justices has ignored the human rights requirements of the accused, while observing the human rights requirements of procedure is prioritized when ordering interim measures. Therefore, the temporary release of Italian nationals, even though it has a negative impact on the principle of settlement of the dispute between the flag state and the coastal state, is more preferable. Disclaimer that the ITLOS does not deal solely with the mechanisms provided for in the Convention on the Law of the Sea in dealing with this case. This approach is influenced by the incorporation of human rights documents in addition to the provisions of the Convention on the Law of the Sea, if necessary, even though the main dispute between the parties is limited to the interpretation of the provisions of the Convention on the Law of the Sea.

The interpretation of the provisions of the Convention on the Law of the Sea, in accordance with other international documents, is therefore appropriate for the realization of international criminal justice. Therefore, the interpretation and application of the provisions of the Convention on the Law of the Sea on the basis of the teachings of international law and international human rights standards have been difficult in this case. In interpreting the provisions of the Convention on the Law of the Sea and observing the principles of necessity and proportionality in the exercise of coastal state jurisdiction over the seizure of ship and detention of its crew, it is still bound by the application of other international law rules deriving from international human rights instruments. Of course, human rights considerations in favor of victimization in the ITLOS case law are affected by the fact that the marine environment and its living resources are affected in most cases, and its preference over the defendant for the protection of the interests of human society. But all the cases before the ITLOS are not same condition. Disclaimer that there is no difference between human beings and the marine environment as a victim and in both cases the position of the defendant's interpretation must be respected. Protecting the interests of the victim (marine environment) should not neglect the human rights considerations of the defendant in favor of the victim at the time of temporary release until commencement, trial and executive sentencing. In such circumstances, it is essential to consider the human rights requirements in interpreting each of the provisions of the Convention on the Law of the Sea with a view to balancing and protecting the rights of the parties. However, subject to the provisions of the Convention, only compensation, confiscation of property and fines are subject to the detention and punishment of imprisonment of crew or personnel. In this case, both the accused and the victim are human, and the interests of one another are not prioritized. The court's approach to the victimization of the victim, therefore, is not justified, arguing that the defendant's liberty adversely affects the judicial process, while there is no basis for this argument and not provided.

**Keywords**

International Tribunal on the Law of the Sea, Provisional Measures, Marine Environment, Human Rights Considerations.

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## The Evolution of Legal Systems of Companies Registration based on Right to Access to the Information

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### Abstract

Nowadays, Companies Registration in different legal systems are considered as a developed organization which besides undertaking the registration of the company as the final stage of establishment (administrative dimension), has the responsibility of providing information symmetry with the internal and external stakeholders (contractual dimension) at minimum cost. Historical studies, however, have shown that Companies Registration did not initially carry out this advanced mission; rather, it developed and expanded its functions over the time through an evolutionary process and step by step after economic failures, and finally, it has reached today's efficient system. Accordingly, legal systems have experienced, over time, three types of business registration information systems:

a) administrative systems: After the failure of the Chartered Company system, multiple pressures by liberals, eventually, led to the liberalization of the establishment of the corporation, and by establishing companies registration organization in various legal systems, the founders were able to obtain a corporate registration certificate by providing identity information to the corporate registration system known as Reference Data. The mere founding role of business firms in the era of liberalism led to rising the Administrative systems of Companies Registration.

b) Supportive systems: In the era of liberalism, always both internal stakeholders (small shareholders and employees of the company) and external stakeholders (creditors and individuals seeking economic interaction with the company) have very weak position compared with controllers (managers) in terms of information symmetry. After World failure of economic in 1930, in order to protect the interests of stakeholders, the Companies Registration developed its roles on the basis of gradual process, to expose and provide a greater scope of information that are known as "financial-economic information". This greater role that supports stakeholders provides Supportive systems of Companies Registration.

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c) Inexpensive systems: After the era of the "welfare state" in the age of "regulation," the discussion of "efficient interventions" of the government and the "cost reduction" arose. Thus, a system called the "Inexpensive system" emerged to reduce the contractual and administrative costs of collecting and accessing information.

Ignorance of "developments of roles of companies registration organization " in the Iranian legal system, has led to lack of understanding of the reasons for the interference of this organization in each of the information domains and as a result, it has caused a weak situation in the system of registration of Iranian companies in terms of information provision, that in addition to failing to guarantee the establishment of a company, at the stage of entering into business contracts, it is unable to "reduce costs" and "create information symmetry" ,and for this reason, other Inter-organizational system that have a different function - such as the Codal system that is embedded for special information of stock market companies- have to bear the burden of this institution partly.

The purpose of this paper, based on a comparative approach to the types of "Companies registration systems from the perspective of access to information" in the field of Continental Europe and Common Law and to analyze the legal foundations of corporate registration system evolution, is to show that, in the legal perspective, Iranian Companies Registration like other corporate registration systems, is in the process of saving access to information in quantity and quality dimension; however, the executive barriers do not permit the implementation of the intended legislator system. Accordingly, it has finally been suggested that, in order to resolve executive problems and build appropriate capacity for the implementation of the regulator intended system, it may be possible, under existing regulations, to define the functions and competencies of the corporate registration body in the form of executive actions such as by-laws or directives and guidelines.

### **Keywords**

registration law, reference data, economic data, Ministerial system, Supportive system, Inexpensive system.

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## Case Study of Gerrymandering in Light of the US Constitutional Review and its Benefit for Iran's Legal System

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### Abstract

The Gerrymandering phenomenon can be considered as one of the most obvious examples of violations of the political rights of a nation and jeopardizing free and fair elections as the most important manifestation of democracy in a country. In this illegal act a political faction weakens the vote effects of some people and reinforces some others through leveraging and redistricting the borders of election regions to reach its political aims. Analyzing the history of nineteenth-century US political developments illustrates the significant negative impact of this violation of lawmakers on the fundamental rights of the American people, especially in the conduct of free and democratic elections. It can be claimed that party-motivated gerrymandering during the nineteenth century systematically influenced the shaping of congressional election campaigns and, by making visible changes in the composition of state delegations, has determined the fate of the majority and decision-making party in the US House of Representatives. The founders of the United States drafted one of the first constitutions for the United States in 1787, and because this law has clear rules, judges go directly to it and give its ruling. Given that the principle of separation of powers is one of the fundamental pillars of the constitution, the judiciary, which is represented by the United States Supreme Court, has complete independence and other powers cannot interfere with its decisions or refuse to enforce its decisions. Based on this fact, the Supreme court of the United States has specifically addressed this issue in the context of the implementation of constitutional review, as its basic duty, and has made the legislation which caused artificial redistricting and violated the principle of equality of citizens in different states abolished and considered them against the constitution. In this analytical descriptive study which has based on documentary data the authors discuss this question that "How does US constitutional review deal with gerrymandering and what is the achievement of this study for reforming Iran's electoral system?" As an objective analysis we will study a recently discussed US Supreme court case (Cooper V. Harris) and use the results for reforming the redistricting system of Iran.

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As a result of this comparative study and after reviewing Iranian laws and regulations regarding electoral districts, it is observed that the mechanism for determining the district borders in Iran and the US is affected by policy and factional inclinations, and as a suggestion, the crucial task of electoral districting in the country can be entrusted to an independent commission to replace the previous pattern with a clear and expert process. It should be borne in mind that the Federal Supreme Court frequently used general terms of the US Constitution to consolidate the foundations of democracy and free and fair elections by using the interpretation of the law, and the Guardian Council in Iran In this way, can also play an active role in preventing the influence of party and factional inclinations on future districting. Utilizing the criteria used by the US Supreme Court to counter this abuse, including the prohibition of racial discrimination and the principle of equality of citizens with regard to the plurality and diversity of ethnic and minority groups in Iran, would be fruitful in possible amendments to the laws.

**Keywords**

United States of America, Equality of citizens, Constitutional review, Gerrymandering, Cooper V. Harris.

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## Survival Clause: A Comparative Study in Islamic and French Law

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### Abstract

Discussing the extent to which the contract clause of adherence to the contract is one of the important issues to be raised in relation to the terms of the contract. Some legal texts such as Article 246 of the Civil Code of Iran have been deduced from the viewpoint of the Iranian legislator that it is a condition for the conclusion and dissolution of the contract. If a contract is canceled due to a legal or contractual reason, the contract clause will be null. It is also known in Islamic jurisprudence that the clause follows the contract.

The fundamental question is that is it possible that a contract clause remains after termination of the contract? It is obvious that there are several cases that, despite the dissolution of the contract, contract clauses have continued to be legal and remain affective and valid. These terms are considered as survival clauses. In French law these clause are known as "Les obligations survivant au contrat". the new French Civil Code, Article 1230, has ruled out some of the terms of the contract from this general rule and stipulated that these clauses would remain in force upon dissolution of the contract. The basis for the survival of some terms after the dissolution of the contract, the examples of them in Iranian law with a comparative study in Islamic jurisprudence and French law forms the subject of this article. For this purpose, this article is prepared in a descriptive analytical method.

As a conclusion of this article we should note that there are two types of contract clause: dependent clauses and Survival clauses. Dependent clauses are those referring to the considerations of the contract. For example the clauses which are related to the quantity or quality of the considerations are dependent clauses. Such clauses can not survive after dissolution of the contract. In the other hand, the survival clause is a clause that can remain after dissolution of contract. For example the arbitration clauses and penalty clauses are survival clauses.

### Keywords

Adherence of the clause, Independence of the contract clause, Relation between contract and clause, Survival of the clause.

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## Comparative Study of Application of the Theory of Dépeçage to International Trade Contracts in Iranian, American and European Law

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### Abstract

One of the crucial issues in international trade contracts is to determine which law is applicable to different aspects of the agreement and whether the applicable law is to be invoked during the execution of the contract and/or during settlement of disputes. In other words, determination of the applicable law in international trade contracts plays an important role with regards to the parties' rights and liabilities. However, the question remains unsettled in various legal systems is whether the parties to an international trade contract can apply different laws and regulations to different terms and conditions in the same contract.

There are various approaches regarding the choice of applicable law and different theories have been expressed relating to choice-of-law provisions. This research explores one of these theories called Dépeçage in private international law and conflict of law. Before early 1960s, the doctrine of *lex loci delicti* was the generally accepted choice-of-law rule which determine the law of the place where the tort was committed as the appropriate governing law. However, this traditional rule is not suitable for international contracts where usually the parties located in different countries. Accordingly, "center of gravity" was the next conflict of law approach. The problem was not completely solved and the doctrine of "most significant relationship" was the new choice-of-law rule. However, it is not always possible to meet parties' expectations by the application of one governing law to the entire case. As a result, Dépeçage became the next choice-of-law rule added to aviation litigation.

The theory of Dépeçage is a concept in private international law that refers to the process of cutting a case into individual issues whereby each issue is constrained to a different applicable choice-of-law analysis. In other words, the theory of Dépeçage is the application of different laws to various legal issues arising from disputes. This research shows that there is an opportunity to gain many advantages by the application of the theory of Dépeçage in international trade contracts. However, adopting this theory ought to be treated with caution due to its disadvantages and the issues it may cause if not applied within a specific framework.

Therefore, for appropriate application of Dépeçage, certain criteria such as protecting parties' justified expectations and maintaining parties' interests have to be

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met. Also, this theory shall not be applied in cases that lead to dissatisfaction of parties, destruction of legislative intention, or invalidation of a contract. Moreover, the applicable law that has the greatest concern for each issue must be applied to effectuate the purpose of each of the applied rules. In other words, choice-of-law values are significant principles for the application of Dépeçage. Lastly, judges and arbitrators must provide criteria and legal reasons for the application of Dépeçage in international trade contract during the dispute resolution process.

**Keywords**

Choice of Law, Conflict of Law, Dépeçage, Governing Law, International Contracts.

## The Comparative Study of the Distinction Criterion between Contractual and Non- contractual Liability in Iranian and French Law

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### Abstract

Extra-contractual liability in its wide sense, is defined as the compensation of losses in the absent of a contract. Although different discussions have been carried out regarding this concept, there are considerable controversies in respect of definition, examples and unity or plurality of extra-contractual liability and contractual liability. It seems that these controversies are mostly the result of the lack of studying of the distinguishing criterion between these two kinds of liability. A criterion which can put an end to some controversies regarding the examples of these two kinds of liability as well as deciding about the new examples which might not be fully comprehensively studied.

Although, different criterions can be extracted from existing studies, some critics show the necessity of proposing a specific and acceptable criterion.

Some criterions can be distracted from current studies, but they would not prevent non related examples to enter into the scope of the extra-contractual liability. In other word, these criterions are too wide. On the other hand, the perspective about some notions which are used as the current criterions, are not correct. For instance, "contract" itself is considered as one of the criterions. It means that, whenever there is a contract, the liability which arises is contractual. Otherwise, it is considered non- contractual. In this criterion, contract is considered as a material instrument. In other word, the objective aspect of contract is important in this sense, which seems critical from our point of view.

Therefore, in this thesis, "volition or will" is proposed as the element which can distinguish contractual and non- contractual liability. Despite the usual objective perspective towards volition and the contract sprang from it, this thesis focuses on the subjective aspect of the said notion.

The result of considering volition as the criterion for determining the scope of the extra-contractual and contractual liability is that there might be some situations in which, despite the absence of contract, parties' volition exists. As the result, the liability of parties is considered contractual, although there is no contract between

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them. For example, the breach of some obligations such as confidentiality which may last even after the termination of a contract is contractual. This is because; the parties' volition can be attributed to this obligation, although the objective contract between them is terminated. Moreover, sometimes in spite of the existence of the contract, parties' volition doesn't entail the required specifications and as a consequence, can't serve as the basis for the contractual liability. This result is true especially for implicit terms and conditions. These terms can join the contract and might serve as the basis of a contractual liability only if parties' will is allocated to them therefore, in case of parties' ignorance about a customary obligation (as an implicit obligation), its breach cannot cause contractual liability.

From this perspective, this criterion shall include two specifications. Originality, as the first specification means that parties' will shall be genuine. Parties have to choose an obligation and its liability by their own genuine will. Therefore, imperative rules which are compulsory are not original and can't serve as a trigger for contractual liability. They are legal obligations and their breach are resulted in non- contractual liability. On the other hand, volition refers to the obligations and commitments which are in line with the main purpose of the contract. This criterion which is also partible with respect to the implied terms and conditions, determines the scope of the said terms which are considered contractual. For instance, duty of care only enters into the contracts which their final purpose is care or something related to that, such as doctors or nurses or those whose duty is considered so critical to hem such as transport enterprises.

According to the said criterion, the examples of different kinds of liability are divided into two groups; first, the examples which are not subject of lots of controversies and second, examples which are accompanied with a lot of dissidences.

Moreover, providing a criterion which determines the scope of the extra-contractual liability leads to some consequences. Occurrence and proof of the said liability and the compensation of related loss are affected from this criterion and causes some differences between contractual and extra contractual liability.

**Keywords**

will- damage decrease- punitive damage- non-contractual liability- contractual liability.

## **An Explanation of the Fundamental Link between Economics and the Property and Contract law with an Emphasis on the Concept of Resource Scarcity**

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### **Abstract**

An attempt to realize the authority of the synthesis of law and economics and stepping into its epistemological realm require thinking of a remedy for and responding to barriers to the methodology of the realization of the economic analysis of law. Many experts in the discourses of "economics" and "law" do not tolerate the entry of economics into the realm of other disciplines, such as law, and the analysis of law based on the theories and methods of another discipline, such as economics, as they believe that there is no homogeneity and relevance between the principles of a methodological domain; i.e. economics, and those of a subjective domain; i.e. law. In the present paper, authors on the one hand, adopt a moderate positivist approach by rejecting the pure positivism approach and simply rejecting "the law as it is" and emphasizing the concept of efficiency and the normative approach on the other hand and in response to this question that whether the incorporation of economic standards into the realm of property and contract law is as an acceptance of the heterogeneous theories and methods of economics? by explaining the role of one of the most fundamental concepts of economics; i.e. the concept of "resource scarcity", in creating the concepts of "property" and "contract," the authors show that the entry of the necessary economic principles of this concept into the realm of property and contract does not mean the acceptance of the heterogeneous theories and methods of economics, but due to the unity of their cause with that of the two latter concepts, we can talk about the homogeneity of method and subject in the economic analysis of property and contract. Given aforementioned discussion, is it essential to apply economic rules in the realm of legal property and contract law? The answer is that if in the analysis of the above rules, the epistemic requirements of the fundamental link

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between economics and the law of ownership and contract are denied or forgotten, these rules will be alienated from their origin, and will more or less deviate from the path to achieve social interests. The epistemic requirements mean promoting the concept of efficacy; as a criterion for the validation of legal rules, and reducing the role of governments in limiting the principles of private property and contractual freedom.

**Keywords**

resource scarcity, economics, property, contract, the economic analysis of law.

## Foundations of Legal Protection of Reputation

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### Abstract

Today, celebrities have a profound impact on various aspects of society, and especially on its economy. As in marketing, it has been proven that the use of celebrities in advertising, especially where it means the endorsement of a celebrity's quality, makes the subject matter of the advertisement remain in the audience's mind for a long time. This bold and influential role has led different legal systems to try to give celebrity a special right to their fame. In American law, for example, The Right of Publicity is used. This right means that a person is allowed to exploit his identity and oppose exploitation without the permission of others. The right is defined in Black's Law Dictionary as "the right of [an] individual, especially [a] public figure or celebrity, to control [the] commercial value and exploitation of his name or picture or likeness or to prevent others from unfairly appropriating that value for their [own] commercial benefit."

The right, which is now recognized as the right of publicity, was originally rooted in privacy law but in the future, this right was separated from the right of privacy. The right of privacy was non-financial and non-transferable to another while publicity right was a financial and transferable right to another.

Although there is little doubt about the principle of celebrity protection today, there are different approaches to the foundations of celebrity support. Why celebrities should be supported? Is their support justified? Some believe that celebrities do not deserve protection. They believe that celebrity fame has no benefit to society. So why should we increase their income without justification by recognizing this right? The group argues that celebrity rights should not be compared with intellectual property rights. Because intellectual property rights have benefits for society, but fame is not as intellectual property rights. Against this approach, some have tried to support celebrities. Some try to use ethical basics to justify the need for the legal protection of the reputation of celebrities. Others use economic principles to justify this right. They use the theory of the common property tragedy. The American legal system, under the influence of a culture of consumerism and capitalism, protect the fame. No matter what its origin is. So, economic fundamentals are used to justify the issue. Because in this set of fundamentals, we have nothing to do with whether or not a person's reputation is derived from his or her hard work, but that reputation, irrespective of how it is acquired, in any case, deserves support. In the legal systems of Germany and France, personality rights are mainly cited, but this ground is incapable of justifying the financial effects of the rights of the persons concerned. In the Iranian legal system, a

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different approach seems to be chosen: given the emphasis of religious and the legal system on work and its importance, it seems that the basis for the protection of reputation is work. Accordingly, fame will only be supported when it is achieved by effort, not by accident. However, non-financial effects are justified by reference to the personality rights.

**Keywords**

reputation, Theory of labor, theory of the common property tragedy, Personality rights, unjust enrichment.

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## The Comparative Study of Position & Function of the Individual Opinions (Separate, Dissent and Declaration) in the Jurisprudence of the International Court of Justice and the International Investor –State Dispute Settlement Arbitration

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### Abstract

Individual opinions of the judges/ Arbitrators are one of the main forms of Legal Doctorin, which assist to determine the rules of law. However, the International Court of Justice and Investor- State Arbitration are two different systems, but both of them belong to dispute settlement legal system and recognized the individual opinions. Therefore, comparative study of these two systems on functions and effects of individual opinions of judges/arbitrators is a step for finding the differentials and similarities of jurisprudences in this two systems and development of legal literature of dispute settlement as well. The Judges of the International Court of Justice (ICJ) by their individual opinions, both in contentious and advisory judgments contributed in development and determination of rules of international law and have taken role as safeguard of court, and also have had role in accrediting the decisions of the court as well as international justice through development of judicial activism, law-making, dialogue of law and removing the gaps of law. Vice-versa, the functions & performances of Individual Opinions of arbitrators in investor-state arbitration (in particular ICSID) faces with various challenges. Because on one hand the arbitrators withdrawals of individual opinions in particular dissent, and on the other hand the dissent is often a tool for looser party to conduct the case on the way of null procedures, and this caused unreliability on these opinions in arbitrations. Due to the lack of the appeal mechanism in investment arbitrations, the awards would be fallen in annulment process just for minor reasons. According to research which has been taken on awards of the ICSID, the arbitrators announced their dissents in most cases in favor of the party who loosed the case fully or partially. For this reasons, the concerns has been increased about individual opinions of arbitrators. Therefore it cannot be expected that individual opinions in investor –state arbitration would be in favor of development of international law.

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Other important point which should be taken in to account, is the independency of the judges in comparison to arbitrators. Since in the international Court of Justice (ICJ) as the focal point for resolving the disputes among States and the parties have less interference in selection of the judges, therefore judges have enough independency and they have some privileges and immunities as well, based on the status of (ICJ) which backup them to provide their individual opinions, in particular dissents. But in investor-state arbitrations, since the arbitrators are designated by the parties, they are under the influence of the parties and face with some challenges in providing the dissents. With regard to the complexity of the investment cases, the use of the individual opinions in correct forms like (ICJ) is necessary, but achieving this aim needs some changes and amendments in investment arbitrations mechanism. One of the proposals which proposed for decreasing the challenges in this respect is the establishment of the Investment International permanent court. This mechanism has already included in some of the new agreements like as Transatlantic Trade & Investment Partnership-(TTIP), Comprehensive Economic and Trade Agreement(CETA),Trans-Pacific Partnership-(TPP), etc. It seems that the establishment of this mechanism will pave the way for the judges/ arbitrators to provide their individual opinions with more independency.

**Keywords**

Individual Opinions (Separate, Dissent & declaration), Judges/Arbitrators, Investor-State Arbitration, International Court of Justice, ICSID.

## A Comparative Study of the Position of the cause in the Contracts of Iran and the New French Law

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### Abstract

Although legal doctrines have provided a more conceptual sense of direction, the position of direction cannot be ignored as an essential element in the conclusion of a contract. The French case-law has repeatedly emphasized the need for direction. In the event of a continuing contract, the contract shall be terminated if at any stage of the performance of its obligations in order to remove it. Some jurists see the contract as a dangerous tool in civil law. That is, contractual obligations are precisely distinguished from non-contractual obligations and have a different function. Civil liability is based on restoring the current situation in order to restore the situation. In the event that a person inadvertently uses another's property, compensation is the first guarantee of enforcement. However, contractual obligations are primarily about the future and its dynamic power to change the status quo, and accordingly, German jurists refer to the contract as the king of private law, although French civil law refers to it as a law between the parties. He knows. Direction in the field of contract law has been considered as a means of dangerously restricting the contract, and Iranian civil law and former French law have considered the existence of a directive along with other essential requirements. There are two main functions for the legislators of these two countries: First, it is a means of justifying contractual obligations, in other words it explains the cause and why of the obligation, and we do not seek to justify the plaintiff's willingness to conclude the contract but merely to seek his purpose. We are committed. The contractual direction of the exchange must be crystallized in the form of a contractual exchange, and the objective aspect is that each party considers that the recipient has a right to exchange for itself, which would create a relationship between the borrowers and justify the economic equilibrium of the contract. On the other hand, the binding force of the obligations is also based on such an analysis. Alongside the objective aspect, we see in the irreconcilable contract the vague and glaring aspect of the direction, the person pursuing his property to another without receiving the bastard, excluding the undertaking of the subordinate aims, merely acquiring his exemption. We identify it as a direction. Secondly, it is primarily about trading as a factor limiting contractual freedom. The parties have the necessary and complete freedom to conclude contracts

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and legal relations, but this freedom is limited to the fact that the public interest and order of the community is not impaired.

In the new French law, the principle is the satisfaction of the contract, and the contract derives its power from the agreement between the parties, and the conclusion is that the contract comes from elements such as intent, relevance and specific purpose, and so on. The title of the essential element is not intended, however, in other legal instruments of contract infringement based on the necessity of existence. Traditional and classical views point to orientation as an important pillar of the contract and are concerned about the number of remediation projects that have suggested removal. However, it is important to note that Koch is a necessity in contract law because judicial security is provided by this. However, others believe that this security will be maintained with regard to the contractual interest anyway, and traditionally every person tries to maintain his or her interests in contractual relations with others., it should be said that by accepting the direction, the cause of the wrong effect on the essential characteristics and the guarantee of the nullity of the contract, and the ineffective character of the ineffective personality associated with the free contract and its nullity, can be justified. In the first case, the contract direction is confused but in the latter case the contract direction remains unaffected. Iranian law can be recognized as a progressive and advanced law by adopting French law and adhering to the principles of Islamic law. Commitment is not considered as one of the basic requirements in contract formation and Article 190 of the Civil Code deals with the transaction. Therefore, I, as a whole, has not been the legislator as one of the essential requirements in the formulation of the contract in question, and only if it stipulates the legality of the contract is a condition of validity and a factor in the influence of the contract.

**Keywords**

Cause, obligation, Contract, Imamie Jurisprudence, French Law.