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Research Paper

Legal and Economic analysis of Bank Execution Guarantee of Issuing an Unpaid Cheque

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Abstract

The increasing development of internal and international trade and commercial transactions, the need for speed and ease of commercial transactions, the important role of capital circulation, and the volume of exchanges in the economy of each country require the prediction of the tools needed in this field, which at the same time keep pace with developments, based on the needs of the market, ensure the fulfillment of obligations. Undoubtedly, a cheque, as one of the most common payment methods in internal business transactions, has a special and practical role in economic relations. Despite having many advantages, this document, as an alternative to bank notes, has some disadvantages, the most important of which is the worry of non-receipt of the cheque by the holder who has taken a piece of paper in exchange for the price, which he does not know if it can be receivable or not? because this document is dependent on the issuer's credit and has no inherent value in itself, as a result, no other support to receive is conceivable except credit and trust in the issuer. Despite the provision of a guarantee of multiple implementation guarantees and even the provision of criminal penalties for issuing bounced cheques, the position of this popular document in business relations has not been established for years. Cheque, as one of the important means of payment in domestic trade, has a significant contribution to commercial activities, and if it is designed for the use of this useful tool and is provided to the activists of this field, it can be effective in achieving macroeconomic goals. But let's not forget that a cheque is only a means of payment and it cannot be considered as a payment, and therefore

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there is always a concern for the person who received this document and lost money in return, that if the document leads to payment If not, how and by what implementation guarantee can he claim his rights.

The effects of bounced cheques, such as the density of court cases, the increase in the number of cheque prisoners, and the decrease in the validity of cheques to economic actors, which ultimately imposes a significant cost on society, have been from the very beginning of the appearance of cheques in the Iran laws, In the year 1925 and then in the current commercial law approved in 1932, has encouraged the legislator to especially support this commercial document by developing special rules and regulations, so that it can be used as an efficient payment tool.

In Iran's legal system, the various sanction guarantees foreseen for bounced cheques have a long history with the establishment of commercial laws. Only one year after establishing the current Trade Act and assigning 8 articles to cheques, the Iranian legislature approved the first sanction guarantee with a criminal approach in 1932 by adding repeated Article 238 to the criminal law. The legislator's idea of predicting the punishment for the issuer of the cheque was carried out in line with the crediting of the cheque, so that while encouraging the economic activists to use this document, their concern about the possibility of non-payment will be reduced and the trust of the people will not be taken away. However, in practice, the chosen way for the legislator to raise confidence by adopting the guarantee of criminal execution could not stop or reduce the upward trend of issuing bad cheques. Later, this approach was adopted by guaranteeing various and sometimes unique performances for this popular normal document, so that some of these privileges are not even provided for the official document.

The last act of the legislator in the direction of increasing the validity of the cheque is the amendment law of 2017, which consequently made changes to the regulations governing the cheque, the most important of which is the guarantee of bank execution. This new implementation guarantee includes a set of protective and punitive measures that are applied by the legislator without the need for a judicial order on the part of institutions providing financial and credit services.

It is worth noting that before the enactment of the above-mentioned amendment law, the bank had no legal obligation for a bounced cheque other than issuing a certificate of non-payment, and the cheque holder had no hope of the bank's cooperation to fulfill his rights. Whereas, according to the guarantee of implementation stipulated in the amendment law of 2017, the most important duty of banks and financial institutions is to receive unpaid cheques for the benefit of the holder. In my opinion, the most important sanction guarantee that the legislator could have established for crediting this document since the birth of the cheque is the bank implementation

guarantee. The official statistics published by the competent authorities indicate a significant decrease in the issuance of bounced cheques after the implementation of the aforementioned law, but this method has disadvantages and problems that must be corrected. In this article, an attempt has been made to provide a legal and economic analysis of this unique performance guarantee.

Keywords: Commercial document, Cheque, Performance guarantee, Bank restrictions, Litigation.

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Research Paper

François Gény and the Foundations Governing the Creation of the Positive Law:Thinking About the Interaction of Metaphysics and Reality in the Creation of Positive Family Law

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Abstract

The scientific formulation of positive law is the basis of François Geny's thought. However, Geny is well aware that if the term "scientific" means extreme scientism of the late nineteenth century, it will result in a positive law that lacks a metaphysical element. However, Geny knows that man is not just matter; it is also the Espirit. Geny refers to a human being who is social, rational, and free, the human being who worries about where he came from, why he came, and where he is going, i.e., the same man that *Maulana Jalaluddin Rumi* also speaks of his inner voice. However, Geny does not want to fall into the trap of liberal metaphysics of modern natural law and conclude positive law based on the ideology of individualism and the liberal positive law of the family.

Thus, like the philosophers of law in the first half of the twentieth century, he seeks to pursue the interaction of metaphysics and reality as serious concerns. The natural, historical, intellectual, and ideal foundations of François Geny's thought, which are inextricably linked, are the

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framework of the same interaction and result in the scientific formulation of positive Law. Real foundations are a set of facts that take precedence over the human mind and human will: physical nature, moral nature, human psychological construction, religious feelings, social and geographical environment situation, the economic situation, and the political or social forces in society The historical foundation does not mean merely some of the socio-historical foundations that potentially and indirectly influence the formation of the law of the present generation. Rather, it refers to norms that, in addition to being the product of the passage of time, manifest themselves as existing law and are responsible for guiding human behavior. The ideal foundation is based on experimental intuition which senses the heartbeat of a social organism and is aware of the mystery of the rules that guide the organism to its areas. Such intuition is related to pragmatism and, of course, should not be confused with *Bergson*'s intuition, which is based on the opposition of intuition and action, and it is the intuition of reason which connects intuition to metaphysics rather than to reality.

Although the rational foundation is more important among these foundations, it does not mean that metaphysics takes precedence over reality; since this reason, on the one hand, is the sole discoverer of the principles derived from the nature of superior objects, and is not intended to replace such nature of objects, which is the basis of the validity of the norm. On the other hand, this intellect is influenced by natural and historical foundations. The empirical nature of intuition also does not negate its guiding role. This intuition is complementary to reason. However, Geny does not place this foundation at the top of its foundations so that experimental intuition does not pave the way for the passage of the nature of superior objects and spiritual intuition; it is an intuition that interacts with the nature of objects, and for Geny to be sure of this interaction, it attributes an experimental description to this intuition and considers it a complete and, of course, evolutionary experience.

Geny's positive law of the family is based on these four foundations; the point is, however, that intuition of Geny may also result in the socialization of family law if it results in the principle of monogamy and leads to the relative liberation of man from position. In this way, one can critique Geny's idea, arguing that the end of this evolution is uncertain and does not follow a definite linear path. It should not be forgotten, however, that spiritual intuition prevents this socialization from leading to full institutionalism; both the natural foundation and the historical foundation prevent this spiritual intuition from leading to liberalism and the transition from institution to private contract in the family law system. In any case, the foundations of Geny's thought are inconsistent with his legalism, which is the result of state positivism.

Empirical intuition is also the basis of the ideal foundation, and such a framework neither sees the transition from institution to contract as its ideal in family law, nor does it conclude marriage that ignores the natural proposition of gender difference; the principle does not challenge the strength and continuity of the family, and at the same time, does not prevent the family system from evolving.

Keywords: Metaphysics, Reality, Foundation, Natural Law, Intuition

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Research Paper

Policies Governing the Implementation of Oil Sales contracts attached to upstream Contract with a Renegotiation Approach

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Abstract

In upstream contracts, selling oil to the investor in exchange for the services and expenses is a common practice in Iran, which is carried out through a contract related to the upstream contract, called the attached oil sales contract. In stable conditions, the stability of the oil sales contract is one of the goals of the parties to the contract, that is, the National Oil Company on behalf of the Ministry of Oil and the Government of Iran and the domestic or foreign contractor. The host government's adherence to this stability depends on the stabilization of domestic and international conditions at the time of signing the contract and the non-change of the macro energy and financial policies governing the implementation of these contracts. The occurrence of domestic and international changes shows the necessity of updating and maintaining the interests of the parties during the implementation of long-term contracts. After facing these changes, the interests of one of the parties are often affected and it deviates from the expectation of concluding the contract. The continuation of such a contract is against the initial intention of its signatories, and disrupting it also causes a delay in fulfilling the

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obligations of the upstream contract and related contracts. The primary solution is to foresee flexibility in the contract, including flexibility in time, price, type, amount, and delivery method. If the flexibility in the contract is not suitable for the changes that have occurred, the second solution is to use the renegotiation clause.

The framework of this research is based on three principles: firstly, the importance and necessity of securing the interests of the host government through renegotiation, secondly, stating the objective criteria of its request and applying examples to these criteria, and thirdly, examining this issue in the context of the implementation of the attached oil sales contract; A contract through which it is decided to hand over half of the products of the field and the right decision can bring more benefits to the host government. The authors hypothesize that by accurately predicting and considering the criteria in the contract, it is possible to pursue the government's policies to secure its long-term interests through renegotiation and without the need to use the sovereign authorities and the subsequent occurrence of disputes. Because the issue has different dimensions and requires a correct and comprehensive interpretation and understanding of the attached oil sales contract and the importance of renegotiation in it, it is considered a qualitative research method and since the research achievements are used in the field of concluding, implementing and resolving disputes in oil sales contracts, it takes on a practical aspect.

Based on the proposed hypothesis and descriptive-analytical study and review of existing articles, books, and laws, criteria such as changes in the conditions governing the contract, changes in national energy policies, and the loss of economic efficiency of the contract were explained as the basis for the start of renegotiation. Therefore, the host government can define the non-financial criteria for renegotiation and use them to protect the public interest, considering the obligation to repay the upstream investment and the governance aspect of it. The change in national energy policies is one of these non-financial criteria, which can be mentioned as having more and more diverse customers and making them depend on the purchase of Iranian oil to increase security in the country and the region and establish communication with other countries or prevent crude sales and support downstream industries. The Removal of sanctions is a clear example of the change in the circumstances governing the contract and the reasons for renegotiation, which has an external aspect. Increasing the internal capacity of refining and processing oil and turning it into derivatives, and the need for rawer materials for refineries and industries, are other cases of changes in the conditions of the contract that have an internal aspect. According to the proposed provisions of the renegotiation condition, if the contractor accepts the new conditions of the National Oil Company, the contract will be continued, otherwise the oil sale contract will be terminated and the rest of

the investment repayment obligation will be done in another way and without any compensation claim.

Keywords: Attached Oil Sales, Host Government Interests , International Oil Company , National Oil Company , Governing Policies.

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Research Paper

Causes of Create, Transfer, and Loss of Wnership in Islamic Law

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Abstract

In general, our legal scholars have integrated the "Theory of General Obligations" from French law into our civil law. According to their belief, what connects the subsets within the category of property is an "obligation." These subsets are subjected to a set of rules and principles governing how obligations are created, transformed, and terminated. In contrast, our civil law, with substantial modifications in content and a clear departure from its Western origins, classifies these subsets under the category of property as "means of ownership."The research methodology employed in the article is fundamental and descriptive. The authors aim to explore the differences in the relationship between property subsets in French and Iranian civil law, seeking to identify the nature of legal relationships concerning property in Islamic law. The research scope is limited to the property subsets, which are further categorized into discussions on possession, contractual and tortious obligations, the right of pre-emption, and inheritance in subsequent sections.

The question raised is about the differences between these two legal systems that lead to one categorizing property under the "title of obligation" while the other categorizes it under the "title of ownership." The authors believe that what has led our civil law to classify these property subsets under the title "means of ownership," with significant modifications in content and a clear departure from its Western origins, is the "Theory of Ownership." This theory is the prevailing discourse in the Islamic legal

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system regarding property. What enables the establishment of a systematic relationship between these subsets under the category of property is the concept of "ownership." Therefore, discussions on possession, contractual and tortious obligations, the right of pre-emption, and inheritance under the category of property are subject to a set of rules and principles governing ownership, including how ownership is created, transferred, and terminated. As a result, the Theory of Ownership can be viewed as a four-lane road that most legal issues related to property categories necessitate crossing. It underscores the need to present it within the framework of a specific general theory. Property, which falls under the general concept of "economic value" in various forms, including tangible and intangible assets, without relying on obligations in personal ownership, will vary depending on the nature of the property, the method of transfer, and the guarantee of enforcing ownership rights in case of violation.

Based on the prevailing theory that ownership is the central concept underpinning property rights in Islamic law, it can be said that, in Islamic law, instead of categorizing contractual and tortious obligations under a set of rules and principles governing how obligations are created, transformed, and terminated, they are categorized under a set of rules and principles governing how ownership is created, transferred, and terminated. In this context, one can argue that Islamic legal systems establish specific mechanisms to address the needs of each phase of the property's existence. For the phase of creation, the legal system recognizes the means for creating relationship ownership, through which ownership is established between a person and property. Once ownership has been established and is considered to have a life of its own, it becomes necessary to transfer ownership. Given that relationship ownership is inherent in ownership itself, and one of its consequences is the sovereignty of the owner over the property, the legal system allows for the transfer of ownership by changing the parties involved. However, the necessity of transferring ownership, as a means of altering ownership, does not prevent the owner from creating a new relationship between themselves and the property, effectively establishing a new form of ownership with another party. Finally, since ownership logically comes to an end at some point during its existence, based on the theory of general ownership, the legal system establishes an institution known as "termination of ownership." Under this institution, the mechanisms for the termination of ownership are addressed in subsequent categories.

Keywords: Ownership, Owner, Property, Employment, To create ownership relationship, To transfer ownership relationship, Termination of ownership, Take out of ownership.

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Research Paper

Banking Draft for Abrogation of the Monetary and Banking Law of Iran

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Abstract

The Iranian State Monetary and Banking Act of 1972 has adapted progressive laws of European countries in the structures and organs of the Iranian Central Bank. In its other part, this Act has dealt with banking operations, the procedure for establishment of private banks and the criteria for their operations, similar to the banks in European countries and the United States. Nevertheless, the Parliament draft bill on the Banking of the Islamic Republic of Iran was put on the agenda of the public session of the Parliament in August 2022 and approved some of its confusing articles with the extreme limitations of broadcast of the debates by the Voice and Vision of the Islamic Republic of Iran, the state radio and television. Those who are handling the draft bill and have no legal expertise and are in fact after abrogation of the State Monetary and Banking Act.

The legal interest and its rate which have been adopted in valuable legislations during the modern period of the Iranian judiciary have distinguished the legal concept of interest from "usury." Towards the international banking system ,Iranian banks have also been able to perform their duties in accepting deposits of the people and payment of bank loans. The so-called, "Free Usuary Banking Operations Act," passed in 1983, with reactionary attitudes and ignoring the separation of the legal concept of "interest" from "usury" and the legislative achievements of Iran after the Constitutional Revolution of 1907, brought to disarray the provisions of the

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banking part of the State Monetary and Banking Act. The superficial and impractical provisions of the 1983 Act broke down the demarcations of the specialized banking operations, which paved the way for the wide scope violations of Article 34 of the State Monetary and Banking Act ,barring the banks to enter into real estate transactions, purchase of shares in commercial companies and engage in entrepreneurial activities. The banks and non-banking credit institutions having entered into real estate and tower building business, the living environment of the big cities has been destroyed and the capital of the banks has become inaccessible for production and creating employment .

For the protection of the rights of the people and security of their deposits ,banks in all countries operate under constant supervision so that they would not exceed from the scope of their specialized functions and duly comply with the standards. However, the proposed draft bill, put on the agenda of the Parliament last August, wants to legalize the operations of non-banking credit institutions and allow them to enter into the scope of activities of the banks .For years, this kind of institutions has imposed heavy losses on their depositors and the former president of the country in response to their protests has unduly paid huge amounts of money from the national capitals for compensation of the losses of the depositors of such institutions, which itself is an illegal appropriation of state properties and amenable to prosecution.

Finally ,the sponsors of this draft bill are pursuing to extend the disarrayed provisions of the Free Usury Banking Operations Act to the jurisdictions of the Iranian Central Bank and thereby also bring to disarray the valuable provisions of the State Monetary and Banking Act on the part concerning the Central Bank .For this reason, five former governors-general of the Central Bank, being concerned about it, have requested that the proposed draft bill on Banking of the Islamic Republic of Iran be excluded from the agenda of the Parliament. I also have dealt with some of the principal criticisms of the draft bill in this Article and have proposed that the draft bill be excluded from the agenda of the Parliament. If there is a will in the government and the Parliament for updating the State Monetary and Banking Act, they must benefit from the assistance of legal scholars, law schools, those involved in the organs of the State banking system and the modern and progressive monetary and banking laws of other countries such as that of France.

Keywords : Legal interest, Usury, Monetary and Banking Law of Iran, France Monetary and Financial Law, Usury.

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Research Paper

University's Interest in City and The View Of Supreme Court to It (Critics and Review to Judgment No 59, Arrangement No 4, 1974/10/28 of Civil Chambers Union)

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Abstract

As a social institution, what right the university has in the city and its construction is the main issue of this article. If the rules and regulations are violated during the construction and development of the city, can the university, which has a social presence in the former, complain about this violation of the rules and regulations due to the negligence or silence of the city administering institutions? The basis of this question is challenging from the point of view that, for a civil action, one should look at the criterion of benefit, because benefit is its basis. So does the university have such an advantage in the city and society? In this article, the demand of the university's lawsuit was the removal of approximately 400 meters of land and the destruction of constructions from Zul-Qadr street in the Amirabad area. Finally, the civil chambers of the General Assembly of the Supreme Court recognized the university as the beneficiary and accepted his lawsuit. Based on this, today, when the plans for the development of the university environment are in hand, is this social view of the role of the university in the city still sustainable?

Examining the decision of the General Assembly of the Supreme Court and identifying its historical and legal position in our legal system has been

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the main method of research in this article. In addition to this method, an attempt has been made to examine the current position of the university in society and in legal fields, and to examine the opinion of the civil chambers of the Supreme Court for the university. The fact is that the judgment of the General Assembly is important from the point of view of the university and the city, especially because in those days when the Administrative Court of Justice was not yet established so that, for example, individuals could, as neighbors, complain about their neighbor's urban and construction measures and possibly revoke their permits.

The theoretical framework of this article is the examination of the judicial procedure regarding interest in litigation, with the consideration that the university still has an important social role in the city, and if the position of the university is viewed from this point of view, many of the implementation problems of the university's organization and development plans with the correct interpretation will be resolved.

If the correct implementation of the law is violated in the city surrounding the university or the legal regulations in the field of urban planning and real estate and private documents are ignored, can the university, as a person who has a living and dynamic presence in this environment, refer to the judiciary for the correct implementation of these laws?

If the university has a dynamic and living social role in the city, the benefit that is the criterion of litigation should be interpreted according to this role.

The judgment of General Assembly, which is a historical and legal document for the University of Tehran, should be considered as a historical and legal document for "Iran" which is based on the right foundation. This document shows that the interest is not only material and the right is not appeared only in the official document. The benefit and right of the university, whose ownership is based on the judgment of *the court of property proceedings* and the law on *the sale of king's real estate*, is stronger than any other document.

In addition, this judgment shows that the university is a part of the life of the city and should not be abandoned on the pretext of the type of litigation and the type of documents and documents in possession and produced. A university that has built a street on its property to participate in the city should be able to demand the eviction of the aggressor and owner of this street. Also, a university that is a part of the city and its social developments should be able to claim and demand its truth and authenticity while passing through a street with a certain width.

This university, which has acted in interaction with the municipality and the city association, has asked for the third party of this institution to show the correct implementation of the law regarding those who have building permits. On the other hand, this judgment showed that the social interest of the university in the city from the perspective of the Supreme Court of Iran was recognized years before the issuance of General Assembly unification judgment No. 672 and 681 of the Supreme Court and 115 of the General Board of the Court of Administrative Justice in Iran's judicial system. With this description, the decision number 4 of 1352 imposes another criterion on the researcher, with which he can reach a kind of evaluation in the comparison between Article 576 of the Civil Procedure Law of 1318 and Article 408 of this law approved in 1379.

Key Words: University of Tehran; The City; Interest; Third Party Lawsuit; City of Knowledge.

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Research Paper

Executive Support of Settlement Agreements in International Regulations and Iranian Law

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Abstract

Mediation and conciliation, as one of the oldest dispute resolution methods, have never found a similar place compared with arbitration or litigation. The numerous advantages of this method for both the disputing parties and the judicial system have led to special emphasis on this dispute resolution method in the Judicial Evolution Document and also have resulted in the signing of the Singapore Convention by Iran as an international mechanism for the enforcement of the settlement agreements. The recent approaches show the desire of Iranian legislators to develop conciliation over other dispute-resolution methods. But considering the current lack of executive support for most settlement agreements, the aforementioned goal is hard. The most important reason for the reluctance of individuals and businesses to mediate is the lack of enforceability for the settlement agreements as a dispute-resolution document resulting from the mediation process. The use of mediation has no logical or legal justification, because due to the lack of enforceability of the settlement agreements, the parties must refer to the competent judicial authority for the enforcement of the settlement agreements, and it is more logical that instead of spending money and time

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in mediation, they firstly refer to the aforementioned judicial authority to resolve their dispute.
This comparative study based on an analytical-descriptive method tries to examine the current status of executive support of settlement agreements, as the most important factor in the development of mediation.

The question of the research is whether the executive support of the result of the mediation process is necessary, and if the answer is positive, what approach should be adopted by domestic and international regulations to achieve the goal? This article hypothesizes that the use of the legal system from the benefits of mediation depends on the executive support of the settlement agreements, the accession to the Singapore Convention from the international point of view, and the application of the provisions of the UNCITRAL Model Law 2018 from the domestic point of view. Finally, the article concludes that executive support of the settlement agreements is the most important reason for the success of the mediation and the benefit of this old method of dispute resolution in the commercial activists and the judicial system of any country. In the international arena, with the approval of the Singapore Convention, an effective step has been taken to eliminate the aforementioned weakness and develop mediation. In Iranian law, there is a positive attitude towards mediation, and this issue is evident in the signing of the Singapore Convention, but unfortunately, the regulations of the Iranian legal system have given very limited executive support to the settlement agreements. Due to the lack of sufficient enforceability for domestic and international settlement agreements in Iranian Law (except in special cases), the Iranian Legislator should enact a special statute inspired by the UNCITRAL Model Law 2018 to support the domestic settlement agreements and complete the process acceding to the Singapore Convention as soon as possible to enforce international settlement Agreements.

Keywords: Conciliation", "Mediation", "Judicial Settlement", "Singapore Convention", "New York Convention".

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Research Paper

The Role of Gender in Moral Damages

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Abstract
The necessity of paying attention to the role of gender in some areas of law is an issue that has been raised by some legal researchers in recent decades. One of these areas in which it is necessary to pay attention to gender differences is moral damages. The existence of brain biological and functional differences in men and women, as well as differences in social responsibilities, roles, and expectations, justify this necessity.

In the case of moral damages, both sex differences (biological differences in the brains of men and women) and gender differences (differences in social responsibilities and expectations) are effective. To explain the sex differences between men and women, we must start with the brain: The brain is one of the organs that researchers say is highly influenced by sex. Although there are differences in the physics of men and women's brains, such as the size of the brain in men being generally larger than in women, or that there is more gray matter in the brain of women and more white matter in the brain of men. However, what makes the difference between men and women is not the anatomical structure of the brain, but its function, including differences in the function of neurotransmitters and hormones. According to the researches, sex differences-especially in the discussion of moral damages- are related to three important parts in the brain, namely, hippocampus, amygdala, and neocortex.

In addition to these biological differences, the existence of differences in expectations and social responsibilities between men and women is another factor that shows the need to pay attention to gender in the discussion of moral damages. Gender norms that are traditionally predetermined in society

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and the expectations that exist in this regard in some cases cause women to suffer more psychological damage in the event of an accident. One of these factors is the "duty of care" that women often have in their families. If we look at the process of reproduction and the stages of child rearing in society, we find that in most cases mothers are more involved in caring and custody of children than fathers, and this leads to more emotional feeling between mothers and their children. This means that if an accident happens to a child or the parents see their child being killed or injured, this will hurt the mother more than the father.

Another example is the cases of rape that cause the loss of virginity in women. Given that according to social norms in many societies, being a virgin is very important for women in marriage, in such cases, the society will impose an additional harm to women, along with the moral damages caused by the crime, while men will not have the same experience.

In order to be able to take into account these gender differences in moral damage assessment, it is necessary to use psychometric tools as complementary tools of moral damage assessment based on indicators. It can be used to measure biological and emotional differences in calculating damages. Although this issue is not specified in the Iranian legal system, there will be no barrier in this regard, because according to Article 3 of the Civil Responsibility Code and Article 515 of the Civil Procedure Code, it is the judges who must determine the amount of damages according to the circumstances of each case. Therefore, judges can pay more attention to the victim gender in assessing moral damage. This will make the compensation more realistic and efficient.

Keywords: Gender Differences, Mental Distress, Psychometric Tools, Compensation.

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