

A Comparative Study on the Principle of Immutability of Litigation in the Iranian and American Laws

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Abstract

Based on «the principle of immutability of litigation», although the parties to a dispute have dominance on the thematic elements of legal claim, when the petition is set by the plaintiff, all the wanted issues must be stipulated clearly in the offered petition by lawful condition observance, and also the defendant has defense right, under this required framework. After the commencement of a trial, making changes is limited which are followed in the whole trial. The purpose of this principle is to show that although parties have free hearing right and defense right, based on the necessity of legal defense, discipline in the trial and speedy judgment consideration, they are limited on the principle of immutability of litigation. This study seeks to specify position of this principle in the Iranian civil procedure and the American Federal law (Federal rules of Civil procedure), basics of the principle and identify its exceptions for its better execution.

Keywords: immutability of litigation, defense right, correspondence, speed.

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A Comparative Study of the Status of the Institution of Execution of Sentences in the Penal Systems of Iran, France and the United Kingdom

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Abstract

One of the most important stages in the criminal process is the implementation of the sentences, and the result of a high and progressive prosecution of crimes is highlighted. Because, on the one hand, the efforts of all the activists of the criminal justice system have not been achieved and, on the other hand, by carrying out the guarantees of criminal proceedings, the basic objectives of punishment, namely, the deterrence, reformation and reinstatement of the prisoners, and thus the right to benefit the community and the victim of the investigator It turns out. In French law, the execution of a criminal conviction is also considered a judicial stage in which the judge for the execution of the sentence, the penal court and the sentencing committee may, based on the change in the behavior of the convicted personality, without reference to the court issuing the sentence of the sentence Moderate. In the English Penal System, the judiciary institution is not individually predicted to execute sentences, but is differentiated by different institutions outside the judicial system, under the supervision of the Interior Ministry, to enforce the sentences and to adapt them to the convicted person; however, in some cases, the issuing court It can make a modification or reduction in the initial order. However, in Iran's penal system, judges have more enforcement and supervisory powers and prosecutors are employed in an administrative capacity. However, it seems that judicializing the institution of execution of judgments and creating indigenous changes in proportion to the size of the cases can lead to ensuring that the execution of sentences is proportionate and individualized with the convicted person.

Keywords: execution of sentence, execution court, judge of execution of sentence, supervisory status, judiciary.

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The Impact of Article 986 Civil Code of Iran on the Contractual Dispute Settlement Clauses in the Current Judiciary Order; Solutions from Comparative Study

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Abstract

In the following article, three common scenarios of private international law pertaining to Article 986 Civil Code of Iran, involving Iranian courts and proceedings, have been particularly discussed by means of comparative study. The first scenario involves "forum selection clause", in which contracting parties have chosen to bring their disputes before a foreign court. The second scenario is related to "choice of law clause", in which the applicable law is decided to be a foreign law by the parties. The third scenario is relevant to a contract including an arbitration clause with the content of dispute resolution. Such an arbitration clause, emphasizes on the fact that any dispute shall be resolved by the chosen arbitration center and under its rules and regulations. In current scenario, the applicable law, which has brought controversy and contentious on hearings, proceedings and judgments, has not been determined in contract. Hence, this article seeks to recommend the Iranian private international law system a few solutions under the auspices of comparative law and legal doctrines. At the end, this article might be of use for readers in order to make them familiar with the application of above mentioned scenarios in Iranian ordinary course of proceedings. It may also help them to come up with practical solutions in similar or identical situations.

Keywords: Applicable Law";"Article 986 Civil Code of Iran";"The threshold point of an international case";" arbitration clause regarding a foreign center";" foreign arbitration".

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The Law Governing Arbitrability The Law Governing Arbitrability

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Abstract

The non-arbitrability of the subject matter of a dispute may arise at various points in the procedure: from the outset until the recognition and enforcement stage. Since this issue might be raised at different stages of the procedure and before different fora, it is essential to examine what law should govern the issue of arbitrability. The determination of the law applicable to objective arbitrability depends on whether it is decided by an arbitral tribunal, by a State court to which one of the parties has concurrently submitted the dispute or in the course of a setting-aside or enforcement procedure. While different opinions exist on the applicable law at each of these stages, many commentators have expressed a preference for applying the *lex loci arbitri* by the arbitral tribunal and *lex fori* by state courts. The aim of this paper is to review different approaches toward the applicable law on arbitrability and to demonstrate how the strict application of *lex loci arbitri* and *lex fori* may result in drawbacks. Having in mind that the rationale behind arbitrability doctrine is to protect exclusive jurisdiction of national courts in certain areas, the *lex loci arbitri* and *lex fori* would only be relevant to the extent that the exclusive jurisdiction of the national courts of the *lex loci arbitri* or *lex fori* is at stake.

Keywords: Arbitrability, Applicable law, Conflict of laws, *lex loci arbitri*, *lex fori*.

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Comparative Study of Application of Fundamental Human Rights in Private Law

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Abstract

The debate over the fundamental human rights has now been challenged the classic separation of public and private law. Although most countries have rejected this separation, there is no consensus about the way and the model of the application of fundamental human rights on private law. It means that every legal system depending on its special structure, has a different view about the effect of fundamental human rights on private law. By implementing a descriptive-analyzing method of research, this study aims to analyze the basis and the goals of resorting fundamental right in private law and shows the impact of this kind of law in the contract, tort and property law. Subsequently, the status of the subject in the Iranian legal system could be represented. It could be mentioned that in the legal systems of the world, especially in Europe, the effects of fundamental human rights on private law has been definitively accepted and a little remaining disagreement is only about the manner of such an effect. However, in Iranian legal system, because of the lack of constitutional court and reluctance of conventional courts in referencing to these kind of rights to interpret private relations, have caused an ambiguity in the qualification and scope of fundamental human rights. However, in spite of this fact, it seems that the structure of the Iranian legal system has the required capacity to accept the theory of indirect impact of fundamental human rights on private law.

Keywords: Fundamental Rights, Private, Public, Indirect Theory, Comparative.

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Bailment in Common Law and Comparative Study in Iran

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Abstract

Bailment, as a special legal concept in common law, has many controversies over its place, boundary, rule and effects. It has some resemblance to “Yade amani” (Custodial possession) in Islamic law. Most of these similarities are in their objects but there are lots of differences in effects. Unfortunately, it is translated in Persian-English Dictionaries mistakenly as deposit contract or other concepts. This mistake could drive to other big errors in legal concepts. So working on this issue needs concentration on concepts, rules, effects and objects. In common law, bailment sphere is becoming to some extent that arouse criticism of some Common law jurists. Consequence of this extensiveness is ambiguity in coverage. But common law courts accepted it and consider it as a source of obligation besides contract and tort. In Islamic law, “Yade amani” is not a source of obligation but is a description for possession of possessor which sometimes neglectfully becomes description for contract.

Keywords: Bailment, possession, Bailee, Bailor , Yade amani

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Study of the Independence of Arbitration Clause in Iranian and American law

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Abstract

According to the existing traditional and dominant view, clauses are dependent on contract. They are subordinate and peripheral and that is why clauses would be also dissolved with the invalidity of the contract. Depending on the arbitration choice, the compromise of the parties can be achieved in two ways. In one hypothesis, parties can refer their dispute, as a separate contract, to the tribunal. In the other one, according to the stipulation, parties can refer their current or future disputes to the arbitration. In the last case, the party who intends to hold up and object to the competence of the tribunal, may claim unreliability of the arbitration clause so that the tribunal is not formed. One of the common ways to achieve this, could be the claim that the major contract that the arbitration clause is implied in, is void or dissolved. So, the party claims that the arbitration clause of such contract is invalid due to invalidity of the major contract. To obviate this, the principle of the independence of arbitration clause has been accepted in the laws of many countries and its primary purpose is to nullify the invalidity of the major contract on the stipulation arbitration clause. So it's determined that the acceptance or rejection of the aforementioned theory has significant impacts. The aforementioned principle was considered by the laws of many countries as well as important international documents. In the rights of international commercial arbitration, legislator explicitly has referred to the independence of arbitration clause.

Keywords: Arbitration agreement, competence-to-competence, Independent clauses, Separability of arbitration clause.

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Legal Mechanism of Activating the Capacity of Whistleblowers, with Comparative Study of Iran and America”

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Abstract

In all legal systems, corruption is considered to be one of the factors that disorders delivering public services and it prevents expression of government's efficiency. Legal systems are looking for effective mechanisms to combat the various forms of corruption. One of the most important issues regarding fighting corruption, is the initial detection of corruption. The most minimalistic mechanisms for initial detection of the corruption in order to have an effective fight against corruption, are the supervisory organizations and institutions. All countries have enjoyed the concentrated supervisory institutions. However, the practical experience of the countries which have been successful in fighting corruption, shows that the mere application of concentrated supervisory and not the capacity of crowdsourcing and the decentralized and popular institutions, will not result in optimal outcomes. In this regard, these countries have organized an appropriate ground in their legislative systems, for persuading people to effectively report the infringements of law by considering the protection and encouragement for the people who report it. This article seeks to shed some lights on this foundational question that how it is possible to provide an appropriate ground for encouraging people to report breach of law? To answer this question, the authors of this article, by descriptive-analytical method, conduct a comparative study on the legislative system of United State of America (USA) along with introducing institution of whistleblowers, representing different protecting and encouraging mechanism in order to activate the capacity of whistleblowers as their findings.

Keywords: whistleblower, public participation, monitoring, corruption, transparency.

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A Comparative Study of Applying Restorative Justice In Schools

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Abstract

Students from different cultures and families develop sociability at school to enter a bigger society. Thus, the occurrence of conflicts among them, which can result in committing crimes at times, is inevitable. In addition, physical and psychological changes special to the teenage years at high schools and middle schools can affect the occurrence of traumatic behaviors such as bullying, different kinds of violent behaviors against other students or even teachers, damage to property, assault and battery, drug taking and theft. Therefore, restorative justice trainings at schools through holding peace circles, like Circle, training courses for students and teachers for solving conflicts and peer mediation can play a great role in resolving disagreements peacefully and preventing deviations and delinquencies from becoming chronic. Therefore, in the present article, it is attempted to explain the basics and methods of restorative methods in the school with emphasis on some field studies carried out in this regard, in a comparative manner and consider its importance in reducing conflicts and their role in the light of the developing prediction and responding to these questions which, inspired by the practice of other countries, the capacities and challenges of using What remedies are in Iran and what are the ways to promote restorative and non-punitive culture in Iranian schools? It should be noted that the writers, using oral data obtained through a series of problem-solving interviews with advisers, students, parents, and activists in this field, and observation in a qualitative manner and a sample of the research to which It will also highlight the status of Iranian school and countries like France. The findings of the present research are based on interviews with principals of elementary, middle and high schools, school counselors, mediating parents and some school students from Kranj and Tehran, who had been trained as teacher assistants, counselors or “peacekeepers” for the purpose of mediation. Also, to have an accurate perception of the mediation plans in some schools, the procedures in two elementary schools in Tehran, in which the “Zang-e Dayereh” (The Hour of the Circle) and “Solhban” (Peacekeeper) programs were run, were observed and the findings were described and analyzed using qualitative method.

Keywords: Mediation, Restorative justice, Circle, Restorative practices, developing prevention.

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The Most Important Practical Challenges to Dealing Directly with Some of the Crimes in the Court Instead of the Prosecution Institution in the Present Criminal Law of Iran

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Abstract

The Code of Criminal procedure (2013) with its last reforms was adopted in 2015. This code was enacted to overcome defects of the previous rules of criminal procedure in Iran and to better realize the criminal justice. Although, this code has several advantages, it has brought about controversies among lawyers. In other words, this code has caused confusion among judges, solicitors and lawyers. Thus, this paper will consider three important issues, which are reflected in the title of the article, namely, the challenges of the subjective jurisdiction of the prosecuting authority in the crimes involving direct trial of the court, Is he/she the prosecutor or the master of justice? It is also explained in the conclusion that if the referral of such a matter to the prosecution, Should be interrogator inappropriate, or send it to the court without issuance of the ineligibility of the case? Does the prosecution have the right to disagree with the court? And finally the paper has also presented strategies which for better implementation of the law or at least to be considered by the legislator in the next reforms of the law.

Keywords: Prosecution Institution, Court, Primary Researches, Crime Without Indictment, Crimes With Indictment.

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Selection of Mayor in the Iranian and French Legal Systems

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Abstract

The decentralized institutions have a considerable place in the realization of the principles of democracy, so that if there are necessary conditions, including their independence from the central government, one can hope to use them sufficiently to fulfill democratic criteria, including participation and control. Moreover, their formation without the necessary qualities can be merely a political show. The way of selecting the mayor is one of the issues that has a significant impact on the fulfillment of the necessary criteria in the decentralized institution such as the municipality. Therefore, its conditions of eligibility and the administrative procedure must be precisely determined. This article aims to find out the common and different points in selecting a mayor in the Iranian and French legal systems in order to assess their weaknesses or strengths. This has been done through library studies and descriptive-analytic methods. The result of this study is that the government's intervention in the selection of mayor in the Iranian legal system is far more than France. Regarding the conditions of eligibility of the mayor, the French legal system has chosen the conditions more restricted and easier, while the situation in Iran is much more detailed and complex. It seems that in France, meritocracy has been pursued in ways such as partyisme and in Iran, through the establishment of multiple conditions for the post of mayor.

Keywords: Mayor, election, partyisme, decentralization, municipal Council.

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Dumping in Iran's Legal System and the WTO

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Abstract

One of the major goals in international trade is to provide a level playing field for those who are involved in international trade. In this regard, the World Trade Organization (WTO) has sought to tackle anti-competition measures through its agreements. One of these procedures is known as anti dumping agreement. In addition, Iran accession to the World Trade Organization is in the center of government attention. Considering the existence of matching condition in the mentioned organization, matching of internal laws to that of the organization is of a great significance. Setting the global rules of trade by World Trade Organization, we are faced with antidumping agreements beside the organization fundamentals and agreements on confronting unfair dumping method. Therefore, to join Iran to the World Trade Organization, and apply matching condition, an investigation on the rules related to dumping in The Republic Islamic of Iran's provisions, and their match to the agreement is of great importance. This research uses an analytical-descriptive approach to explain dumping rules in World Trade Organization and The Republic Islamic of Iran, and compare them by stating their differences. It also suggests some modifications, and answers the question that if these dissimilarities are obstacles on the way of accession or not.

Keywords: Dumping; Competition law; World Trade Organization; Iran accession.

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A Comparative Study between Limitation of the Liberty of Suspect in Iran and Afghanistan Laws with Emphasis of the International Covenant on Civil and Political Rights.

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Abstract

The personal liberty right is not an absolute Right. The ICCPR and the Iran and Afghanistan Laws have recognized Liberty as a principle throughout the criminal proceedings. According to these laws, to limit the liberty of a suspect is an exception and shall be used as the last resort by unless if there is time limit to prescribe other measures As Article 9 of the ICCPR permits the limitation of the liberty of suspect by Law. Human Rights Committee (HRC) has required Member States to abide by the International Fair Trial Standards. The Afghan Legal System Considers; Suspect the Person who is in the Authority of Law Enforcement Officers and The Legal Conditions of limiting liberty in Afghanistan Criminal Procedure Code has limited this to important evident crimes. However, in Iran legal System that Person Considered Accused and Law Enforcement Officers have Authority to Deprived the Accused Liberty in the Police Detention Center for a Maximum of 24 Hours into Evident and non-Obvious Crimes, whether important or not Important. While According to the International Fair Trial Standard, for minor Cases the Law Enforcement Officers may impose suitable Non-Custodial Measures, as Appropriate.

Keywords: Personal Liberty, Conditions for Deprivation Liberty, Suspect, Under Observation and Police Detention Center.

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The Criteria and Principles for Preferring Security Over Rights and Freedoms; with a Study on the U.S. Supreme Court Precedent

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Abstract

In administration of society, the confrontation between security and order with rights and freedoms is inevitable. This raises the question as to what could be the solution for these situations? It seems that the only option is to prefer security and order over the rights and freedoms, and to restrict those rights and freedoms in favour of striking a new and optimal balance between security on the one hand and rights and freedoms on the other hand. However, it is obvious that without the determination of specific criteria and principles in this regard, it would not be possible to rule that which one should be preferred over the other. The topic of this article is to examine this issue in the U.S. Supreme Court's precedent. Our findings arrive at the "real threat of violence" and then it is studied in light of notions "definite threats" and "necessity". These are adopted as criteria for preferring security and order on rights and freedoms in U.S. Supreme Court precedent and governing of this principles: A) Rule of Law, B) Protecting a fair trial, C) Reasonableness of restrictions, D) Non-discrimination in the stage of decision-making and before preferring security and order on rights and freedoms and "Judicial Review" after make a decision on preferring security.

Keywords: Security, Order, Definite Threats, Rights and Freedoms, U.S. Supreme Court.

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Exercising Extraterritorial Jurisdiction based on the Doctrine of Effects in International Law

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Abstract

The “doctrine of effects” is one of the new representations of extraterritorial jurisdiction in the field of prescriptive or legislative jurisdiction. This doctrine can be briefly defined as the concept of “the ability and authority of a State in exercising jurisdiction against the foreigners’ conduct committed outside the country which produces effects within the territory of the State exercising jurisdiction. Some have recognized this theory as a branch of the territorial jurisdiction and, an expansion of territorial jurisdiction principle. However, others have justified it within the frame of other jurisdictional principles such as real or universal jurisdiction. In this article, the definition, concept, and trend of historical change of this doctrine are initially presented. Subsequently, the essence, status, bases, and conditions of exercising jurisdiction based on the doctrine of effects in international law are investigated. The findings of the researchers indicated that first; with respect to the fundamental difference between the doctrine of effects and other jurisdictional bases of the international law, it seems logical to take this doctrine, despite its closeness to principles of objective territorial jurisdiction and the real jurisdiction, into account as one of the new and independent jurisdictional bases of international law in exercising the extraterritorial jurisdiction of the states, second; exercising jurisdiction according to this doctrine depends on the realization of effect, and acquisition of particular bases and conditions such as “independent”, “fundamental”, “predictability”, and “effect”.

Keywords: Jurisdiction, Territorial Jurisdiction, Extraterritorial Jurisdiction, and Doctrine of Effect.

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Human Rights Obligations and Transnational Corporations with Emphasis on Human Rights Council Approach

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Abstract

Transnational Corporations (TCs) are one of the principal participating in the political, social and economic contemporary world. These corporations have put out desire and appropriate achievements, as well as harmful disorders in human rights domains. The latter, has led to a disputed issue in international law. Do the TCs have any human rights obligations? In response to this question, two main approaches have been formed. The first approach, is the ethical approach which argues that human rights as a priori fundamental ethical obligations are assignable to all entities including TCs. The second approach is institutional approach which contends that human rights are those rights that have been listed in Human Rights Declaration and subsequent international instruments and contemplates that States are considered to be principal duty bearers towards human rights obligations. According to the latter approach, the lack of direct assignment of human rights obligations to TCs is a more appropriate way to protect these rights. This article examines both approaches and at the same time it pays attention to the documents of the Human Rights Council which has produced many documents in this respect. This article concludes that although TCs have human rights obligations, States are still being considered direct duty bearers towards human rights obligations.

Keywords: Human Rights, Transnational Corporations, Human Rights Council, States.

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A Comparative View of the Parent's Civil Liability Foundation for the Damages Occurred by Children; Is There any Necessity to Reform Iranian Legal System?

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Abstract

In Iranian and the British legal system parental liability is based on fault. Although it is true for Egyptian legal system, the difference between them is that fault presumption exists in the later. In France, in the late twentieth century parental liability foundation changed to strict liability. The strict liability is a common rule in the most states of the United States of America (USA) too. The risks created by taking parental role and guaranteeing the loss occurred by victims are the most important reasons if we want to justify the strict liability. In addition, the increasing application of distributive justice in civil liability cases emphasizes on loss distribution and strict liability. It is, however, hard to accept distributive view in the context of Iranian civil liability as it amounts to the application of the strict parental liability. Our judges have no authority to change the liability foundation. Thus, in the context of fault based liability there is no need to emphasize on risks arising out of parental role. Fault presumption is an appropriate way to prove parental liability

Keywords: Liability, Parent, Risk, Loss Distribution, Justice.

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Sender's Liability in the Road Transportation of Dangerous Goods in Iranian law and the European Union

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Abstract

The increasing production of dangerous goods and expansion of commercial exchanges is added to the volume of transportation of dangerous goods. This has caused the road transportation of this type of the goods to be a subject of international conventions. By following the international developments, Iranian law has joined some international conventions and has ratified regulations in internal transportation for the mentioned goods. In the process of transportation of dangerous goods, the sender is one of the contracting parties who has a constructive role in preparation of the preliminary of transit. The sender is in an appropriate situation to evaluate the transportation safety and he/she has obligations which intensify his responsibility due to specific nature of dangerous goods as well as span and severity of the possible damages. Therefore in this paper, by using a descriptive and analytical method, it has been tried to describe the obligations and duties of the sender based on the domestic and international regulations regarding the transportation in addition to specifying the limits and inclusion of concept of the dangerous goods and it has analyzed the scope and the basis of liability of the sender in the current status of Iranian legal system and international documents as well as optimal situation.

Keywords: Transportation of dangerous goods, the CMR convention, the ADR agreement, duties of sender, civil liability of sender.

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