

THE Comparative Study of the Impact of Practice and Usage in the Interpretation of Contract under Convention on Contracts for the International of Goods and Iranian Law

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Abstract

The interpretation is removing the vague points and brevity of the contract to discover and finding out the intent of the speaker and recognizing the nature and determining the content and effect of the contract. These tasks are to be performed by a judge or arbitrator. In the Iranian Law, the internal intent of the parties has priority and the criterion is the Subjective Test for interpretation of the contract. However, given that discovery of the actual intent is often difficult or even impossible, placed Conventional meaning of the words and acts as a criterion to interpret (Article 224 of the Civil Law), unless it is proved that the real intention of the parties, has been on the contrary. Article 8 of the Convention on the International Sale of Goods, in interpretation of the contract, has accepted the combination of both subjective and objective tests. Accordingly, in the first understanding of the common intention of the parties is placed criterion and if by reasonable reasons, it would not be established, then, the contract shall be interpreted in accordance with the objective test. Namely, for removing the vague points and brevity of the contract, the contract is to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. This research, attempts to analysis the role of usage in the interpretation of contracts in the Convention on the International Sale of Goods Act 1980 and the Iranian law.

Keywords: Interpretation of contract, Usage and practice, Trade usage, International sale, Objective test.

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A Comparative Analysis of the Challenges Posed by the Silence of the Law in the Iranian Criminal Law and Jurisprudence

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Abstract

The silence of the Iranian criminal law, and the rules to confront this silence is addressed in Article 167 of the Constitution of the Islamic Republic of Iran. This issue has been explained with reference to valid sources and authentic islamic jurisprudence. In the context of criminal matters, the decisions of the Iranian Guardian Council has been based on Article 167 of the Constitution. This approach has gained numerous criticisms by the lawyers and this has caused several challenges. This study is based on intellectual and narrative aspects and challenges in the field of silence of the Iranian criminal law, and to address the problem of this important issue. Describing this theory of the constitution among the important criminal issues is part of the subject of this article . None of these problems can be able to prevent the reference to this principle in criminal matters.

Keywords: Silence of law, Criminal law, Imamie Jurisprudence, Ambiguity of the Law , Article 167 of the Iranian Constitution.

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The Foundations of the Legitimate Expectations in International Investment Law

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Abstract

A breach of the investor's 'Legitimate Expectations' (which asserts that the host State should act consistently and in a stable manner) may be considered relevant when deciding upon whether or not an investment treaty obligation has been violated. This idea has been recurrently referred to by claimants in investment treaty arbitrations and has been endorsed by a growing number of arbitral awards in the last few years. However, the picture emerging out of this jurisprudence is not clear, because arbitral tribunals have provided protection for the legitimate expectations of foreign investors without justifying the basis of this protection (only with reference to the former arbitral decisions). So, considering that the doctrine of legitimate expectations has found its most popular application under the fair and equitable treatment standard, the basis of the protection of the legitimate expectations under this standard is examined in this article.

Keywords: Legitimate Expectations- Fair and Equitable Treatment- General Principles of Law- Stability.

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The Divisibility and Indivisibility of Civil Actions (with a Comparative Study on the French Legal System)

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Abstract

Divisible and indivisible actions are the legal concepts that in terms of legislation, jurisprudence and doctrine have always remained shrouded in mystery. In some civil cases, being of the plurality of beneficiaries or parties, judges encounter various proceeding and enforcement challenges making inevitable the necessity to conduct a research on these two types of actions. The issuance of contradictory judgments is one of the negative consequences of wrongly making distinction between these two types of actions. Nowadays, jurisprudence does not follow any particular formula to distinct these two actions. Hence there are differences in recognition of instances of these two types of actions. This research, with the assistance of comparative study on the French legal system, is aimed to provide an appropriate solution to the prevention of contradictory judgments and violation of the right of individuals through introducing some elements in order to make distinction between these two types of actions

Keywords: plurality of parties, divisible actions, indivisible actions, contradictory judgments.

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The Right of Foreign Citizens to Possess Property in Iran by Looking at the Turkish Legal System

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Abstract

One of the instances of private law is the right to possess property. In the context of possession of movable and immovable properties by foreigners, currently most countries have recognized this right. In Iran, the most important limitation for foreigners is the right to possess immovable property. However, this right may be granted to foreigners under certain circumstances. In accordance with Article 8 of the Iranian Civil Code, if a treaty exists between Iran and the country of nationality of the foreigner, and if the foreign country is committed to reciprocal action, a citizen of a foreign country can be permitted to possess property in Iran. In contrast, by eliminating restrictions such as reciprocal action as a basis for the acquisition of immovable property, Turkey has paved the way for foreigners to purchase property and land. This is because the relevant authority in Turkey are of the view that this approach will lead to the growth of the economy of the country and the attraction of capital to their country. It clear that globalization along with Turkey's attempt to join the European Union has had an effect on the aspirations of the foreigners to purchase property in this country. So, it can be said that the membership of the European Union is linked to the sale of immovable property to foreigners. As for movable property, such as the acquisition of shares and investments, Turkey has imposed less stringent conditions compared to Iran, and this is due to foreign capital seeking to improve the economy of Turkey, which to date has been successful.

Keywords: Foreign nationals, immovable property, the condition of reciprocity, movable property, foreign investment.

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The Comparative Analysis of Human Mistake and Technical Error during a Course of Payment through Debit Cards in the Iranian and American Banking Law Systems

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Abstract

Among the most challenging matters of banking law has always been payments done through banking cards. In the wake of the prevalence of debit cards in everyday banking system in Iran, this research's main query is to analyze human mistake and technical error during a course of payment, and discern thereupon their difference with the unauthorized fund transfer. This question is analyzed through a comparative analysis with the banking system of the United States of America. This analysis can give a clear understanding of the legal responsibilities of the bank and card holders in the Iranian banking law in case of either human mistake in concluding a wrong payment order by the card holder, or technical error run by the operating bank. As the outcome of this analysis, in case of human mistake in concluding the wrong payment order by the card holder, bank has no legal responsibility before the card holder, but in case of any mistake and error in running the payment order, bank holds contractual liability and strict liability before the customer.

Keywords: Card holder, Debit card, Human mistake, Payment order, Technical error.

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A Comparative Study of the Legislation and its Impact on the Patent Process, with a Case Study of the Same Invention in Iran and the United States

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Abstract

Statistics on registration function of Iranian patent office shows that the number of registered inventions has reduced between 1386-1393. The number of issued patents from 10346 in 1387 reduced to 3436 patents in 1392. This is while at the same time from 2008-2013 the number of Iranian patents registered in USPTO increased from 2 to 40. On the other hands there are many problems with commercialization of inventions in Iran and more than 90% of registered patents remain in the archives and never gets a way to the trade. But what are the reasons? This article studies one of the probable reasons, legal defects on patent registration. So a comparative study on the patent Laws of two countries has been done. In this way it studied the laws and the issued patents from the two offices which are analyzed by technical expert. And it is proved that how different legal text effects the function of the patent systems.

Keywords: Disclosure, claim, Patent, registration, Concessional rights.

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Protection of “the Right to Breastfeed” in Islam and International Human Rights System

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Abstract

The results of medical research indicate that breastfeeding has positive effects on mental and physical health for both mothers and newborn babies. The Breast-feeding prevents mothers and children from getting many diseases. For this reason, policy-makers in the field of hygiene and health are seeking to promote breastfeeding in mothers. In the same vein, in different legal systems, including the Islamic law, there are some good rules for the protection of the right to breastfeed. In general, the human right to health and proper nutrition as a fundamental right, are stipulated in all human rights instruments and the violation of it has been considered as an “international crime” (Article 7 (2 b) and 8 (2-25) of the Statute of the International Criminal Court). However, the emphasis on the “right to feed a child by breastfeeding” as a human right has been limited to the doctrine level and international legal documents remain non-binding. Another challenge in this respect has been feminist perspectives on the matter over the past decades.

Keywords: Breastfeeding, human rights, health, international documents.

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Analysis of the Legal Status of Offshore Drilling Units

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Abstract

Drilling unit is the main asset of upstream oil and gas industry which is utilized for the drilling or well work over in exploration, development and enhanced oil recovery operations. The issues concerning Offshore Drilling Units have more complexities due to their locations which are at sea and the requirements governing them; hence, from legal point of view, the status of the mentioned Units is a controversial issue which is ambiguous, not only in international law but also in the Iranian law. The legal status of Offshore Drilling Units may impact on the jurisdiction that States exercise over them. This issue emphasizes the importance of analysis of the legal status of Offshore Drilling Units. Therefore, this article aims to analyze the different developed theories whether Offshore Drilling Units can be regarded as ship or artificial island or whether they have dual status or specific and separate status (category) and then it determines the best legal status of Offshore Drilling Units that can be responsive to the needs of oil and gas industry.

Key words: Drilling, Offshore Drilling Units, Ship, Artificial Island.

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A Comparative Study of Criminalization Criteria in Cyber Space in the Criminal Systems of Iran and Germany

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Abstract

Criminalization criteria in cyber space, in essence, declares the method of selecting moral regulations and its compilation in the form of laws. This approach is based on criteria such as: the principle of subsidiarity of criminal law, the principle of distinction in support of data, and other principles than are proposed to governments as approaches to criminal legislating in the convention of cybercrimes. This study seeks to answer these questions: "To what extent is the criminalization in cyber space, in the two criminal systems influenced by the international criminalization criteria in this realm?", and "What are the implications of the criminal system of Germany for the criminal system of Iran?" To answer these questions, qualitative methods, such as qualitative analysis of the contents of the Iranian and German criminal laws, and analysis of the discussion governing these laws, are used. Results of this study show that for example the German legislator strictly supports personal pleas, whereas the Iranian legislator only considers sensitive pleas as included Iran support. Furthermore, the German legislator considers being a child a form of vulnerability and considers a distinction in the support of individuals, whereas the Iranian legislator does not consider such a distinction.

Keywords: Cybercrimes, criminalization criteria, principle of distinction, principle of subsidiarity, principle of non-reference.

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A Comparative Study of Deferral of Sentencing in the Criminal Law of Iran, England and France

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Abstract

Deferral of sentencing is one of the new effects of decriminalization and customizing response to offence. The origin of this organ has been from common law system and has been introduced from this point to the other countries such as France. Being inspired by the French Penal Code, the Iranian legislator first introduced this organ into the criminal system of the country by way of the Islamic Penal Code 2013. The legislators of these three countries, the criminal laws of which are examined in this article, have followed some common objectives such as decriminalization, correction, treatment and social reintegration of criminals by avoiding criminal labeling. However, the conditions and arrangements foreseen at the time of its issuance and implementation differ. In addition, in the context of the Iranian criminal system, despite the fact that the Islamic Penal Code has been inspired by the French Penal Code; some of the related matters to this organ are not foreseen. This paper, by adopting a comparative approach and by using a descriptive-analytical method stating the background of deferment of sentencing organ, seeks to explain differences and similarities of these three legal systems and uncover the ambiguities of the Islamic Penal Code of Iran.

Keywords: deferment of sentencing, care period, correction of offender, discharge, simple and observatory deferral.

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A Comparative Study of the Scope of the Supervision of the Constituent Guardian Organization on Ordinary Laws, in the Legal Systems of Iran and India

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Abstract

To understand the integrity of the constitution of a country, we must inevitably study the scope of the supervision of the constituent body on the ordinary laws and regulations. The main question is that which types of ordinary laws that are passed by the parliament are reviewed by the constitution, and what are the exceptions to this surveillance? The study of the two countries of India and Iran has led us to believe that, there is significant emphasis in the Iranian constitution on protecting the norms of the standard of law. The same text exist in the Indian Constitution too. However, the Indian constitution better provides a review of the ordinary law and the Supreme Court, as the interpreter of the constitution, has greatly influenced the scope of this supervision. In comparison, in Iran, due to structural problems, many laws and rules are protected by the statutory supervision of the law, and the functioning of the Guardian Council has also contributed to this. Moreover, the limits imposed on the jurisdiction of the Supreme Court of India are often temporary and exceptional, while restrictions on the supervision of the Guardian Council in Iran are structural and permanent. The suggestion of this paper are as follows: providing progressive interpretations of the standard norm in the substantive texts by the Guardian Council, such as the prior submission of all the approvals of the pseudo-legislature to the Guardian Council, and the creation of mechanisms such as the formation of advisory workshops to supervise ordinary laws.

Keywords: “Constitutional Review”, “ Fundamental Rights” , “ Basic Structure” , “Sharia” , “Constitutional Review”

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The Liability of Carrier for Acts and Omissions of Others in the Convention on the Contract for the International Carriage of Goods by Road (CMR)

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Abstract

One of the most important issues about carrier responsibility in international carriage of goods by road, is his responsibility for acts and omissions of the servants and agents of the carrier. This matter is considered in Article 3 of the CMR Convention. According to Iran's accession to this Convention in 1997, the study of the base, nature and scope of the liability of carrier for acts and omissions of others in the CMR convention is important. Therefore this article by describing and analyzing the theories on the basis and nature of carrier responsibility for act and omission of others, concludes that this responsibility on the one hand is a no-fault liability that is presumed by the Convention, and on the other hand is a contractual liability. Drawing the thematic and personal scope of this liability is also considered in this article and it is determined according to the legal subordination and the term of "scope of employment" in the Article 3 of the CMR Convention. However, since the cases in which the carrier is exempted from the liability is exclusive and limited, if a case is considered out of the purview of the mentioned thematic and personal scope, it does not result to the elimination of the liability of the carrier. This is, however, subject to the existence of at least one of the cases of exemption from the liability which is mentioned in the Article 17.

Keywords: carrier, servants and agents of carrier, vicarious liability, the CMR Convention, scope of employment.

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The Conceptual Dimensions of Warranty in Contract Law with Comparative Approach

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Abstract

Warranty in England, where this notion is originated from, is statements made by seller in sale which is considered as a collateral and unessential term. In comparison, in the law of the United States (U.S.), warranty is considered a contractual promise which is embodied in the sale contract as a legal term to provide a remedy to legal and material defects of products if necessary. The latter concept as a contractual term is of vital significance and is considered to be one of the effective measures to counter with legal and material defects and is also considered as an assurance of ownership and quality in international and domestic trade. In our research, we observe that warranty as a practical concept in commercial transaction, consumer purchase and intellectual property along with other obligations like guarantee, has some unknown conceptual dimensions. Thus, in this research, in addition to the examination of warranty concept in common law, we have studied the structure of warranty and have scrutinized the characteristics and the legal nature of this promise. In addition, this notion has been separated from other similar concepts.

Keywords: Contractual Statements, Assurance of Ownership, Assurance of Quality, Warranty, Guarantee.

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A Comparative Study of the Duties of Citizenship Inserted in the Universal Declaration of Human Rights and the Constitution of Afghanistan

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Abstract

Since the full realization of civil rights and freedom is not possible without the foresight and respecting the duties of citizenship, the Universal Declaration of Human Rights (UDHR) and the Constitution of Afghanistan have paid attention to the prediction of rights and freedoms as well as the duties of citizenship. Given that the UDHR is not resulted from a particular perspective of a country, this declaration has assigned the determination of duties limitations of the persons to the society to the governments to which these people belong. Afghanistan has considered its independence, territorial integrity, public order, national security, national goals and interests in predicting duties for the its citizens. The aim of the UDHR has been the recognition of the rights and individual freedoms. The government of Afghanistan such as the other governments has been influenced by these rights and freedoms and has inserted them into its constitution and other laws. However, the government of Afghanistan has not been influenced too much by the UDHR and it has determined the duties of its nationals according to security concerns, public order, public morality, economic vigor and governing circumstances to the society. The methodology used in this research is based on cross-sectional method of research and the aim of this artical is the assessment of the civil duties inserted in the UDHR and the Constitution of Afghanistan.

Keywords: Duties, Citizen, UDHR, the Constitution of Afghanistan.

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Status of the *Individual's Right to Recognition* of Legal Personality in the Global and Regional International Instruments and National Instruments

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Abstract

Human individuals are entitled to human rights from the beginning of their life. Rights that every human is benefiting of it, because he/she is human beings. In the meantime, the individual's right to recognition of juridical personality one of the rights that there is no doubt in importance and prominence and it is considered of the minimums of fundamental human rights. This right is considered as a prerequisite for the enjoyment of other human rights. The mentioned right still neglected in many legal systems and one of the inherent rights of human. The right to recognition of juridical personality is listed in the major global and regional international instruments and some national instruments. This right recognition every one as a person before the law. Therefore, in this paper we explain the status and the concept of right to recognition of the legal personality in some of these documents.

Keywords: “The individual's right to recognition of juridical personality”, “Human Rights”, “Global Instruments”, “Universal Declaration of Human Rights”, “Regional Instruments”, “National Instruments”.

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Principles of Sustainable Development in the Jurisprudence of the International Court of Justice and the International Tribunal for the Law of the Sea

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Abstract

The concept of sustainable development has gradually entered the realms of politics and economy. This concept has achieved the interest of the international community and has gained widespread acceptance in the last two decades of the twentieth Century. The development of this concept in the context of various regional and international treaties, had announced its entrance into the field of international law. The International Law Association, in 2002, adopted the Delhi Declaration, in which seven international law principles of sustainable development were defined. The International Court of Justice, 5 years after the adoption of the Rio Declaration used the concept of sustainable development in its arguments in the case concerning *Gabcikovo-Nagymaros* project and revealed some normative elements of this concept. The decisions and judgements of the International Court of Justice and the International Tribunal for the Law of the Sea show a significant alignment in reference to the principles of sustainable development. Positive approach of these courts for the rights of future generations, while defending the interests of the current generation, shows that the status of the principles of sustainable development have been established in the case law of the two institutions.

Keywords: The concept of sustainable development, international law of sustainable development, the International Court of Justice, International Tribunal for the Law of the Sea.

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A Comparative Study of the Pillars and Requirements of Local Government in Iran and Japan

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Abstract

A good local government is a real and obvious reflection of good governance in which both participation and Supervision is real and objective. It also facilitates democracy and good governance at national level. More importantly, with the crisis of central national governments, local governments play a prominent role in the balanced development. In this essay, the local/urban government in Iran and Japan and their components is studied. The questions proposed in this essay include: What is the status of local government in these countries? What is the basis of the legitimacy of local government? What is the public authority of local government in exercising their power? and what is the relationship between the central and local governments and how local institutions are monitored? This article seeks to answer these questions through collecting data from various legal sources and descriptive-analytical method. This study concludes that the components of the urban government must be strengthened. In addition, in order to realize balanced development national politics in relation to local, regional and territorial planning (justice) should be changed drastically.

Keywords: legitimacy, jurisdiction, independence, supervision, liability.

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