

IS THE MORALITY OF THE JUDICIAL REASONING PROCESS POSSIBLE?

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Abstract

The judicial reasoning process is a profound issue rooted in the philosophical thoughts of the judges. The judge's philosophical and lingual orientations always determine the method used by him in applying the general concepts of the law to the specific case before him. Different philosophical theories offer varying views on this issue. Based on Hegel's *dialectical* approach, Wittgenstein's language function theory, and Gadamer's *legal hermeneutics*, the judicial reasoning process deserves to have its internal moral rules particularly under the non-realistic schools of ethics. The present article, using descriptive-analytical methodology, aims at studying the morality of the process under the said theories. According to Hegel, the law is 'becoming' due to the dialectic nature of the judge's determinism. This fact is an essential element for the 'social newness' which, in turn, makes a context for the formation of the moral norms. Under the language function theory, the language in the judicial argument is not simply the conveyor of the concepts; rather, it creates them. A judicial procedure based on this approach will be capable of making alterations in criminal titles and civil law terminology, possibly leading to the change in social norms. Gadamer's hermeneutics finds circularity in the relation between the judge's philosophical orientation and the legal text: In each reading of the text, new concepts emerge which are conceivably true and applicable. This theory can play a significant role in the judicial reasoning process and its application will lead to the formation of moral values within that process.

Key words

Judicial Reasoning, Morality, Dialectics, Philosophical Hermeneutics, Language Function.

A COMPARATIVE STUDY ABOUT THE ASSESSMENT OF HEDONIC DAMAGES IN PERSONAL INJURIES

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Abstract

Hedonic Damages constitute an important type of spiritual damages. Assessing the damages of this nature involves an evaluation of the quality of life and of the amount of the plaintiff's pleasure before the damages are inflicted. A judgment on hedonic damages is premised on the amount of happiness and the interest in life the plaintiff has lost, rather than an amount of money or a high-earning job he or she has been deprived of. The best method of assessment is to use guide tables containing concerned personal characteristics. It will be suggested that setting upper limits on the extent of this type of damages is an efficient way to avoid extravagant judgment amounts.

Key words

Hedonic Damages, Spiritual Damages, The Quality of Life, Assessment.

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THE LAW APPLICABLE TO THE RELATIONSHIPS IN INTERNATIONAL LETTERS OF CREDIT

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Abstract

Applicant, beneficiary, issuing bank and advising bank are, in most cases, the four parties that have the mutual rights and obligations in a letter of credit. In many cases, the letter of credit is also confirmed by another bank (the confirming bank). International letters of credit always have a foreign element and in spite of the existence of "Uniform Customs and Practice for Documentary Credits (UCP)", in many cases, it is necessary to determine the law applicable to the relationships among their multiple parties. Accordingly, in this paper, the law applicable to the relationships involved in international letters of credit will be studied in four categories, using a descriptive-analytical method. These are the relationship between: 1- issuing bank and applicant, 2- issuing bank and advising bank, on the one hand, and beneficiary, on the other, 3- issuing bank and advising bank, and 4- confirming bank and the other parties to the letter of credit. The study will conclude that, for each of the aforementioned relationships, the applicable law is either the law of issuing bank's or advising bank's country or that of the country where the center of gravity of the contract is situated.

Keywords

Advising Bank, Applicant, Beneficiary, Issuing Bank, Uniform Customs and Practice for Documentary Credits.

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THE EFFECTS OF BANKRUPTCY PETITION ON THE APPLICATION OF ARTICLE 3 OF THE LAW ON EXECUTION OF FINANCIAL JUDGMENTS 2015

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Abstract

The two categories of insolvency and bankruptcy are legal privileges, provided to merchants and non-merchants respectively so that if they are unable to pay their debts, they will be released from the pressure imposed by the creditors. Merchants and legal entities cannot legally file for insolvency and have to file for bankruptcy instead. These two institutions have differences and similarities. One of the effects of the insolvency petition is that if it is submitted to the court within 30 days of the notification of the writ of execution of a judgment against the petitioner, she will not be imprisoned unless and until it is rejected. Considering the silence of law, the question arises whether the filing of a bankruptcy petition, like in the case of insolvency, will release the merchant claiming bankruptcy. Assuming a positive answer to this question, does filing for bankruptcy have that effect only within 30 days of notification? This article will argue that the filing of a bankruptcy petition is a declaration of *cease* by the merchant and that, according to the principle of equal rights of creditors and the prohibition of preferring one of them over the others, the ceased merchant is not legally entitled to pay her debts. Otherwise, the case would involve a bankruptcy by fault. As a result, it will be evident that the primary effect of filing a bankruptcy petition before, or within 30 days of, the execution of a judgment should be the prohibition of enforcing the imprisonment rule contained in the Law on Execution of Financial judgments.

Keywords

Insolvency, Imprisonment, Merchant, Creditors, Cease.

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AN ANALYSIS OF THE PLACE OF THE GOVERNMENTAL VOLUNTARISM AND THE DIVINE VOLUNTARISM: THOUGHTS ABOUT THE BASES OF VALIDITY OF THE RULE OF LAW IN THE IRANIAN FAMILY LAW SYSTEM

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Abstract

There is little dispute that in the field of personal status in the Iranian legal system, including in family law, the Divine Lawmaker's will is the basis of the validity of legal norms. However, due to social and economic evolutions, the field of family law has never been insulated against government interventions. The main topic of this research is the analysis of this intervention and its positive effects. The intervention can be merely declarative, thus entrusting the governmental law with nothing more than the role of an instrument for imparting regulations which have been derived from the will of the Divine Lawmaker. But, sometimes, law is rather the instrument for creating legal rules. In the latter case, the relationship between the Divine Lawmaker's will and that of the government is of considerable importance and gives rise to a number of challenges and questions. For example, what effect does the rule requiring permanent marriages to be registered have on the marriage itself? Should the rule be considered only a rule of evidence or a substantive rule of validity? This study attempts to address, by analyzing the four roles of the State in the legislative system, namely (1) identifying the legal issues, and *secondary titles*, (2) the choice of applicable rules, (3) policing and endorsement, and (4) creating the rules applying to the spouses' mutual behavior, the ways in which the rules of family law conform with the social facts and to offer some solutions to overcome some existing legal challenges in this field.

Key words

Family Law, Law, Rule, Divine Voluntarism, State.

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A COMPARATIVE STUDY OF CHALLENGES AND STRATEGIES FOR USING DIGITAL CRYPTOCURRENCIES IN THE IRANIAN AND AMERICAN LEGAL SYSTEMS

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Abstract

With the invention of data encryption technology, new electronic tools have emerged in the field of money markets that have made it possible to exchange huge amounts of money in the form of electronic messaging data. One of these tools is digital cryptocurrencies. These encrypted media of exchange are divided into two types, the first of which is produced by the sovereignty of countries while the second is extracted by miners from decentralized substrates. Due to the difference in the nature of these currencies with the official currencies of countries in exchange in monetary markets, the possibility of classifying these instruments as currencies faces challenges. In the United States, the current problem is virtual currency exchange auditing, and the issue of licensing procedures for applicants has already been resolved. In Iran, however, due to the lack of a clear definition of the currency, cryptocurrencies cannot be readily recognized as a type of currencies, nor can their use be upheld by invoking principles such as the free will or by deeming the cryptos to be commodities in exchange, so as to endow money markets and capital markets with their exceptional capacities. Therefore, formulating coherent legal and executive policies that involve a clear definition of the currency, exchange mechanisms, legal validation, legal structures and the assignment of competent regulatory authorities are among the prerequisites of the Iranian legal system in order to use these currencies.

Keywords

Digital Cryptocurrency, Money Markets, Challenges and Solutions, Iranian Law, American Law.

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THE ANALYSIS OF LEGAL CAPITAL AND ITS FUNCTION IN PROTECTION OF THE CREDITORS' RIGHTS

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Abstract

Limitation of shareholders' liability to the extent of their shares in a limited liability company could expose creditors to the risk of the default of their claims. Therefore, the *legal capital* as a traditional solution has been devised long ago to protect creditors' rights against the limitation of the company shareholders' liability. According to the *legal capital* theory, the procedures for the provision of minimum capital by shareholders and its maintenance during the business activity of the company can be set so that they sufficiently secure creditors' rights. This proposition has been questioned today, however, and in some legal systems, a more modern approach to the legal capital has thus been adopted. Employing contract terms and rules of insolvency law, this recent approach attempts to introduce alternative solutions which are believed to have obviated the shortcomings of the legal capital and enhanced the protection of creditors' rights. In conjunction with the study of traditional and modern approaches to the legal capital, this essay puts forward recommendations on amending current Iranian laws and recognizes an intermediate approach to be the most proper solution for protection of creditors' rights in Iranian Law.

Key Words

Creditors' Rights, Legal Capital, Limited Liability, Maintenance of Capital, Minimum Capital Requirement.

FRESH START POLICY IN BANKRUPTCY LAW

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Abstract

The doctrine of the fresh start, a modern concept in bankruptcy law emerged under the influence of the school of the economic analysis of law, seeks to relieve the merchants from their debts in order to provide them with the opportunity to rejoin society as a productive economic actor. In fact, the theory of the fresh start protects productive, creative merchants, by discharging them of the debts they are unable to pay, keeping their properties and future incomes out of the creditors' reach. Although the Iranian legislator has not taken a position on this theory, the UNCITRAL Legislative Guide on Insolvency Law addresses it in a separate document. In this research, this theory is explained and studied with a comparative approach.

Key words

Merchant, Fresh Start, Efficiency, Discharge, Bankruptcy.

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LEGAL ASPECTS OF CORPORATE FINANCING

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Abstract

Considering the importance of the capital for firms, the far-reaching roles of firms and enterprises in the economy of any country, and the broad role of the capital market in corporate financing, accurate understanding of corporate financing, its triple steps, and the risks involved in its process is essential. The triple steps of corporate financing, namely (1) investment decisions, (2) financial policy decisions, and (3) dividend policy decisions, are connected to each other and to the capital and product market strategy. Two significant instruments of corporate financing are debts and equities, and two main strategies in corporate financing are the aggressive and the supportive strategy. Considering the interaction between financial and legal decisions, and the importance of the lawyer's role at firms, the present study addresses the legal aspects of corporate financing, and seeks to ascertain whether we need special schemes for corporate financing. This research, conducted in library-analytical method, consists of two parts the first of which deals with concepts and foundations, and the second describes the strategies and steps in corporate financing from the legal standpoint.

Key words

Debt, Equity, Bonds, Capital Market, Product Market.

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A LEGAL ANALYSIS ON THE JUDICIAL LIENS ON THE DIRECTORS' COLLATERAL STOCKS: A VALID INSTANCE OF SURPLUS LIENS

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Abstract

Iranian Civil Code, in its chapter on mortgages, includes several rules specifying the required characteristics of the mortgaged assets, the mortgagor's and the mortgagee's rights. But it only exceptionally addresses the debt for which the mortgage is raised. The way one answers the question whether the stocks deposited, as collateral, with the company by its directors are supposed to secure the debts they incurred at the time of their election or their future debts will determine one's position on a second question, at issue in this article, as well: whether the right of a creditor who secondarily obtains a lien on the collateral stocks or that of the company should prevail, when an actual conflict between the two arises. Unlike the position that the Civil Code seems to uphold, the Commercial Code and its Amending By-Law favor the validity of mortgages not only when the debt is already established, but when merely the duty to pay a future debt is assumed or when just the legal cause for a not-yet-existing debt has come to existence. In the case to be studied here, the company takes collateral stocks from its directors not for debts already existing, i.e. for putting its assets under the directors' custody, but for possible, future damages which may emanate from their managerial conduct: a non-existing debt whose legal cause has been created. It follows that, as long as the company has not sustained damage and the mortgage has, thus, not been established, the creditor's lien would prevail over the mortgage of the company. The case, hence, gives rise to a valid instance of surplus mortgage.

Key words

Mortgage, Mortgage Debt, Collateral Stock, Surplus Lien, Possible Future Damages.

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AN ANALYTICAL, CRITICAL STUDY OF INTERIM MEASURES AND PREVENTIVE MECHANISMS IN IRANIAN CIVIL LIABILITY LAW

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Abstract

In the Iranian legal literature, civil liability is often defined as the duty of the tortfeasor to compensate the damage she caused. The civil liability law thus keeps preventive function of the liability on the sidelines, while working proactively and taking preventive approaches are the more justifiable policy whether economically or ethically. Moreover, civil liability should not be limited to the tortfeasor's duties; the victim must also be made to strive to prevent the loss from occurring or worsening. Preventive liability thus requires that, in some cases, the burden of damages resulting from the abandonment of the pre-emptive action falls upon the victim herself. Accordingly, the questions to be addressed in this article are: what rules, institutions, mechanisms, and safeguards are available in Iranian law to fend off the harm, stop the harmful act, and prevent its recurrence? What are the shortcomings in this field? Some of the relevant mechanisms available in Iranian law are: "prejudgment attachments", "provisional injunctions", "frivolous claim attachments", "alien plaintiff attachments", "attachments of execution in judgments by default", "attachment of execution or suspending execution in re-trial, third party objection, and Supreme Court petition", "blocking the execution of official deeds", the triple specific processes (*Possessory Action, Action for Disturbance of Possession, Action for the Right of Exploitation*), various obligations imposed on municipalities and government agencies to prevent the harm caused by human agents, the authority delegated to insurers and the social security agencies to act on behalf of the victims against the tortfeasor, and the administrative and criminal sanctions to be invoked in case the civil liability rules are insufficient. This article will examine the shortcomings of these mechanisms and will suggest efficient ways to eliminate them.

key words

Interim Measures, Preventive Civil Liability, Injunction, Subrogation, Insurance and Social Security, Disciplinary Responsibility, Criminal Responsibility, Possessory Action, Action for Disturbance of Possession, Action for the Right of Exploitation.

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REFLECTIONS ON THE EXCEPTIONS TO THE INVALIDITY OF GAMBLING AND BETTING, SUBJECT OF ARTICLE 655 OF THE CIVIL CODE

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Abstract

Although the prohibition on, and the invalidity of, gambling and betting in general are among the indisputable rules of Islamic law, Article 655 of the Civil Code has excluded, following the established Islamic juridical (*fiqhi*) opinion, three cases, namely, horseback riding, shooting and swordsmanship from that general rule. Why these exceptions have found their way to the long-lived Islamic legal literature, how they are relevant to the social needs of the present age, and whether it is possible to extend, using the potentials of *Imami* jurisprudence, these exceptions to other, newly-emerged issues, considering the specified exceptions to be non-exhaustive examples of a greater category are the main questions that motivated this analytical-descriptive research which draws on a comprehensive study of the Islamic legal literature. The article will argue that, due to the changes in the facts to which the rules are to be applied, the mentioned three exceptions fail to satisfy *Shari'a* intentions of prescribing such a rule in the first place. Therefore, it is necessary that, by capturing the essence of the rule and by appealing to *ijtihad* based on the requirements of the time and the place, the mentioned exceptions be replaced with updated cases.

Keywords

Gambling, Betting, *Sabq*, *Rimaya*, Article 655 of the Civil Code.