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Curbing Unfair-Dismissal of Workers in Nigeria: What Lessons from other Countries?

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Abstract

The 1999 Nigerian Constitution bestows on the National Industrial Court of Nigeria (NICN) exclusive jurisdiction to hear and determine labor disputes relating to or connected with unfair labor practices, including unfair dismissal. There are, however, no general statutory rights, in explicit terms, according to workers under the Nigerian Labour Law, not to be unfairly dismissed and to claim compensation, re-instatement, and re-employment for unfair dismissal. This paper reviews the practice of unfair dismissal of workers in Nigeria. The research methodology utilized by the author is basically a doctrinal analysis of relevant primary and secondary sources. The paper finds that the unfair dismissal of workers in Nigeria is contrary to the United Nations (UN) International Labour Organisation (ILO) Termination of Employment Convention 158 of 1982 (Convention 158) as well as international human rights norms or treaties. The paper suggests that Nigeria should enact a Labour Rights Act that would accord to workers, in explicit terms, the rights not to be unfairly dismissed and to claim compensation, re-instatement, and re-employment for unfair dismissal in line with the practice in other countries, including the United Kingdom (UK) and Kenya.

Keywords: Unfair-dismissal, Unfair labor practice, 1999 Nigerian Constitution, Constitution (Third Alteration) Act 2010, Employer, Worker, Re-instatement, Re-employment, Nigeria.

1. Introduction

The general rule under the Nigerian Labour Law, governed significantly by the common-law,[1] is that an employer in a mere master and servant relationship can terminate the contract of employment with an employee of any grade or level for a good or bad reason or no reason at all and contrary to the terms and conditions of the employee's contract of employment or the right to a fair hearing, guaranteed under the common-law and the Nigerian Constitution.[2] All the employee is entitled to damages for wrongful dismissal. The damages are the amount he would have earned over the period of a proper notice to terminate the contract of employment or the amount payable in lieu of a proper notice to terminate the same.[3]

The motive of the employer in terminating the contract of employment with the employee by giving a notice of termination is not relevant.[4] Motive is a reason for doing something.[5] Put differently, the motive is the hidden or real reason which made a party terminate the contract of employment.

Oftentimes, the employer decides to terminate his employee's appointment by giving notice of termination because of some hidden reasons, such as the active involvement of the employee in trade union activities. Where such is the real reason why the employee's appointment was terminated, it can be said to be a case of unfair dismissal for which the court should intervene to invalidate such a termination of employment.[6] It is an open secret that many Nigerian workers have been victims of unfair dismissal, due to their participation in union activities. A good case is that of *COB Eche v State Education Commission and Another*,[7] where the plaintiff was dismissed from the Anambra State Public Service on the ground that he took part in a strike by teachers in the State.

It is disappointing that the Nigerian Labour Law does not provide, in explicit terms, for general statutory rights of an employee not to be unfairly dismissed and to claim compensation, re-instatement, and re-employment for unfair dismissal as well as the circumstances where dismissal may be considered to be unfair. The National Assembly of Nigeria (NAN) is to blame for this, as none of its enactments, including the Constitution of the Federal Republic of Nigeria 1999 (1999 Nigerian Constitution),[8] as amended provides for general statutory rights of an employee not to be unfairly dismissed and to claim compensation, re-instatement, and re-

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1 By virtue of being colonised by Britain, Nigeria received English Law made-up of: (i) the statute of general application in force in England on 1 January 1900; (ii) the doctrines of equity; and (iii) the common-law of England. See s 32(1) of the Interpretation Act Cap 192 Laws of the Federation of Nigeria (LFN) 1990 (now Cap 123 LFN 2004).

2 See *Samson Babatunde Olarewaju v Afribank Nigeria Public Limited Company* [2001] 13 NWLR (Pt. 731) 691, 695 – 97, Supreme Court (SC), Nigeria.

3 See *Abalogu v Shell Petroleum Development Company of Nigeria Ltd* [2001] FWLR (Pt. 66) 662, SC, Nigeria.

4 See *Calabar Cement Company Ltd v Daniel* [1997] 14 NWLR (Pt. 188) 750, 758, Court of Appeal (CA), Nigeria and *Ben Chukwuma v Shell Petroleum Development Company of Nigeria Ltd* [1993] 4 NWLR (Pt. 289) 512, SC, Nigeria.

5 P Phillips et al (ed), AS Hornsby's Oxford Advanced Learner's Dictionary: International Students Edition (Oxford: 8th edn, Oxford University Press 2010) 963.

6 AE Abuza, *General Principles of Nigerian Labour Law: Law of Contract of Employment (*vol. 1) (Eku: Justice and Peace Printers and Publishers 2018) 91-92.

7 [1983]1 FNR 386, 391, High Court (HC), Nigeria.

8 Cap C 23 LFN 2004.

employment for unfair dismissal as well as circumstances where dismissal may be considered unfair. These are the gaps this paper or research aims to address. Put in other words, the gaps above constitute the rationale behind conducting this research. A point to make is that these *lacunae* in Nigeria's laws would not augur well for the system of administration of justice in the industrial sub-sector of Nigeria's political economy, as it is prone to abuse as has been the case, for example, since the coming into force of the 1999 Nigerian Constitution. The case of *Godwin Okosi Omoudu v Aize Obayan and Another*[9] is a typical example. In the case, the second defendant-university terminated the claimant's appointment, in breach of the contract of employment between the parties, as he was not paid one month's salary in lieu of notice before or contemporaneously with the termination as enunciated under the said contract of employment and for an unfounded reason.

Needless to mention the planned five-day warning strike by the Nigeria Labour Congress (NLC) as well as Trade Union Congress (TUC) and their affiliates in Kaduna State between 16 and 19 May 2021 to reverse the termination of the employment of over 7, 000 civil servants in Kaduna State on the ground of redundancy without following the due process, having not given notice to the workers and their unions as well as paid severance package as encapsulated under section 20 of the Labour Act[10] 2004. This is a clear case of unfair dismissal of workers by their employer, that is the Kaduna State government.[11] The strike paralyzed the economic activities of the State for the days it lasted.[12] The strike was, however, suspended on 19 May 2021 to pave way for a reconciliatory meeting on 20 May 2021 at the instance of the Federal Government of Nigeria (FGN). At the end of the meeting, a memorandum of understanding was signed by both the State government and the NLC. Despite this agreement, the Kaduna State government continued laying-off workers in the State, as announced before the commencement of the strike.[13] This prompted the NLC to write to President Muhammadu Buhari, threatening to resume the suspended strike in Kaduna.[14] Meanwhile, Governor Nasir El-Rufai of Kaduna State, however, says there is no going back on 'right sizing' of the State's workforce.[15] According to His Excellency, over 90% of the State's Federal Allocation is currently being spent on civil servants.[16]

It is noteworthy that the unfair dismissal of workers by their employers has an adverse effect on the victims of unfair dismissal and the political economy of Nigeria. To be specific, it has led to strikes by trade unions whose members had been unfairly dismissed by the employers of the same as well as Federations of trade unions to which the trade unions, whose members had been unfairly dismissed by the employers of the same, belonged. A typical example is the case of unfair dismissal of workers by the Kaduna State government. As disclosed already, the strike by the NLC and TUC as well as their affiliates in Kaduna State between 16 and 19 May 2021 to reverse the termination of the employment of over 7,000 civil servants in Kaduna State on account of redundancy without following the due process, having not given notice to the

9 (Unreported) Suit No. NICN/AB/03/2012, Judgment of Adejumo J of the NICN, Lagos delivered on 8 October 2014.

10 Cap L 1 LFN 2004.

11 'NLC may escalate Kaduna Strike to National Industrial Action' <https://m.guardian.ng>appointments> accessed 26 July 2021.

12 'NLC writes Buhari, threatens to resume suspended strike in Kaduna' <https://www.preminmtimes.ng> accessed 25 July 2021.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

workers and their unions as well as paid severance package contrary to section 20 of the Labour Act 2004 paralyzed economic activities of the State for the days it lasted. A lot of people are actually upset by this ugly situation. Worse still, the officials of the government whose action of unfair dismissal led to the workers' strike are not being dealt with or removed from office by the Nigerian Government.

Of course, the practice in Nigeria contrasts with the practice in other countries like the UK, Canada, Ghana, South Africa, and Kenya. In the UK, for instance, section 94(1) of the Employment Rights Act (ERA) 1996 specifically provides for the right of the employee not to be unfairly dismissed. While sections 95, 99, 100, 104A, 104C, 105(1), (3), and (7A) of the ERA 1996 contain circumstances where termination of employment can be regarded to be unfair.[17] Again, the remedies of interim relief, compensation, re-instatement, or re-engagement are available to an employee who is unfairly dismissed in the UK.[18]

A relevant question to ask at this juncture is: is the unfair dismissal of workers in Nigeria lawful? Another relevant question is: are there lessons from other countries? A further relevant question is: should there not be statutory rights, in explicit terms, accorded to Nigerian workers not to be unfairly dismissed and to claim the reliefs of compensation, re-instatement, and re-employment for unfair dismissal in line with the practice in other countries? These questions form the basis or foundation of this paper.

The purpose of this paper is to review the practice of unfair dismissal of workers in Nigeria. It gives the meaning of employee, employer, unfair dismissal, re-instatement, and re-employment or re-engagement. It gives a brief history of the practice of unfair dismissal in Nigeria. It analyses applicable laws, including the Nigerian Constitution and case law on the practice of unfair dismissal of workers under the Nigerian Labour Law. It highlights the lessons or take-away from other countries. It takes the position that the unfair dismissal of workers in Nigeria is unlawful, unconstitutional, and contrary to Convention 158 as well as international human rights norms or treaties and offers suggestions, that, if implemented, could curb the problem of unfair dismissal of workers in Nigeria.

II. Conceptual Framework

The word 'employee' is a keyword in this paper. Section 48(1) of the Trade Disputes Act 2004[19] defines a worker as:

> any employee, that is any member of the public service of the Federation or a State or any individual other than a member of any such public service who has entered into or works under a contract with an employer, whether the contract is for manual labor, clerical work or is otherwise expressed or implied, oral or in writing and whether it is a contract personally to execute any work or labor or a contract of apprenticeship.

The foregoing definition can be vilified. To be precise, it includes as a worker any person under - a contract personally to undertake any work or labor, that is an independent contractor

17 See, also, <https://www.acas.org.uk/dismissals> accessed 7 July 2021.

18 <https://www.acas.thomsonreuters.com> accessed 7 July 2021.

19 Cap T8 LFN 2004.

and an apprenticeship contract. These persons cannot be regarded to be engaged under a contract of service to call them workers[20].

Anyhow, a worker, irrespective of his grade, qualifies as an employee within the meaning of a worker in the foregoing definition.

On the other hand, an 'employer', another key-word in this paper, means:

> any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person and includes the agent, manager, or factor of that first-mentioned person and the personal representative of a deceased employer[21].

The employer of a worker would include a corporate organization or an unincorporated organization, an individual, the local Government Council, the State Local Government Service Commission, and the Civil Service Commissions of both the Federal and State governments.

'Unfair-dismissal' is another keyword in this paper. It is, also, known as unfair-termination or unjust-dismissal. It is part of unfair labor practice. 'Unfair dismissal' means the termination of a contract of employment bereft of a valid reason or good cause or fair procedure or both.[22] Another keyword in this paper is 'reinstatement'. It means to go back to a person's job. Reinstatement is a remedy that is only granted in Nigeria in favor of an employee whose contract of employment is with statutory flavor or protected by statute[23]. Lastly, 're-employment' is another keyword in this paper. Re-employment or re-engagement, as it is sometimes called, means that the worker gets his job back, but starts as a new worker.

III. Brief history of the practice of unfair dismissal in Nigeria

In this segment, the discussion shows that the practice of unfair dismissal in Nigeria dates back to the period when Nigeria was under the colonial rule of Britain.

What is called Nigeria today came into existence on 1 January 1914. This followed the amalgamation of the Colony of Lagos and Protectorate of Southern Nigeria as well as the Protectorate of Northern Nigeria by Lord Fredrick Lugard, the person whom the British colonial master of Nigeria appointed the first Governor-General of the country.[24]

The author cannot state with precision how and when the unfair-dismissal practice commenced in Nigeria. Nevertheless, it is crystal clear that the practice of unfair dismissal started with the introduction of wage employment during the colonial period of Nigeria.

It is noteworthy to state that Nigeria was accorded independence from the UK on 1 October 1960. The country became a Republic in October 1963. Over the period between when Nigeria came into being and today many Nigerian workers have suffered from the practice of unfair dismissal. A typical example is that of the *Eche* case. Unfortunately, some ordinary courts

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20 See AE Abuza, 'Lifting of the Ban on Contracting-out of the Check-off System in Nigeria: An Analysis of the issues involved' (2013) 42(1) *The Banaras Law Journal* 61.

21 See s 91 of the Labour Act 2004.

22 <https://deale.co.za/unfair-dismissal-southafrica> accessed 7 July 2021.

23 *Olaniyan v University of Lagos* [1985] 2 NWLR (Pt. 9) 363, SC, Nigeria.

24 See AE Abuza, 'A Reflection on the Regulation of Strikes in Nigeria' (2016) 42 (1) *Commonwealth Law Bulletin* 6 & 21, quoted in AE Abuza, 'A Reflection on the Issues Involved in the Exercise of the Power of the Attorney-General to enter a *nolle prosequi* under the 1999 Constitution of Nigeria' (2020) 1 *Africa Journal of Comparative Constitutional Law* 85.

in Nigeria have refused to accord the Nigerian worker the right to sue for unfair dismissals and claim reliefs such as compensation or damages, re-instatement, and re-employment for unfair dismissal. Of course, a notable case on the matter is *Samson Babatunde Olarewaju v Afribank Public Limited Company*,[25] where the Supreme Court of Nigeria held that an employer in a mere master and servant contract of employment can terminate the contract at any time and for any reason or no reason at all. The position of the apex Court in Nigeria is hinged on the common law.

The 1999 Nigerian Constitution, as amended, based on the Presidential system of government came into force on 29 May 1999, signaling the beginning of the Fourth Republic of the nation. In 2010, the 1999 Nigerian Constitution was amended by the Constitution (Third Alteration) Act (CTAA) 2010.[26] Its section 254A (1) establishes the NICN. The Court is bestowed with exclusive jurisdiction over all labor and employment-related disputes. Section 254C(1)(f) of the 1999 Nigerian Constitution, as amended by the CTAA 2010 gives the Court exclusive jurisdiction to hear and determine labor disputes, relating to or connected with unfair labor practices or international best practices in labor, employment, and industrial relation matters. It is true that unfair dismissal is not mentioned in the provisions above. Regardless, it is an open secret that unfair dismissal is part of unfair labor practice.

Notwithstanding the provisions above, the practice of unfair dismissal has continued unabated in Nigeria.

IV. Analysis of Case-law on the practice of unfair dismissal of workers under the Nigerian Labour Law

The courts in Nigeria have discussed the practice of unfair dismissal of workers in many cases. A discussion on a few selected cases would suffice in this section. One significant case is *Babatunde Ajayi v Texaco* Nigeria Limited.[27] In the case, the appellant/plaintiff was employed on 7 March 1978, as Operations Manager by the first respondent/defendant company a post which is permanent and pensionable. The second respondent/defendant was the Managing Director of the first respondent/defendant's company. While the third respondent/defendant was the General Manager of the first respondent/defendant's company. By a letter dated 1 February 1979, the second respondent/defendant directed the appellant/plaintiff to proceed on leave on the ground that his future relationship with the first respondent/defendant company was under review. By another letter dated 23 March 1979, the second respondent/defendant invited the appellant/plaintiff to see him between 2 and 4 pm on that day. When the appellant/plaintiff went to see the second respondent/defendant, he was asked in the presence of the third respondent/defendant to tender his resignation of appointment, as Operations Manager to the first respondent/defendant company. He was given up to 26 March 1979 to hand over his letter of resignation, otherwise, he would be dismissed from employment. The appellant/plaintiff refused to resign as requested by the second respondent/defendant. On his failure to resign as requested, the second and third respondents/defendants, pursuant to Exhibit D1- Employee's Handbook of the first respondent/defendant-company, terminated the employment of the appellant/plaintiff for working against the first respondent/defendant-company. Instead of giving the appellant/plaintiff one month's notice of termination or paying the same one month's

25 *Olarewaju* (n 2).

26 Act No 1 of 2010.

27 [1987] 3 NWLR (Pt. 62) 577, 593, SC, Nigeria.

salary in lieu of one month's notice of termination, the second and third respondents/defendants paid the same three months' salary in lieu of notice of termination and gave the same all his entitlements.

The appellant/plaintiff instituted a suit in the High Court of Lagos State, Lagos claiming against the respondents/defendants-(1) a declaration that:(a) the appellant/plaintiff was the Operations Manager of the first respondent/defendant-company under a contract of employment; (b) any breach of the said contract of employment between the appellant/plaintiff and the first respondent/defendant-company is illegal, invalid, ultra vires, null and void and of no effect; (2) any injunction restraining the first respondent/defendant-company by itself, its servants and/or agents or otherwise from committing a breach of the said contract of employment existing between the appellant/plaintiff and the first respondent/defendant-company or in any way interfering with the appellant/plaintiff in the performance of his duties as Operations Manager. In the alternative, the appellant/plaintiff claimed against the first respondent/defendant-company the sum of 634, 833 naira (₦) as special and general damages for anticipatory breach of contract. The appellant/plaintiff argued that in terminating his contract of employment, the second and third respondents/defendants were not acting in the interest of the first respondent/defendant company but solely for their own selfish, irrelevant, and improper motives. The trial High Court, Olanrewaju Bada J, in its judgment delivered on 2 November 1979 stated that 'in the circumstances, I cannot make the declaration sought. In so far as a declaration cannot be made, an order for an injunction, in the circumstances cannot be made. His Lordship, however, held that 'the threatened termination of the appellant/plaintiff's appointment was unlawful'. The trial High Court granted the alternative claim because the Court found the termination of the appellant/plaintiff's contract of employment malicious.

Being aggrieved by the judgment of the trial High Court, the respondents/defendants appealed to the Court of Appeal. Justice Mahmud Mohammed JCA, delivering the leading Judgment of the Court of Appeal on 18 March 1985 with which the other two Justices of the Court concurred, allowed the appeal of the respondents/defendants and set aside the decision of the trial High Court in the matter. His Lordship held that the termination of the appellant/plaintiff's contract of employment with the first respondent/defendant company was lawful, having been done under the terms and conditions in Exhibit D1.

Being dissatisfied with the judgment of the Court of Appeal, the appellant/plaintiff appealed to the Supreme Court of Nigeria. Justice Andrews Otutu Obaseki JSC, delivering the leading judgment of the Supreme Court of Nigeria on 12 September 1987 with which the other four justices of the Court concurred, dismissed the appeal of the appellant/plaintiff and affirmed the decision of the Court of Appeal. His Lordship stated thus:

> where in a contract of employment there exists a right to terminate the contract given to either party, the validity of the exercise of their right cannot be vitiated by the existence of malice or improper motive. It is not the law that motive vitiates the validity of the exercise of a right to terminate validly the employment of the employee. There must be other considerations. The exercise is totally independent of the motive that prompted the exercise.[28]

[28] See, also, *Calabar Cement Company Limited v Daniel* [1991] 4 NWLR (Pt. 188) 750, CA, Nigeria and *Fakuade v Obafemi Awolowo University Teaching Hospital Complex Management Board* [1993] 4 NWLR (Pt.291) 45, 58, SC, Nigeria.

The author takes the position that the decision of the Supreme Court of Nigeria in the *Ajayi* case is not correct and, thus, unacceptable. It is argued that a termination of employment that contains ingredients of unfairness such as being ill-motivated or as a result of improper motive or bad or invalid reason like a worker's participation in a strike is unfair or unjust and the court ought to intervene and invalidate the same. In the *Eche* case, Araka, CJ of the Anambra State High Court of Justice rightly invalidated the dismissal of the plaintiff by the Anambra State Public Service Commission on the ground of participation in a teachers' strike. The Court seemed to have taken this stance because it considered the dismissal to be ill-motivated or based on a bad or invalid reason.

Another note-worthy case in point is *Samson Babatunde Olarewaju v Afribank Public Limited Company.*[29] In the case, the appellant/plaintiff was a Deputy-Manager of the respondent/defendant company. He was suspended from work on some allegations of fraud and embezzlement of money as well as sundry allegations. He later appeared before the Senior Staff Disciplinary Committee of the respondent/defendant company which tried him of the foregoing allegations. In the end, the Committee submitted its report to the respondent/defendant company. By a letter, the appellant/plaintiff was summarily dismissed from employment. No reason for the summary dismissal was advanced by the respondent/defendant company in the letter of dismissal. The appellant/plaintiff filed a suit in the High Court of Bornu State, Maiduguri challenging his summary dismissal from employment by the respondent/defendant company. The trial High Court held that the summary dismissal was wrongful on the ground that the appellant/plaintiff was not first arraigned before a court of law to have his guilt on the offenses alleged against the same established. It declared the summary dismissal a nullity and ordered the immediate reinstatement of the appellant/plaintiff.

Being aggrieved by the judgment of the trial High Court, the respondent/defendant company appealed to the Court of Appeal which set aside the judgment and order of the trial High Court. Being dissatisfied with the judgment of the Court of Appeal, the appellant/plaintiff appealed to the Supreme Court of Nigeria. Honourable Justice Aloysius Iyorger Katsina-Alu JSC, delivering the leading judgment of the apex Court to which the other four Justices of the Court concurred, dismissed the appeal of the appellant/plaintiff. His Lordship pointed out that the appellant/plaintiff had a mere master and servant relationship with the respondent/defendant company. Justice Katsina-Alu declared that:

> In a master and servant class of employment, the master is under no obligation to give reasons for terminating the appointment of his servant. The master can terminate the contract with the servant at any time and for any reason or no reason. In the instant case, no reason was given for the dismissal of the appellant.

His Lordship held thus:

> in a pure case of master and servant, a servant's appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defense or explanation. Similarly, a servant in this class of employment can lawfully be dismissed without observing the principles of natural justice.

[29] See *Olarewaju* (n 25).

Furthermore, it was held by Justice Katsina-Alu that it was not necessary under section 33 of the 1979 Nigerian Constitution (now section 36 of the 1999 Nigerian Constitution) that before an employer can summarily dismiss his employee under the common law, the employee must be arraigned and tried before a court of law where the gross misconduct borders on criminality.[30] In His Lordship's view, where the employer's Disciplinary Committee had found the employee guilty of gross misconduct bordering on criminality, the employer can either cause the same to be prosecuted in a court of law or summarily dismiss him from employment.

Lastly, Justice Katsina-Alu held as follows:

> where a master terminates the contract with the servant in a manner not warranted by the contract, he must pay damages for breach of contract. The remedy is damages. The Court cannot compel an unwilling employer to reinstate a servant he has dismissed. The exception is in the case where the employment is specially protected by statute. In such a case, the employee who is unlawfully dismissed may be reinstated to his position.

It is crystal clear from the foregoing decisions of the Supreme Court of Nigeria and the other ordinary courts in Nigeria that they are not prepared to accord an employee under a mere master and servant relationship the right to sue for unfair dismissal or to claim re-instatement or re-employment for unfair-dismissal. Their stance is hinged on the position under the common law.

The author takes the position that the decision of the Supreme Court of Nigeria in the *Olarewaju* case is not correct and, thus, unacceptable for the following reasons. First, the apex Court in the *Olarewaju* case had suggested that the master is under no obligation to give reasons for the summary dismissal of the servant. This is not correct, as in a contract of employment, whether a mere master and servant contract of employment or contract of employment protected by statute, reasons for the summary-dismissal of the servant must be advanced.[31] It should be noted that summary dismissal is predicated on the misconduct of the employee. An employer cannot summarily dismiss the servant from his job for doing no wrong. Of course, summary-dismissal goes with it a stigma and deprives the dismissed servant of benefits while the termination of a contract of employment does not carry a stigma and deprives the employee whose contract of employment is terminated of benefits. Oftentimes, a servant who is summarily dismissed from service cannot secure a job in public service for the remaining part of his life on earth. The courts, therefore, maintain that reasons for the summary-dismissal of the servant must be advanced by the master which said reasons must be justified by the master, otherwise the summary-dismissal would not be permitted to stand.[32] In addition to this, the courts of the law insist that where an employer pleads that an employee was dismissed from his job on account of specific misconduct, the dismissal cannot be justified in the absence of

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30 This view was upheld by the Court of Appeal in *BS Onwusukwu v The Civil Service Commission and Another* [2020] 10 NWLR (Pt.1731)201-202, CA, Nigeria.

31 See *Abomeli v Nigerian Railway Corporation* [1995] 1 NWLR (Pt. 372) 451-456, CA, Nigeria, quoted in AE Abuza, 'An examination of the power of removal of Secretaries of Private Companies in Nigeria' (2017) 4 (2) *Journal of Comparative Law in Africa* 50.

32 See *Johan Nunnick v Costain Blansevort Dredging Ltd* [1960] LLR 90, High Court, Nigeria, and *Ogunsanmi v CF Furniture (WA) Company Ltd* [1961] 1 ALL NLR 862, 864, HC, Nigeria, quoted in *Ibid.*, 51.

adequate opportunity being given to him to explain, justify or else defend the misconduct that is alleged.[33]

Second, the decision of the apex Court in the *Olarewaju* case is not in accord with its earlier decision in *Ewaremi v African Continental Bank Limited,*[34] where it upheld the decision of the trial High Court which ordered the reinstatement of a company-employee in a pure master and servant relationship on account that the purported dismissal of the appellant/plaintiff from the service of the respondent/defendant-company was null and void. Nigeria should borrow a leaf from other countries. For instance, in the Indian case of *Provisional Transport Services v State Industrial Court,*[35]the Supreme Court of India (per Nagpur Das Gupta J) declared that an industrial court would invalidate the dismissal of a worker and order reinstatement of the same where his dismissal was done without a fair inquiry.[36]

Third, the decision of the apex Court in the *Olarewaju* case is contrary to section 36(4) of the 1999 Nigerian Constitution, as amended. It states as follows:

> Whenever any person is charged with a criminal offense, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.

The apex Court had in previous cases interpreted the foregoing provisions to mean that where a Nigerian is alleged to have committed an offense he must be brought before the ordinary court for trial to establish his guilt and that no administrative panel can try the same for the offense alleged against him.[37]

Arguably, the action of the apex Court in giving an employer or his disciplinary panel the option or right to try a servant who is a Nigerian on allegation of committing an offense is tantamount to a usurpation of the court's duty for the benefit of a master or his disciplinary panel and depriving a Nigerian servant the protection accorded by section 36(4) of the 1999 Constitution, as amended.[38] It is argued that no person in Nigeria should be permitted to usurp the jurisdiction and authority of the court of law in the country under any pretext or guise whatsoever.[39]

Fourth, the Supreme Court can be vilified for taking the stance in the *Olarewaju* case that a master in a mere master and servant relationship can terminate the contract of employment for any reason or no reason at all. It is contended that termination of an employment contract bereft of a valid reason is invalid or wrongful, being contrary to Convention 158. To be specific, article 4 of the Convention states that:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or

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33 See James *Avre v Nigeria Postal Service* [2014] 46 NLLR (Pt. 147) 1, 10, CA, Nigeria, quoted in *Ibid.*

34 [1978] 4 SC 99, SC, Nigeria.

35 AIR [1963] 114, 117, SC, India.

36 Quoted in Abuza (n 31) 56.

37 See *Garba v University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550, SC, Nigeria and *Gregg Olusanya Sofekun v Akinyemi and Three Others* [1980] All NLR 153, 165, SC, Nigeria.

38 See Abuza (n 31).

39 *Ibid.,* 55. Good enough, the apex Court in the recent case of *Central Bank of Nigeria v Uchenna Godswill Dinneh* [2021] 15 NWLR (Pt. 1778) 91, 98, SC, Nigeria rejected the decision of Justice Katsina-Alu on s 36 above.

> conduct of the worker or based on the operational requirements of the undertaking, establishment, or service.

Articles 5 and 6 of the Convention above list matters which cannot constitute valid reasons for termination of employment. These matters are: membership of a trade union or participation in trade union activities outside working hours or with the consent of the employer within working hours; seeking office as, or acting, as having acted in the capacity of, a workers' representative, the filing of a complaint or the participation in proceedings against an employer involving alleged contravention of laws or regulations or recourse to competent administrative bodies; race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from a job during maternity leave; and temporary absence from a job as a result of illness or injury.

It is argued that Convention 158 has no force of law in Nigeria and, therefore, cannot be applied by the NICN in labor dispute resolution, having not been ratified by Nigeria. As disclosed already, the NICN is the Court that has exclusive original jurisdiction over all labor and employment-related matters. It is rather worrisome that Nigeria a member of, and former member of the Governing body of, the ILO, has not ratified this Convention. The country should sign and ratify Convention 158 forthwith. As a member of the UN and ILO, it is obligated to apply Convention 158. Needless to emphasize that the nation must show respect for international law and its treaty obligations, as enjoined by section 19(d) of the 1999 Nigeria Constitution, as amended.

Lastly, the apex Court can, also, be vilified for taking the position in the *Olarewaju* case that in a mere master and servant relationship, the servant's employment can lawfully be terminated without first telling the same what is alleged against the same and hearing his defense or explanation as well as the servant in a mere master and servant relationship can lawfully be dismissed from employment without observing the rules of natural justice. This stance is certainly contrary to procedural fairness or the rules of natural justice, that is, *audi alteram partem*- meaning hear the other side of a case and *nemo judex in causa sua*- meaning a person cannot be a judge in his own cause. Procedural fairness or these rules of natural justice are enunciated under Convention 158, the common law, and section 36(1) of the 1999 Nigerian Constitution, as amended which guarantees the right to a fair hearing to all Nigerians. Thus, such dismissal from employment without adherence to procedural fairness or the rules of natural justice is void and a nullity for being inconsistent with, or contravention of, procedural fairness or the rules of natural justice or the provisions of the 1999 Nigerian Constitution, as already disclosed. To be specific, article 7 of the Convention 158 embraces the principle of a fair hearing before dismissal or termination of employment by the employer. It declares as follows:

> The employment of a worker shall not be terminated before he is provided with an opportunity to defend himself against the allegation made unless the employer cannot reasonably be expected to provide the opportunity.

A note-worthy case decided under the common law is *R v Chancellor, University of Cambridge*.[40] In the case, the University of Cambridge withdrew all the degrees it awarded in

[40] [1723] 93 English Reports (ER) 698, Court of King's Bench, the UK. See, also, *Adedeji v Police Service Commission* [1967] 1 All NLR 67, SC, Nigeria; *Eperokun v University of Lagos* [1986] 4 NWLR (Pt. 34) 162;

favor of its former student one Dr. Bentley without first hearing his explanation or defense. The Court of king's Bench declared the action of the University unlawful. It issued an order of mandamus to the University requiring the restoration of Bentley's Degrees of Bachelor of Arts and Bachelor and Doctor of Divinity of which he had been deprived by the University without a fair hearing. Fortesque, J of the Court stated that even the Almighty God adhered to the rules of natural justice, as he did not punish Adam by driving him and his wife, Eve from the Biblical Garden of Eden for disobeying the same[41]without first hearing him. It is a general principle settled by cases that the breach of statute or natural justice is a nullity.[42] Good enough, the Supreme Court of Nigeria in *Olatunbosun v NISER Council*[43] a case in point held that procedural fairness was acclaimed as a principle of divine justice with its origin in the Biblical Garden of Eden.

An important point to bear in mind is that the approach of the 1999 Nigerian Constitution, as amended, as could be discerned from its section 36(1) is in alignment with the position under international instruments. For instance, the Charter of the United Nations 1945 guarantees the right to a fair hearing. Also, the Universal Declaration of Human Rights (UDHR) 1948 guarantees the right to a fair hearing and other fundamental rights in its articles 3 to 20. Admittedly, the UDHR is a soft-law agreement and not a treaty itself and in this way not legally binding on Member-States of the UN, including Nigeria. Regardless, it has become customary international law that has been embraced globally in protecting human rights.[44]

Additionally, the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981 guarantees to every person, including a worker the fundamental right to be heard in article 7. The African Charter has not only been signed and ratified by Nigeria but has equally been made a part of national law, as enjoined by the provisions of the same and section 12(1) of the 1999 Nigerian Constitution.[45] In *Sanni Abacha v Gani Fawehinmi,*[46] the apex Court in Nigeria held that since the ACHPR had been incorporated into Nigerian Law, it enjoyed a status greater than a mere international instrument and the same was part of the Nigerian body of laws.

Furthermore, the UN International Covenant on Civil and Political Rights (ICCPR) 1966 guarantees to every person, including a worker the fundamental right to a fair hearing in its article 14(1). It has been postulated that the ICCPR now has the effect of a domesticated enactment, as required under section 12(1) of the 1999 Nigerian Constitution, as amended and,

SC, Nigeria and *Bamgboye v University of Ilorin* [1999] 10 NWLR (Pt. 662) 296, 299, SC, Nigeria, quoted in Abuza (n 31).

41 See the Book of Genesis, Chapter 3, verses 11-19 of the *New World Translation of the Holy Scriptures* (New York: Watchtower Bible and Tract Society of New York, Inc., 2013) 46-47.

42 See, for example, *Adeyemi Adeniyi v Governing Council of Yaba College of Technology* [1993] 6 NWLR (Pt.300) 426, 461, SC, Nigeria and *Governor of Oyo State and Others v Oba Folayan (Akesin of Ora)* [1995] 8 NWLR (Pt. 413) 292, SC, Nigeria, quoted in Abuza (n 31) 51.

43 [1988] 3 NWLR (Pt.80) 25, SC, Nigeria, quoted in Abuza (n 31) 52.

44 See KM Danladi, 'An Examination of Problems and Challenges of Protection and Promotion of Human Rights under European Convention and African Charter' (2014) 6(1) *Port Harcourt Law Journal* 83.

45 See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.

46 [2000] 6 NWLR (Pt.660) 228, 251, SC, Nigeria, quoted in AE Abuza, 'The Problem of Electoral Malpractices in the Democratic Politics of Nigeria: A Contemporary Discourse' (2019) 9(2) Gujarat National Law University (GNLU) Journal of Law, Development and Politics 57.

therefore, has the force of law in Nigeria, since the ICCPR guarantees labor rights to workers in its article 22(1) and has been ratified by the nation.[47]

Again, the Arab Charter on Human Rights (ACHR) 2004 guarantees to every person, including a worker the right to legal remedy in its article 9, and the European Convention on Human Rights (ECHR) 1953 guarantees to every person, including a worker the fundamental right to a fair and public hearing in its article 6. While the American Convention on Human Rights (AMCHR) 1969 guarantees to every person, including a worker the fundamental right to a fair hearing in article 8. It should be noted, however, that Nigeria is not obligated to apply the provisions of the ACHR, ECHR, and AMCHR above, as the country is not a member-State of the Council of the League of Arab States, Council of Europe and Organisation of American States, as well as State-Party to the ACHR, ECHR, and AMCHR.

It is wise to argue that as a member of the UN and AU as well as a State-Party to the ACHPR and ICCPR, Nigeria is obligated to apply the provisions of the Charter of the UN, ICCPR, and ACHPR. The country, in this connection, must demonstrate respect for international law as well as its treaty obligations, as enjoined by section 19(d) of the 1999 Nigerian Constitution, as amended.

Regarding the right to a fair hearing guaranteed to citizens of Nigeria under section 36(1) of the 1999 Nigerian Constitution, as amended the Nigerian Court of Appeal (per Helen Moronkeji Ogunwumiju JCA) held in *Nosa Akintola Okungbowa and Six Others v Governor of Edo State and Eight Others*,[48] that fair hearing is a constitutional and fundamental right encapsulated in the Nigerian Constitution which cannot be waived or unjustly denied to a Nigerian, including a worker, and that a breach of the same in any proceeding nullified the whole proceeding. Also, the Supreme Court of Nigeria (per Amiru Sanusi JSC) held in *James Avre v Nigeria Postal Service*[49] that the right to a fair hearing is such an important, radical, and protective right, that the courts of law put up every effort to protect the same. It even implies, according to the apex Court, that a statutory form of protection will be less effective if it does not warmly embrace the fundamental right to be heard. It went further to declare that when an employee is accused by his employer of committing any act of misconduct, he must be accorded the opportunity to explain and give his reason, if any, for committing such misconduct.

With respect to fundamental rights generally, the Nigerian Court of Appeal (per Abdu Aboki JCA) held in *Mallam Abdullah Hassan and Four Others v Economic and Financial Crimes Commission (EFCC) and Three Others*,[50] that:

> (a) fundamental rights are rights without which neither liberty nor justice would exist;
> (b) fundamental rights stood above the ordinary law of the land and in fact constituted a primary condition to civilized existence; and

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47 See *Aero Contractors Company of Nigeria Limited v National Association of Aircrafts Pilots and Engineers and Two Others* [2014] 42 NLLR (Pt. 133) 64, 717, per Kanyip, Judge of the NICN and AE Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' (2016) 1(1) North Eastern Hill University (NEHU) Law Journal 16.

48 [2015] 10 NWLR (Pt. 1467) 257, 268-69, CA, Nigeria. See, also: *Mohammed Sambo Dasuki v Federal Republic of Nigeria and Two Others* [2021] 9 NWLR (Pt. 1781) 249, 253, CA, Nigeria; and *Destra Investment Ltd v Federal Republic of Nigeria and Another* [2021] 6 NWLR (Pt. 1771) 57, 65, CA, Nigeria and *Sylvanus Eze v University of Jos* [2021] 2 NWLR (Pt. 1760) 208, 213, SC, Nigeria.

49 [2020] 8 NWLR (Pt. 1727) 421-422, SC, Nigeria.

50 [2014] 1 NWLR (Pt. 1389) 607, 610, CA, Nigeria, quoted in Abuza (n 31).

(c) it was the duty of the court, including the Supreme Court of Nigeria to protect these fundamental rights.

The words of the Nigerian Court of Appeal (per Obande Festus Ogbuinya JCA) in *Nigeria Security and Civil Defence Corps and Six Others v Frank Oko*[51] are apt. According to the Court:

(a) fundamental rights are rights attaching to man as a man because of his humanity;
(b) fundamental rights fell within the perimeter of species of rights and stood on top of the pyramid of laws and other positive rights;
(c) fundamental rights constituted a primary condition for a civilized existence;
(d) due to fundamental rights' kingly position in the firmament of human rights, section 46 of the 1999 Nigerian Constitution, as amended allocated to every Nigerian whose fundamental right was or had been harmed, even *quiatimet*, to approach the Federal High Court or State High Court to prosecute his complaint and obtain redress.

A noteworthy point to make is that due cognizance must be accorded to the import of the provisions of Chapter Four of the 1999 Nigerian Constitution, as amended in which section 36(1) of the 1999 Nigerian Constitution, as amended is a part. In actuality, they are sacrosanct. Should any provision require amendment, the 1999 Nigerian Constitution, as amended provides for a tedious and challenging procedure in section 9(3). The country, in this light, must apply, and show respect for, the Constitution. It is important to bear in mind that in Nigeria the provisions of the Constitution are supreme and binding on all persons as well as authorities throughout the Federal Republic of Nigeria, including the Supreme Court of Nigeria.[52]

In the final analysis, it is argued that the decision of the Supreme Court in the *Olarewaju* case on the matter is null and void. This contention is hinged on the insightful provision in section 1(3) of the 1999 Nigerian Constitution, as amended. The argument is fortified by the decision of the apex Court in *Attorney General of Abia State v Attorney-General of the Federation.*[53] Perhaps, the Justices of the Supreme Court of Nigeria would have come to a different conclusion if they had applied their minds to the foregoing points.

Good enough, the NICN seems to have departed from the old traditional or common-law position on unfair dismissal, owing to its expanded jurisdiction under the 1999 Nigerian Constitution, as amended by the CTAA 2010. To cut matters short, the NICN now has exclusive jurisdiction to hear and determine all labor and employment-related disputes, including disputes relating to or connected with unfair labor practice or dismissal[54]

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51 [2020] 10 NWLR (Pt. 1732) 314-315, CA, Nigeria.

52 See the 1999 Nigerian Constitution, s 1(1).

53 [2002] 6 NWLR (Pt. 763) 264, SC, Nigeria, quoted in AE Abuza, 'A Review of the Jurisdiction of the High Courts and National Industrial Court to hear and determine Labour Disputes Litigation in Nigeria' (2016) 3 (2) Journal of Comparative Law in Africa 157-58.

54 See the 1999 Nigerian Constitution, as amended by the CTAA 2010, s 254 C(1). See also *Musa Ismaila Maigana v Industrial Training Fund and Another* [2021] 8 NWLR (Pt. 1777) 1, 9, SC, Nigeria. Note that the NICN, also, has criminal jurisdiction, as it can exercise jurisdiction and powers in criminal cases and matters arising from any cause or matter of which jurisdiction is conferred on the same by s 254C of the Constitution

According to section 254 C (6) of the 1999 Nigerian Constitution, as amended by the CTAA 2010 an appeal shall lie from the decision of the NICN in criminal causes and matters, as stated in section 254C(5) above to the Court of Appeal as of right. Arguably, the decision of the Court of Appeal in any such criminal causes and matters shall be appealable to the Supreme Court of Nigeria.

A significant point to note is that based on the interpretation given to the provisions of section 243(2) and (3) of the 1999 Nigerian Constitution, as amended by the CTAA 2010, by the Supreme Court of Nigeria in *Skye Bank Public Limited Company v Victor Iwu*,[55] all decisions of the NICN in the exercise of its civil jurisdiction are appealable to the Court of Appeal which said Court shall be the final court on labor disputes not touching on criminal causes or matters of which jurisdiction is bestowed on the NICN by virtue of section 254 C or any other Act of the National Assembly or any other law.[56]

It is instructive to observe that the NICN considers unfair dismissal to be an unfair labor practice.[57] In line with global best practices, the Court now insists that valid reasons must be advanced by an employer in termination of the contract of employment of an employee, whether or not it is a mere master and servant relationship.[58] In short, the NICN is now prepared to declare invalid any determination of a contract of employment prompted by motive or reasons outside the recognized reasons for the termination of a contract of employment in article 4 of Convention 158 or not in line with procedural fairness or the rules of natural justice or the right to a fair hearing in alignment with the Convention 158 and other international best practices in labor, employment as well as industrial relation matters.[59] Also, it is now prepared to award appropriate remedies such as monetary compensation, reinstatement, and re-employment, whether or not the contract of employment involved is a pure master and servant relationship. To be specific, the NICN warmly embraced the principle of unfair dismissal in arriving at its decision in *Godwin Okosi Omoudu v Aize Obayan and Another*.[60] In the case, the first defendant was a Professor and Vice-chancellor of Covenant University, the second defendant. The NICN (per Adejumo J) held that the termination of the claimant's appointment by the second defendant university on 18 August 1981 was in contravention of the contract of employment between the parties and that the termination of the claimant's appointment was, also, based on an unfounded reason, as disclosed before and was, therefore, wrongful.

above or any other Act of the National Assembly or by any other law. See s 254 C(5) of the Constitution above.

55 [2017] LPELR 42595, SC, Nigeria.

56 This is consistent with the practice in other countries, including Kenya and Uganda where the Court of Appeal is the final appellate Court on labor disputes. See, for example, s 17(1) of the Employment and Labour Relations Act 2011 of Kenya and the Ugandan case of *DFCU Bank Ltd v Donnakamali*, Civil Application No. 29 of 2019 arising from Supreme Court Civil Appeal No. 1 of 2019<https://www.bownaslaw.com> accessed 25 July 2021.

57 See *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) v Schlumberger Anadrill Limited* [2008] 11 NLLR (Pt. 29) 164, NICN, Nigeria.

58 See CJ Chibuzor, 'The Concept of Unfair Labour Practice and its applicability in Nigeria' <https://www.patrelipartners.com/the concept-of-unfair-labour-practice-and-its-applicability-in-Nigeria/> accessed 11 July 2021.

59 Note that pursuant to s 254 C (3) of the 1999 Nigerian Constitution, as amended by the CTAA 2010 and the NICN (Civil Procedure) Rules, 2017 a judge of the NICN may refer a claim filed in the Court to the Alternative Dispute Resolution Centre within the Court premises for conciliation and mediation. But where conciliation and mediation fail, the judge shall adjudicate over the labor dispute. See NICN (Civil Procedure) Rules 2017, Order 24, Rules 1, 7 & 8.

60 See (n 9).

His Lordship stated that it can never be just where an employer bereft of just and established cause expresses doubt about the integrity of an employee and based on this expression of doubt about the integrity of the employee goes ahead to terminate his contract employment in a way that did not allow for discussion and refusal. Justice Adejumo went further to assert that the law has moved from the narrow confines of the common law in the master and servant contract of service to a more proactive approach that secures the rights of both parties to an employment contract. In this way, according to the learned Justice, the attention has shifted to the protection of employees in matters of unfair labor practices in tune with the practice of other nations.

Justice Adejumo concluded that section 254C(1) (f) of the 1999 Nigerian Constitution, as amended by the CTAA 2010 created an entirely new concept and right of unfair labor practice which is both alien to the common-law concept of master and servant relationship and the industrial relations jurisprudence hitherto- meaning before now, existing in Nigeria. According to his Lordship, it was natural and expected that if this new right was violated there must be a remedy, otherwise, the whole purpose of creating the right would be defeated. Justice Adejumo asserted further that if no specific remedy was created by the Nigerian Constitution, the NICN was duty-bound to look at the practice in other countries where the concept had been borrowed. The Court, in the view of His Lordship, was duty-bound to give section 254C (1) (f) above a broad interpretation and interpret the same as both accommodative of giving a right and imposing a remedy for its contravention.

Honorable Justice Adejumo granted the following reliefs in favor of the claimant:

(i) the termination of the claimant's employment is declared wrongful;
(ii) the claimant is awarded one-month salary in lieu of notice of termination of his contract of employment;
(iii) the claimant is awarded five months' salaries as general damages;
(iv) the claimant is awarded the costs of ₦100, 000; and
(v) the judgment sum shall attract 10% interest rate per annum, from the date of this judgment until the judgment debt is fully liquidated.

The decision of the NICN above is commendable, being in line with the practice in other countries, including South Africa, Kenya, the UK, Canada, and Ghana. Nonetheless, the Court can be criticized. Firstly, section 254C (1)(f) above does not stipulate in explicit terms the right of an employee not to be unfairly dismissed or the right not to be subjected to unfair labor practice. Secondly, section 254C (1)(f) above or any other Nigerian statutory provision does not provide for the circumstances that would amount to unfair dismissal or any remedy for unfair dismissal or unfair labor practice. Lastly, contrary to the doctrine of separation of powers, His Lordship tried to make law by substituting his own words for the words used in the Nigerian Constitution in order to give them a meaning that suits the Court. In *Abdullahi Inuwa v Governor of Gombe State and Two Others*[61], the Nigerian Court of Appeal held that it is not the function of the court to amend the Constitution.

To sum up, on the issue of analysis of case law on the practice of unfair dismissal of workers under the Nigerian labor law, it is not out of context to emphasize that the unfair dismissal of workers in Nigeria is unlawful, unconstitutional, and contrary to the Convention 158 as well as international human rights norms or treaties.

61 [2020] 5 NWLR (Pt. 1716) 32, 36-37, CA, Nigeria.

V. Practices on unfair dismissal in other countries

What is of interest in this subheading is the issue of the practices of unfair dismissal in other countries. The relevant countries with regard to the practice of unfair dismissal are discussed below:

United Kingdom

In the UK a country practicing the common law, the Parliament has intervened by enacting the ERA 1996 to provide for a right of the employee not to be unfairly dismissed,[62] circumstances where termination of employment can be regarded to be unfair,[63] remedies of interim relief, compensation, reinstatement or re-engagement[64] and employees who can sue for unfair dismissal. Regarding the latter, it should be stressed that the UK imposes limitations on the exercise of the right to file a suit for unfair dismissal. To be precise, only employees who have worked for an employer for a period of at least two years have a right to file a claim for unfair dismissal.[65] There are exceptions for those persons who are dismissed automatically and those persons who are dismissed principally for a reason connected with political opinion or affiliation.[66] Furthermore, the right to bring a complaint to an Employment Tribunal which is conferred with jurisdiction to hear and determine labor disputes, including cases of unfair dismissal is not accorded to self-employed people, independent contractors, members of the Armed forces, or Police forces, unless the dismissal is connected with health and safety or whistleblowing.[67]

VI. Observations/Findings

In this segment, the author highlights or gives the summary of observations/findings during the study as can be seen in the preceding sections.

It is glaring from the foregoing review of the practice of unfair dismissal of workers in Nigeria that some ordinary courts in Nigeria have not accorded Nigerian workers the right to sue for unfair dismissal. These courts have hinged their decisions on the position of employees in a mere master and servant relationship under the common law.

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62 See ERA 1996, s 94(1). See, also, M Suff, *Essentials of Employment Law* (London: Cavendish Publishing Ltd., 1998) 106.

63 These circumstances or invalid or bad reasons for the termination of the contract of employment include (a) where the employee is pregnant or on maternity leave; and (b) where the employee is a trade union member or representative. See <https://www.acas.org.uk/dismissals> accessed 7 July 2021. See, also, ss 95, 99, 100, 104 A, 104 C, 105(1), (3) & (7A) of the ERA 1996. For details, see S Deakin and G S Morris, *Labour Law* (Oxford: 5th edn, Hart Publishing Ltd., 2009) 429-430.

64 <https://www.acas.thomsonreuters.com>accessed 7 July 2021. See, also, CJ Carr and PJ Kay, *Employment Law* (London: Longman Group UK Ltd., 1990) 158.

65 See Carr and Kay, *Ibid*., 139.

66 <https://www.gov.ukdismiss-staff> accessed 25 July 2021.

67 *Ibid*. Note that in South Africa, Canada, Ghana, and Kenya-all countries practicing the common law, there are statutory provisions that provide for the right of a worker not to be unfairly dismissed by his employer, circumstances under which a dismissal or termination can be considered unfair and remedies such as payment of compensation, re-instatement, and re-employment for the unfair dismissal of a worker and employees who can sue for unfair dismissal. See, for example, South African Labour Rights Act1995, ss 2, 185, 187(1) &<https://www.labourguide.co.za/discipline-dismissal/712-unfair-dismissals> accessed 10 July 2021; the Canadian Labour Code Act 1985, s 240(1) & 'No 15-Adjudication of unjust dismissal complaints' <http://www.crib.ccri.ca<site>eng> accessed 19 July 2021; Ghana's Labour Act 2003, ss 63(1) – 4, 64 & 66; and the Kenyan Employment Act 2007, ss. 35(4)(a), 45(3), 46(a)-(i) & 49.

It is observable that the unfair dismissal of workers in Nigeria is unlawful and contrary to, among other international laws, Convention 158.

Also, it is observable that section 254C (1)(f) of the 1999 Nigerian Constitution, as amended by the CTAA 2010 gives the NICN exclusive jurisdiction to hear and determine claims on unfair labor practice, including unfair-dismissal. Regrettably, neither the Constitution above nor any other enactment in Nigeria provides for general statutory rights of an employee not to be unfairly dismissed by the employer and reliefs such as re-instatement, re-employment, and compensation for unfair dismissal as well as circumstances where a termination of employment of an employee would be considered an unfair dismissal. Thus, the problem of unfair dismissal of workers in Nigeria has continued unabated. A typical example is the *Omoudu* case.

Again, it is observable that the Parliament in the UK, South Africa, Canada, Ghana, and Kenya have intervened to give recognition to the right of workers to sue for unfair dismissal and claim reliefs, including re-employment for unfair dismissal, as disclosed before. These developments are certainly commendable. They are consistent with international law.

The problem of unfair-dismissal of workers in Nigeria must be accorded the highest consideration it deserves by the FGN under the headship of President Buhari so that it is not accused of pretending on the issue of vesting in the NICN exclusive jurisdiction over labor disputes relating to unfair labor practices, including unfair-dismissal. A continuation of the problem of unfair dismissal of workers in the country poses a grave danger to the industrial sub-sector of Nigeria's political economy. It is already engendering industrial disharmony with the capacity to stop economic growth and development. The author wishes to re-call the five-day warning strike by the NLC and TUC as well as their affiliates in Kaduna State, as disclosed before. Incessant strike by workers has the capacity to impact negatively on the economy of Nigeria. This would undoubtedly discourage both local and international businessmen from investing their resources in the economy of Nigeria. Thus, President Buhari may not be able to accomplish totally the 'Change Agenda' of the FGN for the all-around socio-economic development of the nation.

VII. Recommendations

The problem of unfair dismissal of workers in Nigeria should be effectively addressed in Nigeria. In order to overcome the problem, the author strongly recommends that Nigeria should enact a new law to be known as the 'Labour Rights Act' to provide for a right not to be unfairly dismissed and the right to seek relief of re-instatement, re-employment, and compensation for unfair dismissal as well as circumstances where termination of employment would be considered an unfair dismissal. A law on unfair dismissal such as the proposed 'Labour Rights Act' would take care of the problem above and give some protection to workers who may otherwise be rounded out of employment on account of their union activities and other invalid reasons for the termination of employment.[68] The recommendation above is a novelty or new recommendation in the paper, geared towards curbing unfair dismissal in the current situation in Nigeria, as it is not contained in the existing literature on labor rights protection in Nigeria consulted by the author and therefore addresses a gap in the same. It is significant to bear in mind that the unfair dismissal of workers is being undertaken in Nigeria by some employers for invalid or bad reasons. Some employers actually terminate the employment of their workers on account of their active involvement in trade union activities. This is

[68] O. Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers 1991) 326

unacceptable, as it is not in tune with Convention 158. The author wishes to recall the provisions of Article 4 of Convention 158, as disclosed before.

Articles 5 and 6 of Convention 158 list matters which cannot constitute valid reasons for termination of employment including membership of a trade union or participation in trade union activities outside working hours or with the consent of the employer within working hours.

Also, the termination of the employment of a worker on account of his active involvement in trade union activities is contrary to section 12(4) of the Trade Unions Act[69] 2004, as amended by the Trade Unions (Amendment) Act[70] 2005 which provides that membership of a trade union is voluntary and no employee shall be victimized for refusing to join or remain a member of a trade union. Needless to recall that in the *Eche* case, Araka, CJ of the Anambra State High Court of Justice invalidated the dismissal of the plaintiff by the Anambra State Public Service Commission on the ground of participation in a teachers' strike. It is argued that the court took the position because it considered the dismissal to be ill-motivated or based on a bad or invalid reason.

Furthermore, it should be re-iterated that the unfair dismissal of workers may also conflict with the right to procedural fairness or the rules of natural justice, or the right to a fair hearing guaranteed under the common law, Article 9 of the ACHR, Article 7 of the ACHPR, Article 14 (1) of the ICCPR, Article 6 of the ECHR, Article 8 of the AMCHR, Article 3 of the UDHR, Article 7 of the Convention 158 and section 36(1) of the 1999 Nigerian Constitution, as amended.

The author wishes to re-iterate the provisions of Article 7 of Convention 158, as disclosed before. As a member of the UN and AU as well as a State Party to the ICCPR and ACHPR, Nigeria is obligated to apply the provisions of the ICCPR and ACHPR.

Also, Nigeria should sign and ratify Convention 158 forthwith, as disclosed before. The country, being a member of the UN and ILO, is obligated to apply Convention 158. It needs to be reiterated that the nation must show respect for international law and its treaty obligations, as enjoined by section 19 (d) of the 1999 Nigerian Constitution, as amended.

With respect to section 36(1) of the 1999 Nigerian Constitution, as amended, it has been disclosed before that the Nigerian Court of Appeal (per Helen Moronkeji Ogunwumiju JCA) held in the *Okungbowa* case that fair hearing is a constitutional and a fundamental right guaranteed under the Nigerian Constitution which cannot be waived or unjustly denied to a Nigerian, including a worker, and that a breach of the same in any proceeding nullified the whole proceeding[71].

Of course, due cognizance must be given to the import of Chapter Four provisions of the 1999 Nigerian Constitution, as amended in which section 36(1) of the 1999 Nigerian Constitution, as amended is a part. They are indeed sacrosanct. Little wonder section 9(3) of the 1999 Nigerian Constitution, as amended provides for a tedious and challenging procedure for their amendment. The nation is obligated to apply, and show respect for, the Constitution. It should be stressed that section 1(1) of the 1999 Nigerian Constitution, as amended declares the

69 Cap. T 14 LFN 2004.

70 No. 17 of 2005.

71 See, also, *Eyitayo Olayinka Jegede and Another v Independent National Electoral Commission and Three Others* [2021] 14 NWLR (Pt. 1797) 409, 443, SC, Nigeria.

Constitution above to be supreme and its provisions to have a binding effect on all authorities and persons, including the employer of a worker throughout the Federal Republic of Nigeria.[72]

The recommendation above is consistent with the approach in other countries, including the UK, South Africa, Canada, Ghana, and Kenya where the Parliament has intervened to accord workers a right not to be unfairly dismissed, a right to claim reliefs, including re-employment for unfair-dismissal and state the circumstance where a termination of employment of an employee could be considered an unfair-dismissal, as disclosed before. Of course, the approach in these countries is consistent with the UN Charter, UDHR, ACHR, ICCPR, ACHPR, ECHR, AMCHR, Convention 158, and other international human rights norms or treaties.

The law's approach to the servant and master relationship has changed dramatically. Workers are no longer considered slaves or properties of their employers. They have been granted labor rights, including the right to a fair hearing, the right not to be held in slavery or servitude and be required to perform compulsory or forced labor, the right to freedom of association, including the right to join a trade union for the protection of workers' interest, right to collective bargaining and right not to be unfairly dismissed under international law and municipal laws[73]. With the *Eche* and *Provisional Transport Services* cases as well as other countries of the world guaranteeing the right of the employee not to be unfairly dismissed, the dissipation and later extermination of the menace of unfair dismissal are feasible and, indeed, inevitable. Nigeria cannot fold its arms and do nothing serious on the matter. The country, in this light, must adopt positive measures to identify strongly with the international law-motivated efforts in these countries where unfair dismissal has become unlawful.

In the final analysis, it is postulated that unfair dismissal is not in the best interest of the worker, as the same is thrown out of employment unjustly. Section 17(3)(a) of the 1999 Nigerian Constitution, as amended guarantees the rights to adequate means of livelihood and suitable employment to all Nigerians, including workers. A plausible argument to advance is that employment ought to be regarded as a fundamental right so that where an employment contract is breached by an employer, whether or not in a mere master and servant relationship, for example, if he did not give to the employee fair hearing or follow the agreed or fair procedure in terminating the employment contract the appropriate remedy ought to be reinstatement. The judgment of Adolphus Godwin Karibi-Whyte, JSC in *Olaniyan v University of Lagos*[74] is very apt. His lordship declared that the law has reached the stage where the principle to be warmly embraced is that the right to a job is analogous to a right to property. According to the learned Justice Karibi-Whyte, where a man was entitled to a particular job reinstatement of the man to his job was the only just remedy where the termination of his employment was invalid.

Additionally, both the 1999 Nigerian Constitution, as amended, and the AU Convention on Preventing and Combating Corruption (AUCPCC) 2003 frown against corruption and abuse of power in the public and private sectors of the economy.[75] It is crystal clear that the unfair

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72 The supremacy of the Nigerian Constitution was upheld in *Iboyi Kelly v Federal Republic of Nigeria (2020) 14 NWLR (Pt. 1745) 479, 492, CA, Nigeria and Uyo Local Government v Akwa Ibom State Government and Another (2021) 11 NWLR (Pt. 1786) 1, 13, CA, Nigeria.*

73 See, for example, the UN ILO Declaration on Fundamental Principles and Rights at Work 1998, 'About the Declaration-ILO' <https://www.ilo.org>lang. en> accessed 6 July 2021, s 94(1) of the UK ERA 1996 and ss 33, 34(1) & 40 of the 1999 Nigerian Constitution, as amended.

74 (n 23), quoted in Abuza (n 31).

75 See, for example, the 1999 Nigerian Constitution, as amended, s 15(5) and AUCPCC 2003, art 3 (5).

dismissal of a worker is tantamount to corruption[76] and abuse of power. The emphasis is placed on the right of a worker not to be unfairly dismissed should be perceived, however, not as one seeking to accomplish the propagation of a labor right of workers as an end itself but rather as a means of assuring the economic prosperity of the entire citizenry or mankind. It is not for mere sloganeering that the motto of the NLC a Federation of trade unions of workers in Nigeria is 'Labour creates wealth'. To cut matters short, it is labor that creates the wealth of Nigeria and, indeed, any other country.

The author is of the view that the recommendation above if implemented, could effectively curb the problem of unfair dismissal of workers in Nigeria.

VIII. Conclusion

This paper has reviewed the practice of unfair dismissal of workers in Nigeria. It identified shortcomings in the various applicable laws and stated clearly that the practice of unfair dismissal of workers in Nigeria is unlawful, unconstitutional, and contrary to international human rights norms or treaties as well as Convention 158. This paper, also, highlighted lessons or take away from other countries and made suggestions and recommendations, which, if carried out, could effectively address or end the problem of unfair-dismissal of workers in Nigeria.

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[76] Note that President Buhari identifies corruption as the basic reason for the prevalence of poverty in Nigeria. See Vanguard (Lagos 14 September 2015) 7, quoted in AE Abuza, 'A reflection on the Law and Policy on Curbing Desertification in Nigeria' (2016) 6(2) GNLU *Journal of Law, Development and Politics 143*.

The role of governments in investigating crimes committed in outer space

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Abstract

Due to the lack of comprehensive and unified regulations on criminal jurisdiction in outer space and Insufficient scattered regulations between governments and weak and inadequate rules in international documents and agreements in this field, the present study descriptively and analytically uses the library method by taking notes from International Space Law and International documents and agreements in this field and reliable information and articles collected and seeks to answer the question of how can governments be considered competent to investigate the crimes committed by their citizens and non-citizen in outer space?

The results of studies show that the governments have jurisdiction to prosecute crimes committed by their citizens in outer space within domestic courts and international authorities however the existing laws do not answer the numerous ambiguities in this area, even multilateral international agreements, which are more limited in scope than international treaties and international space law, have failed to address the existing ambiguities. The role of governments and their efforts, as well as those of international organizations and the legal community, in unifying the efficient rules of outer space to prevent various national legislations, is important.

Keywords:

International Space Law, Jurisdiction of Courts, Outer Space, the role of governments in the proceedings crimes committed

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Foreword

The field of space is the most unknown and dangerous field of human activity in the present era. Despite the passage of a short time since the beginning of human space activity, which is not a few decades, space technology and industry have made significant progress and development, so that humans are thinking about the commercial exploitation of resources outside the earth's atmosphere, space tourism, and scientific discoveries outside the solar system. As space tourism and space commercialization become more serious, many private and public companies enter the field, such as Virgin Galactic and "Roskosmos"[1], which are looking to build a space hotel by 2022 (Reddy, Nica & Wilkes, 2012: 1094-1095) as well as projects to exploit the resources of space objects and also to create permanent bases on the moon and other space objects such as the multinational project "Artemis"[2] with the participation of eight countries, the permanent presence of humans in space in the not too distant future is expected.

One of the most important challenges of the world community in space is maintaining the security and environment of space and the unknown physics and order of space, because any attempt and intervention in the direction of militarization or nuclearization of space or attempts to control the energy of black holes and Neutron stars can destroy the unknown order of the universe, and its consequences are not only for that country, the planet, and humanity, but can also be a threat to the solar system. For this reason, the cooperation of all governments to formulate and develop space rights and create a solid mechanism of executive guarantee is necessary. Compared to other branches of international law, international space law is a newly born branch that is on the way to development and evolution, therefore, all aspects of human presence in space have not been investigated.

From the beginning of the formation of human societies, one of the phenomena that have always been of interest to human beings has been the issue of crime. There have been different definitions and interpretations of crime and many thinkers including sociologists, jurists, criminologists and psychologists and other scientific and intellectual groups have dealt with it from different aspects. Considering that crime, like other social phenomena, is a multidimensional and multi-causal issue, and due to special and unnatural conditions in outer space and isolated relationships of people of different nationalities and religions and with different cultures, as well as interests The common existence of different national and personal interests, the emergence of challenges between individuals that provide the motivation and context for committing a crime is not far from expectation and committing a crime also seems likely. In this regard, the development and expansion of international law regarding the rights governing outer space are essential. This article will try to examine the competence of domestic courts in proceedings of crimes committed in outer space. in the light of the role of governments.

1- Theoretical concepts and bases

International space law, with its independent resources as the newest branch of international law knowledge with a stunning scientific and technical development that gave mankind the ability to leave the earth for the first time, and new concepts related to sovereignty It shows the difference between space and air and earth. International space law has faced challenges such as preventing the spread of armed conflicts into outer space and determining the limits of governments' sovereignty and exercising jurisdiction, ownership, and responsibility in the vast expanse of outer space, which explains some of the concepts and bases related to the jurisdiction over We will investigate the crimes to identify the competent authorities.

1- Launcher Government

Determining and identifying the government that launched the space object in terms of the rights, duties, and obligations of that government towards the launched space object and towards the international community, including other governments and governmental and non-governmental organizations, and natural and legal persons, especially in the discussion of actions The active and passive competence of the crew, employees and people present in that space object is important. In Article 8 of the Outer Space Treaty of 1967, the state with jurisdiction over individuals is defined as the state whose space object is registered under the name of that state. Also, Article 2 of the 1975 Convention on the Registration of Spacecraft introduces the state that launches a space object as the state that registers that space object, and not necessarily the "launching state". In general, it is deduced from the international space regulations resulting from space treaties that the state that registers the space object of the state is competent over people.

The 1972 Convention on International Liability for Damage by Space Objects provides a clear definition of the term launch and the term launch state. In month 1 of this Convention, the launching State refers to the State which launched the space object into space, or that space object launched from the territory under the control of that State, or the State which provided the means, means, and means of launching. Determining and identifying the government launching the space object in terms of the rights, duties, and obligations of that government to the launched space object and to the international community, including other governments and governmental and non-governmental organizations, natural and legal persons, and especially in the discussion of actions. Active and passive competence on the crew and staff and people present in that space object is important. According to Article 6 of the 1967 Outer Space Treaty[3], any "space activity of non-governmental organizations in outer space, including the moon and other celestial bodies, requires the continued permission and supervision of the appropriate State Party." Therefore, the supervision and issuance of space activity licenses are the responsibility of governments, and governments within their governance system face the challenge of creating a competent authority to supervise, issue licenses, training, etc. in the field of space activities, and we will address it in later sections. In international law, international space regulations imply that the launcher government is responsible for overseeing space activity.

For the purposes of this Agreement, the term "Launcher authority" shall refer to the State responsible for launching, the concept of launching authority being introduced by Article 6 of the 1968 Rescue Agreement as the State responsible for launching, but to clarify this concept, it is necessary to refer to Article 7 of the Space Treaty and examine its relationship with the compensation mechanism. . The concept of the official responsible for launching the space object bridges the gap between liability for compensation and international liability. This concept implies a causal relationship between the international responsibility of the government and the creation of liability for compensation for damages caused by a space object.

The concept of a launcher has another meaning, as enshrined in the 1992 resolution on the principles of the use of nuclear energy in space. According to the resolution, the term launcher in line with the goals of the resolution is essentially a government that exercises its authority and control over a space object while carrying nuclear energy resources. According to this concept of throwing state clearly refers to the recording state. The Government shall make the registrar of the space object responsible for carrying out its supervisory duties. (Kazemi and Golrou 2016: 3).

1- 2- Space Law

In the literature of international space law, apart from Article 8 of the 1967 Outer Space Treaty and Article 2 of the 1975 Registration Convention, which is a kind of repetition and emphasis of Article 8 of the Outer Space Treaty, there are no other materials on the jurisdiction of individual's Legal regimes that have been formed in space are based on freedom of space and non-allocation to a particular state. These legal regimes and rules and regulations were finally realized with the ratification of the 1967 Outer Space Treaty. Other conventions and agreements were also ratified. These documents should have been drafted in such a way as to cover all activities, and these activities should be in line with humanitarian goals and the goals of the international community. The role of governments in drafting and enforcing these rules has been crucial because if governments did not show coordination in drafting these laws, the space would become a place of abuse and each country could, according to its own interests and the technology at its disposal, Use space. Accordingly, space is one of the areas that is highly regarded by powerful countries due to its many functions in creating power and progress for governments. Therefore, the outer space requires a comprehensive and complete plan set by governments to adhere to it The role of governments and their cooperation in the international arena to regulate their activities in space is very important. Including the non-peaceful use of space, which could have dire consequences for the international community; Also, if the rules and regulations regarding the space environment are not observed, its dangers can be easily imagined for both astronauts and people on Earth. By creating space stations in space and sending astronauts to perform space activities there, it will focus human thoughts on the rules of disaster relief and rescue astronauts to ensure the safety of their lives in times of danger. Meanwhile, the discovery of remote sensing satellites and their widespread use caused many problems in the security and confidential information of countries. The role of governments in creating and implementing these laws and regulations is easily palpable (Mojtahedi and Abbasi 1399: 4).

All legal and technical issues related to Outer space are discussed in the United Nations Committee on the Peaceful Use of Outer Space (COPUOS). member states of the United Nations formed the Committee in 1958, which was recognized as a subcommittee of the United Nations General Assembly by Resolution 1472. The United Nations Office for Outer Space Affairs (UNOOSA) is the most important oversight body in the field of space. It has been formed to promote international cooperation in the peaceful use and exploration of space, as well as the use of space science and technology for sustainable social and economic development. The Office assists all UN member states in establishing the legal and regulatory structure and framework of countries and empowering developing countries in the use of space technology and its applications, in the development of space facilities and their development programs. The secretariat of this office is the UN Committee on the Peaceful Use of Outer Space.

Various theories have been put forward about the legal regime of outer space. Some have compared extraterrestrial space to the high seas, while others have compared space to Antarctica and the airspace. Each of these theories has implications for the legal system of space. For example, the theory of the similarity of space to Antarctica requires space to be free of military activities, and theories of likening the space system to Antarctica or the airspace, in exceptional cases, allow military activity in international law to the system. They also spread the space (Navadeh Toupchi 1386: 319).

Space activists, especially private sector space activists, want more freedom of action in important space areas, but if such freedom of action is accepted for new and more complex space areas and space objects, the existing legal rules can no longer be guaranteed.
The current legal system of space is generally derived from five treaties: the 1967 treaty on the activities of states in the discovery and use of outer space, the moon, and other celestial bodies (the space treaty), the 1968 treaty on the rescue of astronauts and the return of projectiles. Outer Space (Rescue Treaty), the 1972 Treaty on International Liability for Damage to Space Objects (Liability Convention), the 1975 Treaty on the Registration of Objects Launched into Outer Space (Registration Convention) and the Treaty governing the activities of countries on the Moon and other celestial bodies 1979 (Treaty of the Moon). Of course, the declarations of the General Assembly, customary international law, and the practices of the leading countries in the field of space (which has created international custom) and the four resolutions of the General Assembly in the 1980s and 1990s can also be mentioned in this regard. But will recent resolutions be binding? Contrary to the recommendations, the decisions (resolutions) of international organizations are binding, however, not all of them have the same binding scope. Some decisions that have a specific audience are binding only on them and decisions that do not have a specific audience are binding on those who agree with those resolutions (Beygzadeh 1389: 216).

1- 3- The role of governments in the development of international space law

Due to the wide range of space activities alongside the Committee for the Peaceful Use of Outer Space (COPUOS) and in an independent and parallel process, international and regional organizations and national organizations such as the Ministries of Telecommunications and National Space Agency and national legislative institutions with making domestic and national regulations, each according to the subject of their activities, are related to the Space and the Rights that govern it. The actions of these organizations in the areas of policy-making and regulation, as well as participation in operational activities, directly or indirectly affect the gradual formulation and development of the International Space Law.
The 1967 Space Treaty and the Agreement on the Rescue and Return of the Astronauts, and many efforts over the decades, have led to the expansion of international agreements in various regions, UN General Assembly resolutions, national legislatures, statements by government officials, and scientific statements by scientists on expansion and growth Space rights have been influential. Since international space law is a subset of public international law, many of the rules and principles that apply to the formulation and development of public international law can be extended to the field of space law. Article 13 of the Charter of the United Nations and Article 15 of the Statute of the Commission on International Law states: It is not developed in the practice of governments. The term "codification of international law" also refers to cases in international law in which the practice of governments in these areas is considerable and sufficient, and there are records and theories. (Hatami and Jabbari 1393: 143)
The role of international regulatory bodies is important because countries do not have sovereignty in the Space and can not legislate on their own. Through the adoption of resolutions, international organizations play an important and undeniable role in the formulation and development of international law, including International Space Law. The Declaration of the General Principles Governing the Activities of States for the Exploration and Exploitation of Outer Space, adopted by the General Assembly in Resolution 1962 of 13 December 1963, is one of these declarations which, by establishing the general principles, establishes the International Space Law. Put. The

UN General Assembly, at a time when there was a possibility of a deviation in the development of international law, issued a proclamation seeking to enlighten the future legal system in outer space. International law in outer space today is in fact the customary international law that has become the rule by governments. The creation of these customary and sometimes innovative rules by governments makes the role of governments in establishing international space law undeniable. In other words, before the use and exploitation of outer space can be regulated through international treaties or resolutions, taking into account the interests of humanity, it is necessary to accept the appropriate legal principles. Some anomalies among activists in this field have been prevented and paved the way for the gradual development of international law of Space. A significant part of the principles related to the international law of outer space has been adopted through the United Nations and its specialized committees and organizations. Legal principles do not need to be amended and revised. One of the results that can be achieved in the light of recognizing the extraterrestrial space and the limitedness of this resource, is the need for continuous reform and revision of the relevant laws and regulations. It was under this recognition that the principles of free use of space were challenged, and developing governments opposed the monopoly of spatial communications by developed governments, claiming to have a proper and equal position in the use of frequencies and circuits.

1- 4- The role of sovereignty of governments in creating a competent authority in space law

Under the Space Treaty, each state is required to designate a competent authority to issue licenses for space activities by its own citizens. This lack of explicitness indicates that governments are free to choose the organization or institution in question. However, none of the space treaties has a competent authority and has left this issue to governments. Hence, one of the most important questions that any government faces is to determine the competent authority in its subset for licensing, and in other words, governments face the issue of which authority or institution is competent to issue licenses for activities. Is competent (Kazemi and Golroo 1395). The issuance of licenses for space activities by governments is more important than the supervisory and exercise of sovereignty because governments have international responsibility for the space activities of their citizens and this responsibility is without the right to exercise sovereignty and incomplete supervision it seems. Governments have taken different steps in establishing a competent authority to oversee space activities and issue the necessary permits, to name just a few. The Swedish government directly decides which authority is responsible for issuing permits and which ministry Saleh has not been selected for space activities and has only supported the National Space Board or Council. The council acts on each licensing application separately from the ministry. In South Korea, the Ministry of Science and Research has the authority to authorize space activities. England has outsourced space activities to the British National Space Agency. The British National Space Center is an agency under the auspices of the Home Office. A space agency called the Australian Safety and Licensing Authority licenses space activities. This institution is under the Ministry of Science and Research. In Belgium, licensing for space exploration is administered by the Federal Minister for Science. In France, permits are issued by the Office of the Ministry of Outer Space Research, while technical tests are carried out under the auspices of the National Space Center. Economics is mentioned. In Norway, the Ministry of Industry and Commerce and in the Netherlands the Ministry of Economic Affairs are in charge of licensing and monitoring space activities. In South Africa, a sub-body of the Council of South Africa's Office of Industry and Commerce is responsible for licensing space activities. In some countries, such as the United

States, the Department of Transportation is the competent authority. Under the Commercial Space Launch Act, the Secretary of Transportation is the authority to authorize space activities. On the other hand, licenses for space activities related to radio communications are issued by the Federal Communications Commission. In some cases, similar to Russia, the National Space Agency is competent to issue licenses; Without being a subset of a ministry. In other governments, national space agencies are involved in the licensing process, but the relevant ministries are responsible.

As noted, the authority for licensing varies from country to country. These differences reflect the division of competencies in different governments. It seems that countries, based on their governing structure and the political and economic system governing the country, decide in this regard how to protect their national interests and not have national and international security concerns. However, given the issue of space activities, which is international and requires the cooperation of countries, countries must act in a coordinated and uniform manner in terms of licensing.

Article 6 of the Space Treaty stipulates that states have international responsibility for national activities in space and explicitly allows the space activities of non-governmental organizations in space to be regulated with the permission and supervision of governments.

The presented analysis shows that there are differences between the states in the licensing process. Not only the competent authority and the institutions involved but also the information and examination issues differ between governments. Despite this practice, licensing cannot be understood solely based on laws and regulations, as the performance of governments must also be considered to better understand this regime. The national laws review in this project shows that, in general, the older laws are brief and less detailed while the competent bodies and institutions are now more competent. Recent laws are the mirror of technology development that provide more detailed regulations. (Kazemi and Golro 2016: 36).

In all national space laws, the most important interests of the competent authorities and operators are taken into account. In other words, it ensures that space activities are carried out safely and in accordance with the standards of technology. There is more uniformity than difference here. This shows that the most important concern of space operators is that the space object under operation will function properly and continue for a reasonable period of time after the operation. This is a technical matter related to technology that can be useful for a coordinated strategy in the national licensing process.

The social, economic, political, and security conditions or other interests of governments regarding the spatial activities of the governmental and non-governmental sectors differ. In this regard, the procedure for issuing national permits by governments regarding the type of view of governments on the exercise of sovereignty over their subdivisions is different and is the basis for the preparation of internal regulations. The role of governments as key players in space can be maintained by licensing space activities to various institutions.

However, the current system established by Article 6 and Article 7 of the Space Treaty and the provisions of the Liability Convention does not conform to the economic and legal realities of the reality of space activities in orbit (Kazemi and Golrou 2016: 35).

The transcendental space is recognized by the international community as the common heritage of humanity and has established its legal status as a principle in international law. Has it developed or has it lacked the power and space facilities or will it never? The common heritage of humanity is a theoretical concept that has been introduced as a fundamental principle in public international law and has been accepted and established in international space law in the case of space objects

and extraterrestrial space. There is no doubt that in space and space objects, gaining benefits from cost-effective resources is cost-effective for humanity, but it is undeniably important as a deterrent to the powers that be in seizing space in their favor. Outer space and space objects as a common world heritage are under international rule. How is international sovereignty exercised in space? How do the three distinct concepts of sovereignty and competence and ownership interact in outer space? Without the exercise of jurisdiction, sovereignty will not be complete, and the absence of an international body exercising jurisdiction in space will not be conceivable. The creation of an international governing council for outer space, like the governing council of the International Atomic Energy Agency, could be the beginning of global sovereignty in space. As mentioned earlier, it is necessary to act in a coordinated and uniform manner regarding the licensing of space activities by an international institution, and governments on behalf of this institution to issue licenses for space activities to various institutions and the private sector. And play their role as the main actor in space.

2- The Role of Governments and the Challenges Related to Competency and Formal Issues in the proceedings of crimes committed in Outer space

The legal framework that has developed over the years in the field of international space law is very broad and complex, including UN resolutions and bilateral or multilateral agreements, which are formulated more from a political and military point of view and pay much attention to the aspect. Commercial and criminal law is not formal or substantive. Governments, on the one hand, adhere to their national interests and national and international political and security considerations, and on the other hand, must turn their attention to the formal and substantive legal aspects of negotiations on international treaties and laws. Among the basic principles that have been recognized since the beginning of the space age, the principle of freedom of exploration and use of space is one of the most important principles that has played an important role in the development of space rights and its combination with the principle of non-possession, fundamental difference between rights. Has created space and air rights. In the Persian legal literature, apart from the brief reference to Article 8 of the Space Treaty, there are no substantive and other forms of jurisdiction over individuals.

3 - Applying the authority of governments on crimes committed by tourists in their spacecraft and the deck of the International Space Station

Article 2 of the 1967 Outer Space Treaty stipulates that space may not be nationally acquired by claiming sovereignty, exploitation, occupation, or any other means, thus making space a super-jurisdictional area (Gorove 1995: 246). Of course, this does not preclude States from exercising their authority and control over their own individuals, entities, and space objects in space; Any Contracting State which has registered an object launched into space shall have control over that object and all its crew in outer space or any celestial body. This principle was also enshrined in paragraph 7 of the Declaration of the Principles of Space (1963), which stipulated that the State registering an object thrown into outer space, on that object and all its crew in outer space or any celestial body, had authority and control. Will have. At the time of drafting the 1967 Overseas Convention, reference had been made to the need for "registration" in this article and Article 5 of the treaty. In paragraph 1, section B of UNSCR 1721, the General Assembly requested that UN

member states, through the Secretary-General of the United Nations, notify Kapos of any object being thrown into outer space and that it be in its territory and in accordance with Record their own rules. The space object always remains in the ownership of the registering country and the rights and duties of that country and can not leave the space object to become ownerless property. That object will always be considered the property of the country of registration.

In this regard, action must be taken to establish the registering country and the jurisdiction of its court in accordance with Article 8 of the Outer Space Convention and the provisions of the Registration Convention. Regarding the competence and generality of issues related to the continuation of control and competence of states, paragraph 2 of Article 5 of the 1998 Intergovernmental Agreement provides the following points:

(A) Each partner or associate retains its authority and control over the components of the International Space Station which they have registered in their territory and over their own staff inside or on the space station of which they are nationals;

(B) This Agreement stipulates that each Partner Agency will own components that Partners or Partners provide in order, including users and components listed in the Appendix to the International Ownership and Equipment International Space Station. Are also located inside or on the space station;

(C) Each partner or partner State shall take measures, such as legislation in specific cases, prior to the ratification of the Intergovernmental Agreement (1998) until the obligations and requirements relating to cooperation in the construction and operation of the International Space Station are met. Enter their internal laws. This includes objectives related to the exercise and enforcement of authority and control.

D) Considering the competence and control over the nationals (partners and partners) of the astronauts, who must always be nationals of the signatory states of the Intergovernmental Agreement;

(E) Article 4 of this Agreement Recognizes and Recognizes the Responsibility of Partner Agencies to Conduct Cooperation Agreed that the European Space Agency (ESA) shall be designated by the European Parties as a partner agency responsible for implementing the cooperation requirements laid down for the station. Is an international space;

(G) European Partner and Partner States undertake to fulfill their obligations and to exercise their rights in relation to their participation and cooperation on the International Space Station. This, of course, is done through an optional European Space Agency program;

(H) On 5 March 2010, the European Space Agency shall notify the Secretary-General of the United Nations that the registration information relating to the Columbus Section (launched 7 February 2008) is the European Partners' contribution to the International Space Station program (after accepting their commitments under Registration Convention).

Article 4 of this Agreement explicitly recognizes the European Space Agency as the custodian of the European Partners and Partners for them to take action in accordance with the objectives related to the implementation of the rights and obligations of these Partners and Parties under this Agreement for cooperation in construction and management. The International Space Station; It is clear that this representation and representation is only in relation to matters recognized within the scope of the mission of the European Space Agency under the founding treaty; Instead, the participating European States independently retain their competence in matters which are among the special rights and privileges of States, such as criminal jurisdiction, certain parts of treaty liability (civil liability) and matters relating to intellectual property. Etc., is.

The important point is that a competent government, which can commit a crime under its own national law, may not have the authority to commit it in all cases. (Karami 1396: 21).
Of course, if for any reason the perpetrator is not prosecuted and punished by the government of the tourist vehicle registration space, then other countries according to a foreign element or communication factor such as "place of crime or citizenship of the offender or the need to protect interests. "All humanity or the interests of the international community" can exercise their authority. This is because governments can enforce their own laws on their own citizens (under active personal jurisdiction) in suburban tourism, depending on the nationality of the perpetrator. In cases where the domestic law of the victim country restricts the exercise of this jurisdiction to the commission of serious crimes or the observance of the principle of exercising personal jurisdiction based on the victim's citizenship (passive personal jurisdiction) in sub-tourist tourism trips, it is limited to cases The relevant government has not acted. Of course, the condition of severe crime and double criminality is also mentioned in the laws of many countries (Momeni 1393: 299).
Real jurisdiction can be applied only in cases where the vital interests of a particular government are endangered by the crime committed (Pourbafarani 1391: 75).
Of course, the realization of real competence in space travel seems unlikely. Universal jurisdiction also relates to the commission of crimes that, due to the severity of that crime, are considered against all of humanity, and the judicial authorities of all countries, regardless of the place of the crime, the perpetrator or the victim, will be competent to investigate (Pourbafarani 1390: 168).
This jurisdiction is limited to cases that do not violate the principle of independent sovereignty of the states mentioned in paragraph 1 of Article 2 of the Charter, and in particular interference in the internal affairs of states, which is prohibited under paragraph 7 of Article 2 of the Charter. This jurisdiction can be applied in case of space hijacking or other international crimes. This competence is not conceivable in space travel and in the near future.

Conclusions and suggestions

At present, there is no international body for dealing with crimes committed in outer space, and in the event of a crime occurring in space, the guilty government or the guilty government, as astronauts, whether military, flight crew, scientist, Or space tourists are special individuals of the society and are important in the national interests of the respective country. Outer space, including the moon and other celestial bodies, 1967, and paragraph 2 of Article 2 of the 1975 Convention on the Registration of Launched Objects, on the authority of the State registering the space object over that object and its crew and occupants as long as that object resides in outer space. Exercise its jurisdiction over the prosecution of a crime.
Now, if a crime is committed against astronauts on a spacewalk or from within a space object, or vice versa, the issue of determining a competent government will become more controversial, and if international agreements such as the 1988 and 1998 agreements between the country Consider also the construction of the International Space Station. Determining the competent government to deal with crimes committed in outer space has become more complex and provides the basis for an international conflict that can have far-reaching consequences. Examining the existing laws of space law in the field of criminal jurisdiction, we conclude that governments have jurisdiction to prosecute crimes committed by their citizens in outer space within domestic courts and international authorities under certain conditions. Space activities in their domain play an important role in establishing a competitive position in space affairs. However, given the issue of

space activities, which is international and requires the cooperation of countries, countries must act in a coordinated and uniform manner in terms of licensing.

In addition, even after the appointment of a competent authority to investigate crimes committed in outer space, the law governing the prosecution of domestic law, international law, treaties, agreements, or international resolutions will be disputed. Due to the growing momentum of space activities, the lack of an appropriate and efficient legal framework is one of the most important obstacles to the growth and comprehensive development of space activities and humanity's use of its resources. The international community and the legal community are indispensable in unifying the efficient rules of outer space.

A country's space activities could have consequences for other countries and the international community and the planet, or even trying to harness the energy of neutron stars called black holes could have catastrophic consequences for the solar system and the Milky Way. Therefore, it is suggested that to the implementation of the seventh chapter of the United Nations Charter, all space activities be carried out after the plan in the UN Committee on the Peaceful Use of Outer Space (COPUS) and a comprehensive scientific review and authorization.

Also, regarding the space activities of non-member countries, the Convention has remained silent, so it is suggested that due to the possible impact of space activities of a country beyond that country and the organization involved, any space activity is subject to acceptance and ratification of international law and membership in the Convention. And international treaties in this regard so that any space activity by all the activists in this field, including governmental, interstate, and international, and persons without COPUS permission, is prohibited and placed under the seventh chapter of the United Nations Charter and should be dealt with.

Generally, international law and particularly international Space law to protect the interests of the powers and developed countries was compiled by themselves, and whenever international law conflicts with their interests, it is easily ignored and violated without serious consequences, so Establishing efficient and centralized laws without guaranteeing strong implementation alone can not meet the current and future needs of international law. It is suggested that, at the same time as enacting laws, strict enforcement guarantees be enacted along with treaties and laws, as well as in the case of a developing country and in the absence of international obligations, comprehensive and strict international sanctions on its political life and economy. And to put all-out pressure on the world powers and developed countries to do the same and to define a mechanism to prevent the punitive actions of the powers against the sanctioning countries. It is also suggested that Kupus establish criminal sub-committees consisting of prominent jurists of countries to criminalize and decriminalize some acts and abandon acts in outer space. For example, stealing a number of bolts from a spare parts warehouse on Earth is considered a simple theft that can be forgiven under criminal circumstances, but stealing a bolt from a spare parts warehouse of a spacecraft or a space station can kill many people. Threaten. Another example is that on Earth, taking possession of the property and equipment of a casualty who died in an accident is considered a crime, while owning the equipment of an astronaut who died in outer space can save the lives of other astronauts. In the meantime, governments can by playing and encouraging the prominent lawyers of the country and holding competitions and calling lawyers to play a significant role in the formulation and development of international space law. It is essential that jurisprudence keep pace with the development and advancement of advanced technology and not as a post-occurrence solution.

It is necessary for the criminalization of actions and the omission of actions in outer space as the subject of a separate study to be considered by researchers and jurists.

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[1] State Corporation for Space Activities "Roskosmos" (abbreviated name - State Corporation "Roskosmos") is a Russian corporation that manages the country's space industry
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A COMPARATIVE STUDY OF THE SUPREME COURT OF IRAN AND THE UNITED STATES OF AMERICA

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Abstract

The Supreme Court, is the highest judicial authority in both legal systems, the Civil Law Group and the Common Law Group. In each legal system, the structure and functions of the court may vary according to the judicial system. The Supreme Court of the United States has ultimate appellate jurisdiction over all U.S. federal court cases, and over state court cases that involve a point of U.S. Constitutional or federal law. While in Iran, the Supreme Court is the highest juridical authority in Iran, established to supervise the correct implementation of laws by courts of justice and consists of the most prominent judges of the country. Understanding the structure and powers of the Supreme Court of any country will play an important role in understanding the legal system of that country. This article aimed to identify the structure, duties, and authority as well as the jurisdiction of the Supreme Court in Iran and the United States of America to conduct a comparative study of this supreme judicial authority in these two countries.

Keywords: Supreme Court, Jurisdiction, Judicial Authority, Constitution.

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I. Introduction

In the past and before the modern justice system was established in Iran, disputes were not necessarily handled by government-appointed judges, Rather, the elders of each tribe and prestigious people often looked at disputes between people, even though they had no official authority from the government. Occasionally, government affiliates were appointed to handle disputes. However, in the capital of the state, the King could re-examine all the disputes, even though the verdict had already been issued, Whether by state judges or by prestigious individuals (Pasha Saleh, 2004: 12). As such, the King served as the Supreme Court. During the Achaemenid era,[1] a court consisting of seven judges was formed in the capital to re-examine the verdicts. During the Sassanin era,[2] Zoroastrian clergy could re-examine the verdicts(Ravandi, 2007: 4).

This trend continued after Islam. During the reign of the Abbasids,[3] a court was formed in the capital known as the Divan-e Mazalem (grievances). At the head of the court was a person who was called a judge. He could review a ruling issued by any judge across the country. If he saw the vote in accordance with the religion, he would approve it, and if he saw it as against religion, he would revoke it. In that case, he would either judge the case by himself or pass it on to another (Saket, 2003: 45).

In the following periods, the Divan-e Mazalem continues to exist. In the Seljuk era,[4] for example, there were two categories of courts: Sharia courts (Religious Courts) and state courts. Sharia courts handled people's private disputes (such as inheritance, marriage, etc.), but state courts handled people's crimes and their lawsuits against government agents. At the head of state courts, there was the Divan-e Mazalem eme Court. The tribunal could review the verdicts issued by the state courts (Yousefifar, 2016: 110).

Obviously, the dual system of courts could not have been desirable. It would undermine the authority of the government and make people wonder. Therefore, the need to change the approach was seriously felt.

This happened during the period of the Constitutional Revolution. The Persian Constitutional Revolution also known as the Constitutional Revolution of Iran, took place between 1905 and 1911. The revolution led to the establishment of a parliament in Persia during the Qajar dynasty. With the formation of parliament, the first constitution was written. The first constitution of Iran was signed by Mozaffar-e-Din Shah in 1905. Thus, the Iranian government, which had a monarchy-based nature, was transformed into a Constitutional monarchy. Due to political events, there was a hurry in writing the constitution, so it was incomplete. As a result, in 1906, the text was added as a supplement to the constitution(Ebrahimiyan, 1982: 76-77).

In the supplement to the constitution, a chapter was assigned to the courts. Under Article 71 of this code, state courts are the official authority for dealing with disputes. Mojtahedin (: A

[1] The Achaemenid Empire (559 BC–330 BC) was the first of the Persian Empires to rule over significant portions of Greater Iran. (Shapour Shahbazi and Daryaee (ed.), 2012:131)

[2] It ruled from 224 to 651 AD(Pourshariati, 2008: 4).

[3] The Abbasid Caliphate was the third of the Islamic Caliphates to succeed the Islamic prophet, Muhammad. It was founded by a dynasty descended from Muhammad's uncle, Abbas ibn Abdul-Muttalib (566–653 CE), from whom the dynasty takes its name. They ruled as caliphs for most of the caliphate from their capital in Baghdad in modern-day Iraq. it ruled from 1261–1517 AD(Bake, Mohammed, 1989: 45).

[4] The Seljuk empire was founded in 1037. From their homelands near the Aral Sea, the Seljuks advanced first into Khorasan and then into mainland Persia, before eventually conquering eastern Anatolia. This dynasty was extinct in 1194(Savory, R. M., ed, 1976: 82).

religious clergyman who, after years of studying in religious centers, deduces religious law) can also judge only in religious matters. According to Article 73, the establishment of a court is possible only with the by law's permission, and no one can establish a court without the law's permission. In Article 74, this point was again emphasized. Therefore, not every clergyman can form a court and make a judgment.

According to Article 75 of the Constitution, a court was established in the capital called the Court of Distinction. The court was supposed to oversee the lower courts(Shams,2003:65). This principle has been translated from Article 147 of the Belgian Constitution. According to this principle: "There is a Supreme Court of Appeal for the whole of Belgium. This court lacks competency regarding matters of substance, save for the judgment of ministers and of members of Regional and Community Governments".[5]

In practice, however, the Court of Distinction was not established until the year 1911. This year, a code called the code of Principles of Structure of Justice was enacted. According to this code, there will be two categories of court: preliminary and appeal. Above these courts is the Court of Distinction. The court is divided into two branches: private and criminal law. Also, the members and the head of the Court of Distinction are appointed by the Minister of Justice with the King's approval. In 1938, at the suggestion of the Academy of Persian Language and Literature, the name of the Court of Distinction was changed to the Supreme Court.

With the outbreak of the revolution in the year 1979 and the fall of the monarchy, a new constitution was written. The Constitution of the Islamic Republic of Iran was adopted by referendum on 2 and 3 December 1979, and went into force replacing the Constitution of 1906. It was amended on 28 July 1989. The law officially and permanently ended the work of the religious courts. According to Principle 159, "The courts of justice are the official bodies to which all grievances and complaints are to be referred. The formation of courts and their jurisdiction is to be determined by law".

This code also assigned a principle to the Supreme Court. According to Article 161 of the Constitution, the Supreme Court is formed to oversee the proper implementation of the law in the courts and to resolve disputes between the courts.

II. THE POSITION OF THE SUPREME COURT IN THE STRUCTURE OF GOVERNMENT

In The Constitution of the Islamic Republic of Iran, the principle of separation of powers was recognized. According to Article 57, "The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute religious Leader… in accordance with the forthcoming articles of this Constitution. These powers are independent of each other".

Thus, the three branches of government, while being independent of each other, work under the supervision of the country's leader. The method of choosing a leader is described in principle 107. According to this principle,"… the task of appointing the Leader shall be vested with the experts elected by the people. The experts will review and consult among themselves concerning all the religious men possessing the qualifications specified in Articles 5 and 109. In the event they find one of them better versed in Islamic regulations or in political and social issues, or possessing general popularity or special prominence for any of the qualifications mentioned in Article 109, they shall elect him as the Leader. Otherwise, in the absence of such a superiority, they shall elect and declare one of them as the Leader. The

[5] http://www.servat.unibe.ch/icl/be00000_.html

Leader thus elected by the Assembly of Experts shall assume all the powers of the religious leader and all the responsibilities arising therefrom".

The judiciary is one of the three branches of government. The tasks of this branch are in principle 156. In principle 156 as follows:

"The judiciary is an independent power, the protector of the rights of the individual and society, responsible for the implementation of justice, and entrusted with the following duties:

1. investigating and passing judgment on grievances, violations of rights, and complaints; the resolution of litigation; the settling of disputes; and the taking of all necessary decisions and measures in probate matters as the law may determine;
1. restoring public rights and promoting justice and legitimate freedoms;
2. supervising the proper enforcement of laws;
3. uncovering crimes; prosecuting, punishing, and chastising criminals; enacting the penalties and provisions of the Islamic penal code; and
4. taking suitable measures to prevent the occurrence of crime and to reform criminals".

The head of the judiciary is elected by the country's leader. In Article 157: "In order to fulfill the responsibilities of the judiciary power in all the matters concerning judiciary, administrative and executive areas, the Leader shall appoint a Religious cleric with the ability of ijtihad and just, well versed in judiciary affairs and possessing prudence and administrative abilities as the head of the judiciary power for a period of five years who shall be the highest judicial authority". As such, the supreme authority of the judiciary is its head. He must have attained the ability of ijtihad. Ijtihad, that is, one's ability to deduce from Religious and Jurisprudential Rules after studying in religious schools. The Supreme Court of Iran is within the judiciary. According to Article 161, "The Supreme Court is to be formed to supervise the correct implementation of the laws by the courts, ensuring uniformity of judicial procedure, and fulfilling any other responsibilities assigned to it by law, based on regulations to be established by the head of the judicial branch". The head of the Supreme Court is also elected by the head of the judiciary. This will be discussed later.

The political system of the United States of America is the Federal Republic, and the system of separation of powers is clearly visible in this country (Tushnet, 1997: 47). The government of this country can be analyzed as follows:

There are two types of parliament in the United States: the US House of Representatives and the US Senate, which is fully responsible for legislating (Dotqueville, 1968: 110). In electing its representatives, there is no institution other than the direct vote of the people and cannot be dissolved. The president of the United States of America is also elected as the chief executive by direct vote of the people through the votes of the electoral assembly and has full authority over the election of ministers. In fact, the president does not need a vote of confidence from Congress, and Congress cannot mutually oust a cabinet or ministers by a vote of no confidence (Abul Fateh, 2002: 73).

At the top of the triangle of power in the United States is the judiciary or the Supreme Court of the United States of America, whose members are elected by the executive and legislative branches, and on the other hand, oversee the two branches. In other words, the judiciary, crystallized by the US Supreme Court, is fully independent and neither the executive nor the legislature can influence its decision-making process. In fact, the President or Congress cannot invalidate or refuse to enforce the decisions of the Federal Supreme Court (Webb, 2004: 112). Although members of the Supreme Court are nominated by the President with the approval of two-thirds of the Senators, they will be members of the Supreme Court as long as they are alive. As a result, they will enjoy independence because members of the Supreme Court will carry out their legal duties without fear of being ousted by the President or Congress. Under the constitution, members of the Federal Supreme Court are dismissed solely for their crimes (Johnson, 2001: 179).

The relationship between the Federal Supreme Court and the President is defined in that, on the one hand, the President nominates its members to Congress for approval, and on the other hand, the Federal Supreme Court can declare a crime on the President's behalf. In such a case, the legal process of impeachment of the president in Congress would begin. The Federal Supreme Court and Congress also have reciprocal relations, in that Congress approves of individuals nominated by the president to become a member of the Federal Supreme Court and, in turn, can overrule congressional decisions. The Federal Supreme Court's vote to ensure proper implementation of the Constitution is binding on Congress and the President, and Congress cannot violate Supreme Court legal decisions.
Comparing these two legal systems, it can be said that in the United States, the two legislatures and the executive are effective in selecting Supreme Court members, while in Iran, neither the President nor the Majlis has a role in selecting Supreme Court members, Rather, it is the head of the judiciary who elects the president of the Supreme Court and other judges of the Supreme Court.

1. THE POSITION OF THE SUPREME COURT IN THE JUDICIAL SYSTEM

In American law, due to the federal and state government structures, there are practically two different judicial structures: one at the federal level and one at the state level. Obviously, the US Judiciary has federal courts on the one hand, and state courts on the other.
Pursuant to Article III of the US Constitution, the US judiciary is composed of the Supreme Court and the Courts that Congress may determine at any time. In line with the above principle, Congress passed the so-called Judiciary Act of 1789. Under the law, the US judicial system is a pyramid with the Supreme Court at the top of the pyramid, the appellate court is in the middle stage, and in the preliminary stage, the district court. The same pyramid pattern is found in each state (Hazard and Taruffo, 1993: 43).
Explain further that at the state level, each state has its own judicial organization and cannot be mapped to a single hierarchy. But there is typically a 3-degree hierarchy that includes the lower courts (district courts in the United States), courts of appeal in the United States, and a state Supreme Court. The appellate court has the power to hear appeals of the lower courts. In the event of a dispute between the lower courts and the Court of Appeal, the State Supreme Court shall rule. In some states, however, there is no appellate court, and appeals from the lower courts are referred directly to the state Supreme Court (hazard and Taruffo, 1993: 54). There are a wide variety of specialty courts in both civil and criminal matters, often differing from other states (Jolowicz, 2000: 301).
At the top of the federal courts is the Federal Supreme Court. The Courts of Appeal and then the District Courts are inferior to the Supreme Court. District courts actually play the role of lower courts. District court decisions are appealable to appellate courts, and In the event of a dispute between the two courts, the United States Supreme Court will decide (Tandy Lewis, 2007: 47).
In Iran, there is a central government and the provinces are not autonomous and in every respect, they are subordinate to the central government. Therefore, there is no government in the provinces. This also affects the judicial structure. In every city, there is a lower court and in every province, there is a court of appeal. At the head of these courts is the Supreme Court, which is based in the capital. Appeals against the lower court's decision will be heard in the appeals court. Appeals to the Court of Appeal are also under consideration by the Supreme Court. Thus, in Iran, unlike the US, there is only one Supreme Court, and each province has no Supreme Court.

1. SUPREME COURT ORGANIZATION

The Supreme Court is composed of two sections: branches and the General Assembly. At the same time, the head of the Supreme Court should also be mentioned.

Branches

In Iran, The Supreme Court currently has forty branches. The branches of the Supreme Court are formed only in the capital (Tehran), but if the head of the judiciary considers it necessary, he can form a branch of the Supreme Court in other cities as well.

There are two judges in each branch. One is the head of the branch and the other is his adviser. Each case is studied and decided by both judges. If they disagree, a third judge will be added. This judge is considered a member of the branch only for this case. In that case, the majority will decide. The third judge is elected by the President of the Supreme Court.

To be appointed as a branch judge, one must meet the following requirements: Has reached the level of ijtihad or Has studied Islamic law for ten years in religious schools, or Have ten years of legal practice (as a lawyer or judge). The Head of the Judiciary appoints the person who is eligible to serve as the Supreme Court judge.

The Divisions of Court are divided into two categories: private and criminal law. Judges fall into either of the two based on experience and knowledge. The cases are referred to the Branches by the Chief Justice, which means the Chief Justice decides which case to study by which judge.

In the legal system of the United States of America, In the US Supreme Court, there is no branch, but the Supreme Court as a whole has nine members that handle cases (Patrick, 2001: 28). The members of the Supreme Court examine the cases together unless one of the judges is absent due to illness or any other specific reason. The decisions of the Supreme Court shall be taken by a majority of the members present (Hall, 2004: 364).

there are no specific requirements as to the general or specific requirements of Supreme Court justices; Therefore, the President has full authority in selecting the judges of this authority and can elect any person who wishes to do so (Patrick, 2001: 28). Presidents usually elect people who are politically similar to him and often belong to the party to which the president belongs. It is very unlikely that people who have not read the law will be appointed; in practice, they will be appointed to have experience and expertise in legal matters. Members of the Supreme Court are elected by the President of the United States with the recommendation and consent of the Senate; That is, persons are nominated by the president to the Senate. Senate members can also refuse to accept nominees for any reason (Hazard and Taruffo, 1993: 64).

Apart from the appointment process, consideration is also given to how membership ends; Explaining that Supreme Court justices are elected for their lifetime, provided they are well-behaved (Leuchtenburg, 1995: 85). As such, the termination of the membership of the Supreme Court may be accomplished by the resignation of the members themselves, their deaths, or the declaration of guilt by the House of Representatives and the trial by the Senate (Patrick, 2001: 28). But these cases have rarely happened so that only one judge has been convicted of a crime, trial, and expulsion in history (Leuchtenburg, 1995: 148).

1. *Chief of the Supreme Court*

The head of the Supreme Court must have two characteristics: First, it must have reached the level of ijtihad. Second, it must be aware of judicial issues. According to Article 162 of the Constitution, the head of the judiciary must consult with the judges of the Supreme Court to

elect the President of the Supreme Court, but the mechanism for this consultation has never been established. In practice, the head of the judiciary appoints the head of the Supreme Court after a hearing with the judges of the court and hearing their views. According to Article 162, The Chief of the Supreme Court is nominated by the head of the judiciary branch for a period of five years. The head of the Supreme Court is not just an official, he is also the head of one of the branches.

The President of the Supreme Court has only been mentioned in Article 6, Section 3, of the Constitution only once (Patrick, 2001: 69). The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside.

As previously stated, the United States Supreme Court is composed of nine members The President of the Supreme Court is one of nine members of the Court appointed by the President in consultation with the Senate. However, the presidency of the Supreme Court is important in that the person holding the post is recognized as a judge, administrator, and symbol of national justice and is responsible for overseeing the federal court system (Hazard and Taruffo, 1993: 46).

However, other members of the Supreme Court are assistants

(Associates), but they have the same right as the Chief Justice: In other words, there is no difference between the head of the Supreme Court and the other members of the Supreme Court in terms of the number of votes (Patrick, 2001: 28). In fact, the head of the Supreme Court has no extra advantage over other judges. The workflow can well illustrate this equality: cases in the Supreme Court are attended by nine members, and at least five votes are required to approve or reject the Court's decisions (Patrick, 2001: 28).

Therefore, it can be seen that there is no distinction between the members and the President of the Court. However, it is important to note that the head of the Supreme Court is different from other members in writing the vote, after voting, if the chairman is in the majority, he has the power to write the vote himself (Patrick, 2001: 69).

Or delegate it to another and thus influence the writing of the vote, but if it is in the minority, the author of the vote is determined by the majority. The Supreme Court has had 16 presidents since 1789, the longest presidency, lasting 34 years (Hall, 2004: 641).

1. *The General Assembly*

In the Iranian legal system, judges are independent judges, meaning no other official can impose his or her opinion on the judge. The judge has to make a decision based on His own understanding of Laws, regulations, and legal principles.

This method, though, has some advantages. But this causes disagreement among the judges. This causes disagreement among judges, meaning that judges make different Duties and Powers of the Supreme Court decisions in similar cases. This undermines the credibility of the judiciary. In addition, it makes people in trouble. So the legislator has considered a solution. Accordingly, the Supreme Court has a duty to resolve disputes.

To this end, Supreme Court justices gather in one session to look into the dispute. This meeting is called the General Assembly. A public hearing is held at the request of the President of the Supreme Court. Whenever the President of the Court is informed that there is a disagreement between the Courts on a single issue, he shall request a hearing. Any judge across the country can tell the Supreme Court that there is a disagreement between judges.

The General Assembly shall be composed of three-quarters of the Judges of the Court (including Presidents and Advisers). The Chairman of the General Assembly is the President of the Supreme Court. The judges at the hearing examined the matter and Then they vote. The opinion of the majority of judges will be valid. this opinion will be binding on all judges. In

fact, the vote of the board is like the rule of law. The Supreme Court's vote because it eliminates the dispute is called the Unification Judgment of the Supreme Court. In American law, although there is no specific legal provision regarding the Unification Judgment, courts are always required to follow the decisions of the Supreme Court (Lane, 2008: 5).

1. DUTIES AND POWERS OF THE SUPREME COURT

1. In Iran, there are two stages to the court process: preliminary and appeal. Accordingly, it is the principle that the verdicts of the Court of Appeal cannot be re-examined by the supreme court except in exceptional cases. According to Article 367 of the Code of Civil Procedure, the decisions of the preliminary court cannot be appealed by the supreme court unless they are worth more than 20 million Rials or are related to The validity of the marriage and termination of it, divorce, waqf. Also, the appellate court's judgments cannot be appealed by the supreme court unless they are related to The validity of the marriage and termination of it, divorce, or waqf. After the appeal, the petition is referred to one of the branches. Branch judges review and decide the case. If the verdict is in accordance with the law, it will be approved and if it is against the law, it will be returned to the court that issued the vote. The court is required to review the case again. The Supreme Court in Iran does not examine the case substantially, but rather examines the case formally. The Court seeks to determine whether the laws of the country have been followed in the case.

The US Supreme Court is, in principle, an appeal body. Therefore, it is not competent to deal with the case at the preliminary stage, except in specific cases. The second part of Article III of the US Constitution states: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make". Also, in cases where states are suing each other, the Supreme Court is the authority to hear complaints. Other than that, in principle, the Supreme Court is a judicial authority for appeals. Under the United States Constitution, the Supreme Court will consider appealing the decisions of state and federal courts.

Its decisions are binding. It is, in fact, the final phase of the legal proceedings and the joint chapter of the two-state and federal judicial agencies. For this reason, its rulings are of particular importance and create unity in the judicial process. This unity reduces disagreement between states' legal systems and creates a kind of internal unity within the US legal system.

As stated above, there are two main differences between the Supreme Court of Iran and the United States: First, the Supreme Court in Iran is always an appellate authority, while the Supreme Court in the United States is sometimes considered a primitive authority. Second, the Supreme Court in the United States shall have appellate Jurisdiction, both as Law and Fact deal with issues of jurisdiction, while in Iran, the Supreme Court only deals with the law.

1. in Iran, The president of Iran can be dismissed in two ways: First, if parliament votes that the president is incompetent. Second, where the Supreme Court decides that the President has violated his duties. In either of these two assumptions, the matter is referred to the leader. He can oust the president. According to Article 110, "The duties and responsibilities of the leader are as follows: … 10. Dismissal of the President of the Republic, with due regard for the interests of the country, after the Supreme Court holds him guilty of the violation of his constitutional duties, or after a vote of the Islamic Consultative Assembly testifying to his incompetence on the basis of Article". The details and how the Supreme Court will deal with it are unclear. Are all Judges of the Court going to investigate the President's violation? Of course, this is not possible. It

seems that the head of the Supreme Court should refer the case to one of the branches. In that case, that branch also has to make a decision. In practice, the president has never been removed by the Supreme Court.

In American law, pursuant to paragraph 6 of section III of Article I of the Constitution, "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present". Also, pursuant to paragraph 2 of Section 2 of Article 2, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction"(Leuchtenburg, 1995: 221).

The comparison suggests that in Iran, the Supreme Court, alone, can deal with a president's violation. Given the judicial nature of the Supreme Court, the Court should focus only on legal matters, not on political issues. The comparison suggests that in Iran, the Supreme Court, alone, can deal with a president's violation. Given the judicial nature of the Supreme Court, the Court should focus only on legal matters, not on political issues. But in America, the Supreme Court alone does not have such jurisdiction: the primary jurisdiction is with the Senate and The President of the Court (and not all of its members) will chair the meeting. So, depending on the characteristics of the Senate, investigating the president's infringement becomes a political aspect.

1. One of the tasks of the Supreme Court is to oversee the law passed by the US Congress and state legislatures. If the laws are contrary to the principles of the Constitution, they are void by the Supreme Court. In other words, the Court has the role of the Constitutional Court is to prevent federal or state authorities from violating the Constitution. This duty is, more than any other duty of the Court, political and has a significant impact on the political and social developments of the United States. The Court's decisions in this regard are definitive and unchangeable (Leuchtenburg, 1995: 230).

In Iran, the Supreme Court has no such authority. In fact, after a law is passed by parliament, the law is sent to an institution called the Guardian Council. based on Article 91, "To safeguard the Islamic ordinances and the Constitution, to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam, a council to be known as the Guardian Council is to be constituted with the following composition:

1. six religious men, conscious of the present needs and the issues of the day, are to be selected by the Leader, and

six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the judicial power"(Article 94).

1. All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt to ensure its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise, the legislation will be deemed enforceable.

VI. THE JURISDICTION OF THE HIGHEST JUDICIAL AUTHORITY IN RELATION TO THE INTERPRETATION AND SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION

A. The Competencies of The Highest Judicial Authority in Relation to The Interpretation of The Constitution

Although there is no text on the authority to interpret the constitution in the laws of this country, but this practice is common in the law of this country that the courts have the right to interpret the laws as judges. Now, if the constitution is discussed according to the issue, they also have the authority to interpret this law. Thus, all US courts have the power to interpret the Constitution, but the ultimate responsibility for denotation of right from wrong and interpretation lies with the Court.
In the interpretation of the constitution, it is important to note that "the constitution is not like other laws that could be re-explained, so it must be interpreted in a way that covers various aspects of human life." For this reason and so is that, despite the inexpedience of the authority of congress to approve and establish the bank, the Court accepted the possibility and permission of Congress to create the bank by not considering the limitation of the powers of Congress. But sometimes this sensible practice is far removed from the view of the Supreme Court, as for the answer to this question "Is it inspection of the car by the police with regard to Amendment 4 prohibited or not?" because at the time of enactment of this amendment there were no cars, the above principle cannot be invoked4

B. Jurisdiction of The Highest Judicial Authority in Relation to Supervision

The Court oversees the implementation of the Constitution in relation to both powers.

1. The Executive Branch

The most important authority and jurisdiction of the Supreme Court are in the "judicial review authority" of this branch: an authority that regulates the balance between the powers and the relationship between the powers and the people and increases the power of the Court in the field of legislation as a parliament6 and due to that distinguishes the court of good and bad deeds of the national government and provincial from the constitution. This competence can be specially developed to the extent that it can overturn government decisions. Among these controversial decisions is the Court's decision in Roe v. Wade (1973) case, in which the Court recognizes and upholds the right of women to abortion as an example of the right to privacy, and considered criminal law prohibiting the above act against the constitution. and also among other important decisions, we should mention the decision of Brown v. The Board of Education (1954) noted that racial segregation was banned in schools.

The most important criticism of the Court's authority can be summed up in two points: first, that the Court should not be able to question democratically elected government actions, and second, that it runs counter to the principle of separation of powers.

Although these two critiques are consistent with the traditional view of the principle of separation of powers, the truth is that the three forces should not be seen as distant islands: in the new interpretations of the principle, the connection between forces is seen and one of The characteristics of each power is to prevent that power from exceeding the powers of other powers. We, therefore, believe that the power of judicial review causes the Court to prevent the executive from exceeding the limits of its jurisdiction: an authority which, if exercised properly, can be used to ratify and strengthen it rather than as undemocratic.

2. The Judiciary

One of the functions of the Court is to oversee the decisions of the United States Congress and state legislatures. If these resolutions are found to be contrary to the principles of the

Constitution, they will be invalidated by the Supreme Court. In other words, the court acts as a constitutional court to prevent violations of the constitution by federal or state officials. According to some authors, this task is considered more political than other tasks of the Court and has a significant impact on the political and social developments in the United States.

This is especially important because the United States Constitution begins with a description of the functioning and power of the legislature, and therefore its importance and role among the formulators of the US Constitution. Between 1790 to 1990, 132 laws passed by the United States Congress and 1,127 laws passed by state legislatures were declared unconstitutional by the Federal Supreme Court. The fewest cases of rejection by the Federal Supreme Court date back to the 1790s and 99s, when no law was deemed unconstitutional, but in the 1970s to the 79s, the American people faced the highest level of opposition from the Supreme Court to congressional and state legislatures. During this decade, 20 US congressional resolutions and 181 state legislatures were declared unconstitutional. These decisions of the Court regarding the violation of the Constitution are final and unchangeable.

C. Elections

In 2000, George W. Bush of the republican and Al Gore of the Democratic Party ran for the presidential election in America. Following the vote count, the Supreme Court exercised its jurisdiction over the dispute and on November 7, 2000, declared George W. Bush the winner of the US presidential election. Interestingly, seven of the nine judges on the court were republican, and more interestingly, George W. Bush won the election in the crucial state of Florida, which will determine the next president, by a margin of 537 votes. The request for a recount was rejected by the US Supreme Court despite the permission of the Florida State Supreme Court.

VII. STUDY OF THE LEGISLATIVE POWERS OF THE SUPREME COURT IN THE AMERICAN JUDICIAL SYSTEM

A. Legislative Competence of The Highest Judicial Authority in Preparing Bills

The truth is that the Supreme Court of this country does not have a permanent and prescribed jurisdiction to legislate, and this jurisdiction cannot be called as a special function of this court, but in practice and to use the scientific and experimental abilities of experts working in this court, sometimes The case and temporary authority is also assigned to the legislature. In American law, for example, differences in the procedures of federal state courts led to the passage of the 1934 Act, which left the development of a single system of jurisdiction to the Supreme Court, provided that the text of the Court was finally approved by Congress. A task force in the court was tasked with carrying out this task, which eventually passed the 1938 Act.

B. Legislative Competence of The Highest Judicial Authority in Exceptional Legislation in Judicial Affairs

Although there is no specific legal provision regarding the ruling on the unity of procedure, subsequent courts always find themselves obliged to follow the decisions of the Court. This is particularly important because the Court does not see any doubt as to its jurisdiction to hear and challenge dissenting opinions.

VIII. JURISDICTION OF THE SUPREME COURT

The main jurisdiction of the Court should be considered in the appellate hearing; However, Article 3 of the Constitution and other laws passed by Congress have given the Court Primary Instance jurisdiction along with appellate jurisdiction. Of course, there are rare cases of exercising this authority. Explain that in very limited cases, a lawsuit may be brought directly before the Supreme Court. The initiation of a court hearing on such cases under the jurisdiction of the original jurisdiction is justified. It is noteworthy that there is no legal text passed by Congress in this regard: this point extends the hand of the Supreme Court tremendously. These cases usually deal with disputes between states and mainly border disputes. In practice, the court in such cases appoints a special forensic expert to review the evidence of the parties and submit it to the court along with its legal analysis. Usually, one or two such cases are submitted to the Court each year.

The Supreme Court also has the authority to hear states' complaints against each other. The founders of the United States created this institution to resolve disputes among members of the federation. In these cases, too, the Court has jurisdiction over the merits. Under the United States Constitution, in the United States legal system, appeals from both state and federal courts are heard in the Supreme Court, and the rulings are final and binding. This court is in fact the final stage of legal proceedings and the joint chapter of the state and federal judiciary. For this reason, its rulings are of special importance and create a unity of procedure in the procedure. This unity of procedure reduces differences between state legal systems and creates a kind of internal unity within the US legal system.

In the United States legal system, litigation can be divided into two distinct stages: In the first stage, the parties can present their testimony and evidence in court, but for the person who loses in this stage, there is still a chance for a retrial.
Regarding this stage and the role of the court, the following points can be mentioned:
First, With the passage of the Judiciary Act in 1789, an attempt was made to formulate a single law as a federal law. According to the Code of Judicial Procedure, judges must rely on federal law only when it exists, otherwise federal law will not apply. Despite this effort, state law still takes precedence over federal law, and legal pluralism in the United States has not disappeared. Currently, there are differences between states in the implementation of many civil and criminal laws. In one state the death penalty may be legal, and in another, it is prohibited, or even driving, marriage, inheritance, and tax laws differ. These differences in civil rights between states are more pronounced; Because federal law is more general, public law and due process and penalties vary from state to state, depending on the cultural conditions and historical roots of those states.
Second, regarding the diversity of laws and regulations in the United States, the existence of a United States Supreme Court has become necessary for legal coordination. In addition to issuing final judgments issued by appellate courts, it has a duty to establish consensus in the federal legal system and to hear complaints brought under the laws of different states.
Third, there are two purposes in the appellate court: to ensure the correctness of the proceedings in the subsequent courts and to harmonize the legal system.20 In this way, the effect of the final hearing and the votes issued will go beyond its parties and will affect other persons as well. In any case, the Court's view and practice have shifted from mere correction of errors to harmonization of the legal system.21
Fourth, a simple definition of the Court's review authority states: "The authority conferred on the Supreme Court by the Constitution to review and review the final decisions of each of the state's highest courts and to review cases from the United States Court of Appeals itself"; Thus,

not only are the courts of each state subject to the jurisdiction of the Court, but the courts of the country are also subject to the jurisdiction of the Court.

Fifth, A person who appeals against the decision of the obverse Court shall submit a petition23 to the Court for consideration. This petition is prepared mainly by lawyers and usually briefly and according to customary procedure in a maximum of 30 pages and includes some important issues of the case including the case and the verdict, the course of the case, and finally the legal importance of the case. The other party also has the right to draw up a bill 24 that falsely discloses the information contained in the appeal or the legality of the case. Although the Court may request other information and documents, the decision of this authority to accept or reject the case for reconsideration is usually based on the above documents.

Sixth, Accepting or rejecting the review of the case in the court in question and then voting; This decision can be made with 4 positive votes of the members of the court. This is known as rule four.27 The above decision is known as a Writ of certiorari. The definition of a legal entity states: "It is a written order issued by the Supreme Court and exercises the discretion of the Court to instruct the State Supreme Court or the Federal Court of Appeals to submit the records of a case for inspection." The source of authority for issuing the above order is the constitution of this country and the law approved by Congress. Article 3 of the Constitution and other laws passed by Congress give the Court two powers: primary jurisdiction and appeal. Law 1891 empowered the Court to review the final decisions of subsequent courts in certain cases by issuing the above order. The issuance of the above order or its non-issuance is entirely at the discretion of the Court and the Court does not need to justify or explain its decision.

Seventh, the above decision will be issued when there are important and special reasons for the court to hear, such as the existence of conflicting decisions of the courts or when the court has significantly and significantly deviated from the usual procedure, as well as when the court in particular, it decides on a matter in which the Supreme Court has not yet ruled, or if the court's decision conflicts with previous decisions of the Court. Also, if due process is not followed or the vote violates the fundamental rights of individuals, the court will not doubt its jurisdiction.

Eighth, after accepting the court can give each party the opportunity to attend and provide information orally. This is usually 30 minutes and has little to do with the court's final decision. However, in some cases, such as Brown v. Board of Education the Court adjourned the hearing for information due to the importance of oral information. Another point to note is that the appeal stage is not such that the case flies entirely to a higher court in such a way that the Supreme Court wants to hear the witnesses or examine the new evidence, but rather the limited court review of the case; It is not a matter of subject matter. Therefore, to violate the verdict, one should try to prove the erroneous verdict of the obverse court to the court and not merely prove that the obverse Tribunal made a mistake in the substantive matters.

Ninth, The Supreme Court, like other competent authorities, shall hear matters in the presence of more than one person; More precisely, the nine members of the Supreme Court review the decisions of the subsequent courts together. A few days after the hearing, a meeting is convened in the presence of the judges, and after secret negotiations, the decision is taken unanimously and signed by the President of the Court, unless the President of the Court disagrees with the decision of the majority, in which case the vote by The Chief Justice signs after him.

A. The Jurisdiction of the Highest Judicial Authority Regarding the Interpretation of the Constitution

In Iran, according to Article 98 of the Constitution; The interpretation of that law falls within the exclusive competence of the Guardian Council, which will be approved by three-fourths of its members. Therefore, the interpretation of the constitution is left to an authority beyond the three powers, and the Iranian legal system in this regard is dependent on the principle of separation of powers. Such an interpretation has a value equal to the constitution itself(Madani,

1983) and is like the principle of law for all respected and binding officials(Katouzian, 2004: 130).

B. *The Competencies of the Highest Judicial Authority in Relation to Supervision*

Because in the Iranian legislative system, the implementation of the constitution is monitored in the legislative process, the basic premise is that all laws are in accordance with the constitution. Therefore, the Supreme Court has no jurisdiction over the legislature, but on the contrary, the courts and the Supreme Court of Iran are obliged to follow the laws authorized by the parliament. Supervision of the implementation of the Constitution in connection with the approval of the law in the Islamic Consultative Assembly has been a priori, which is done by the Guardian Council of the Constitution. Accordingly, before the resolutions of the Islamic Consultative Assembly become binding law, they must be approved by the Guardian Council in terms of compliance or non-compliance with the constitution. After the approval of the law and its approval by the Guardian Council, no authority has the right to abrogate or waiver it, and only the Islamic Consultative Assembly can abrogate the old law with the approval of the new law(Katouzian, 2004: 169).

In Iran, the Supreme Court has no jurisdiction to review decisions and regulations made by the executive branch. Although Article 170 of the Constitution obliges judges to refrain from enforcing government decrees and regulations that are contrary to Islamic laws and regulations or outside the powers of the executive branch, in accordance with Article 173, to deal with the complaints, violations, and protests of the people against government officials or units or regulations and the realization of their rights, a court called the "Court of Administrative Justice" is established under the jurisdiction of the judiciary. Article 170 of the Constitution, on the one hand, warns the courts of Iran against the implementation of decrees and regulations that are contrary to Islamic laws and regulations, and on the other hand, makes the annulment of these regulations within the jurisdiction of the Court of Administrative Justice. Accordingly, the courts of Iran, as well as the Supreme Court, cannot implement the ratification or regulations approved by the executive branch if the ruling on their annulment has been issued by the Court of Administrative Justice (Shams, Volume II Advanced, p. 410). The Court of Justice has a separate structure and organization from the Supreme Court, and although it is part of the judiciary, it is independent of the Supreme Court. Therefore, the Supreme Court has no jurisdiction to review or monitor the opinions and decisions of the executive branch, and this is the responsibility of the Court of Administrative Justice.

IX. STUDY OF THE LEGISLATIVE POWERS OF THE SUPREME COURT IN THE IRANIAN JUDICIAL SYSTEM

The Supreme Court of Iran has no jurisdiction to legislate. The law is the exclusive competence of the Islamic Consultative Assembly. However, the Supreme Court, in overseeing the rulings of the subsequent courts and in uniting judicial procedure, makes decisions that are in accordance with the law. According to Article 471: "Whenever different branches of the Supreme Court or the courts issue different opinions on similar cases, including legal, criminal and judicial matters, with different inferences from the laws, the President of the Supreme Court "The chief justice or the Attorney General, in any way they become aware, are obliged to seek the opinion of the General Assembly of the Supreme Court to create a unified procedure ...". The rulings issued by the Supreme Court as a unit of judicial procedure are equal to the law and the Iranian courts are obliged to comply with them. Article 473 of the law of Criminal Procedure stipulates in this regard: « The rulings on the unity of procedure of the General Assembly of the Supreme Court can be changed only in accordance with the law or the ruling on the unity of later procedure issued in accordance with Article 471 of this law. » Therefore, unlike the US legal system, in which there is no legal article regarding the unity of judicial

procedure, in Iran, the law of this country allows the General Assembly of the Supreme Court to issue a decision on the unity of procedure, the validity of which must be considered by law.

A. Judicial Jurisdiction of the Supreme Court

Article 161 of the Constitution states that the purpose of establishing the Supreme Court is to supervise the proper implementation of laws in the courts and to establish the unity of judicial procedure and the performance of the responsibilities assigned to it by law. Therefore, regardless of the task of creating a unified judicial procedure, which has been described, the jurisdiction of the Court can be summarized in two cases:

1. Supervising the correct implementation of laws: The most important role of the Supreme Court in the Iranian judicial system is to monitor the correct implementation of laws in the courts. This oversight is exercised through the handling of appeals against court rulings. In fact, if the Supreme Court does not find the inference of the issuing courts of the laws and regulations in the case correct, or if it finds that the effective rules of the trial in the general sense have not been observed, it will violate the appealed verdict and often infer the same verdict, Proclaims the correct manner and manner of proper implementation of the rules of procedure (Shams, 2008: 105). It is noteworthy that the ruling of the Supreme Court in this regard is not binding on the subsequent courts, but in violation of the ruling of the Supreme Court has practically exercised its oversight. However, the courts can issue an assertive verdict, and finally, with the formation of the General Assembly of the Legal or Criminal Branches, the verdict may be overturned and the case may be referred to the same court for an appropriate verdict (Shams, 2008: 105). A noteworthy point in this regard is that according to Article 366, "Cassation is the determination of the conformity or non-conformity of the requested appeal with the religious norms and legal regulations." Therefore, the Supreme Court, in its position of supervising the proper implementation of laws in the courts, has neither the dignity nor the authority to review the substantive verdict and only examines its form in terms of compliance or non-compliance with religious and legal regulations. For this purpose, the branches of the Supreme Court consist of a chairman and two advisers is formed, whose meetings are formalized in the presence of two people.

2. Performing the responsibilities assigned to the Supreme Court according to the law: In addition to the duty of supervising the proper implementation of laws in the courts of the Supreme Court, in some cases, according to the law, it has the primary authority to deal with certain issues. These include:

1. ***Investigating the President's Violation***

According to Article 110, Paragraph 10 of the Constitution, the removal of the President is one of the duties and powers of the leadership. However, the removal of the President by the Supreme Leader is possible only when the Supreme Court has sentenced him to violate his legal duties. Therefore, the President's violation of the Supreme Court is the prelude to his removal from the presidency.

2. Permission to retrial in relation to criminal sentences

According to Article 473 of the law of Criminal Procedure, it is possible to request a retrial in the seven cases authorized in the said article in relation to the final verdicts. Such a request shall be submitted to the Supreme Court in accordance with Article 476 of the same law. If the authority deems the request to be in accordance with one of the seven cases mentioned above, it shall refer the case to the court of the issuing court with a retrial order.

X. CONCLUSION

The United States Supreme Court plays an important role in governing the judiciary through the interpretation of the Constitution and through the power of judicial review, especially since, in addition to the above two powers, the Court also has appellate jurisdiction: the power by which the Court can exercise Strictly monitor the duties of judges and violate their wrong decisions. Therefore, if we consider the pillar of the highest judicial authority of any country in the judicial oversight of that authority over the courts, without a doubt, the United States Supreme Court will be the supreme judicial authority of this country.

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Soul-like law

On the joint essence of rights between human, animal and robot

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Abstract:
What is that thing in a human, animal and robot to which legal rights accrue? There have been two answers: the spirit, or the body. According to this article, *right* is a soul-like concept rather than a spiritual or bodily one. We hardly perceive or even introspect the spirit of the things, and there is a lost ring between the rights accruing to live matters and the dead bodies of the objects. However, the soul is not a body-free concept like a spirit and not so dead as solid objects; it is an interval between the terrestrial body and the celestial spirit. We can adequately introspect and even perceive the presence of the soul when we are suffering a bodily pain. The article introduces the eyes as a concrete and objective standard for the soul and its clear thesis is: every living creature which has eyes has the rights as a human or sentient animal. I mean by the eyes the exact organ which we patently see on the face of the creature and utterly perceive that it is watching us. Therefore, the embryo in the twelfth month, whose eyes have been completed, has to be considered a competent person to own and hold the legal right, and an animal or even a robot whose look at a human being is obviously perceived as a human-like look has at least the right not to be annoyed.

Key Words:
eyes, rights, spirit, body, soul, animal, embryo, robot, common sense

1. …That is the question

Some legal legislative texts recognize the birth of a human as the beginning of his competence to rights (Article 956 of the Iranian civil code). However, the damage to the embryo before the birth is a sufficient cause for civil responsibility and criminal punishment, and the will for this unborn existence is legally binding. So, it seems that a human being is legally venerable even before his birth as if he is a complete human. However, the birth of a human has always been through a well-known process: the intercourse between husband and wife, and birth of the child through natural childbirth. When the cesarean section appeared, nobody doubted the humanity of Rostam or Julius Caesar whose births were through this method as in the story and history. It had been absolutely accepted that the children born by this surgical procedure have to be undoubtedly considered human beings precisely as the children born by natural parturition. Nevertheless, when other bizarre birth methods emerged, a question was broached for the first time: does the child born by artificial insemination or sperm donation have all rights acquired by ordinary men and women? Nowadays, cloning and the invention of human-like robots have put lawyers in a legal check; the problem here is how these intelligent beings could be really or legally considered human and given the same rights other ordinary men and women have.[1] Are they a kind of reality in the universe or a sort of untrue metaphor in the multiverse? The philosophical intricacy inherited in the concept of reason as in Descartes and Kant's theory has caused the spirit, as an equivalent to universal reason, to be the keystone of right in the opinion of some jurisprudents. The others following Merleau Ponty or Pierre Bourdieu's embodiment theory emphasize the human body as the very phenomenon that deserves rights. This article seeks a plain answer to these hard questions by finding the soul of the phenomenon to which we desire to accrue rights. The answer is that if we can speak of the soul of such a being, then we can consider him/her/it an entity that deserves rights. However, the soul is hardly approachable and maybe the criticizers assimilate it to the spirit in their ambiguity. Therefore, the eyes have been propounded as an objective signifier of the invisible soul. If there is a production process of human beings in the production line of a factory, we could talk about their legal rights as other human persons provided that we could maintain that they all have the soul. So, to be a human or not to

[1]. For a classic debate on the robots' problem see: Mortimer Adler, *The Difference of Man and the Difference It Makes*, Fordham University Press, 1967, p. 240.

be a human is not a complicated legal problem; to have a soul and eyes or not to have a soul and eyes, that is the question.[2]

2. It is considered a human

Our question is on human rights not on his existence. If we are not the creator of the human, we are the establisher of his rights at least in the opinion of many philosophers. A certain human being is factual and concrete, whereas his rights are completely subjective and abstract. In other words, A as an existent is really existent in the real universe, while the rights of A are completely abstract i.e. A's conventional rights are what are metaphorically assumed to be its rights. Hence, a human being is an existent who really eats, drinks, sleeps, and breeds but his right to eat, drink, sleep, and breed is a subjective concept constructed by others. We hardly recognize the reality of the existence of humankind, while we likely understand the entitled entities because we are the creator of the concept of entitlement. In other words, sometimes we ask: who is a man as an authentic existence, and sometimes our question is: who is to be considered a man to be granted the rights we discovered for a man. Therefore, it is a fact that a certain man who is standing here is according to law a person, while his personhood is wholly a fiction and presumption. Accordingly, not only the legal personality of a corporate entity is a concept supposed by the human legislature, but also the real personality of a man and woman is completely a subjective and non-real concept supposed by law.

The human rights granted to both real and supposed persons are wholly abstract and conventional institutions, while human beings are entirely concrete and objective entities. Some particular legal systems in the history of law did not consider any human right for the enslaved people, albeit they reckoned the enslaved people human beings. Now, we are reversely searching for a non-human being to give him the same human rights. The reality of humankind is a subject matter of theoretical and formal rationality in scientific and philosophical argumentations. However, the right of humankind is a subject of practical rationality in dialogical argumentations of law and ethics. The question here is that: is it possible to grant human rights to an existent supposed as a phenomenon entitling human rights? A biologist or a philosopher may put the chromosome or the reason as a recognizer of the reality of mankind, but a jurisprudent intends to differentiate between human and non-human from the perspective of a practical rationality. Accordingly, the lawyers contemplate naming an existent human to grant him human rights, although the biologists and philosophers do not scientifically consider that existent a human being.

[2]. See: Hassan Jafaritabar, Toward the Window of the Eyes, Legal Researches Review, Shahid Beheshti University, n. 62, summer 2013, pp. 131-161.

3. Body, Mind, Soul, and Spirit

What existent does entitle the rights or what is considered legally a person to be entitled to the rights? Some answers conduce to the spirit as the core of rights, while some other answers culminate in the body as its center. I prefer the soul as the best subject to which the rights accrue. Soul as a faculty in human beings and some organisms makes them aware of themselves without the need to any information from the outside of their existence. There are four dimensions claimed to be recognized in a human or in an animal: body, mind, soul, and spirit. The body is the concrete material structure of an existent especially of an animal or a human being. The mind is that element of an organism, animal, or human being that makes it able to become aware of the information given from the external universe out of its existence. Hence, an animal and a human being have the mind because they have the ability to become aware of their peripheral events by the signals sent from the outside. However, the mind has not been normally admitted for solid and inanimate bodies because they are not able to be aware of the world although they have an objective body. The soul or *psyche* is that part of the mind able to be aware of itself without the need to any information advised from the outer.[3] Thus, this is the soul part of a human being that feels pleasure or sadness, and experiences hope or despair because he does not need to be noticed of this kind of information via others. The spirit is the controversial and non-physical part of a person to which everyone joins after his death. The difference between soul and spirit is that while every animal or human may have its especial soul allocated to that and differs from the other's soul, the spirit is single and unique in which all the creatures are shared. The tendencies, wills, and wishes of one's soul are contrary to or even opposed to other's wills and wishes, although the unified spirit of the world is single and held in common by all the existents. Spirit is the natural ally of reason in the belief of Socrates[4] and both reason and spirit are also interchangeable in the opinion of some Iranian Islamic philosophers like Shahab al-Din Suhrawardi (1154-1191).

4. The spiritual and embodied right

Many Islamic penal codes state a penalty for offenses to the body attends the spirit (Iranian penal code, Articles 306, 556, 716, and 720). It seems that this attitude to the

[3]. Of course this is a strict interpretation of the word soul. The soul and spirit are used interchangeably in so many texts; for example, see: Paola Cavalieri, The Animal Debate, in: Peter Singer, *In Defense of Animals*, Blackwell Publishing, 2006, p. 55.

[4]. See: Rachel Singpurwalla, Why Spirit is the Natural Ally of Reason, in: Brad Inwood, *Oxford Philosophy in Ancient Philosophy*, vol. XLIV, Oxford University Press, 2013, p. 41.

relation between body and spirit is under the influence of some mythical idea in the philosophy and teleology that considers the spirit as the essence of human being and the actual place of his rights. This archaic idea has been reflected in Kant's philosophy that since animals are not rational, we do not have any direct ethical obligation toward them.[5] Moreover, it seems that his philosophy allows entrapping the wild animals by deceiving them because they are lacking the rationality. The problem with this idea, apart from the affinity between mind and reason, is that it may conduce to the refusal of rights for the existent seems devoid of reason and spirit. According to the mysticism of Rumi (decd. 1273) if human being is human being, it is merely because of his wisdom not because of his visible body, bone and skin.[6] Najm al-Din Razi (1177-1256), in his book Mersad ol-Ebaad, says you cannot ever find a nethermost abyss lower than a human body.[7] This idea is highly susceptible not to admit rights for three sorts of living: first, a man who believes in a subject matter that the political authorities consider heretic, absurd and irrational. Second, a human being with a more minor degree of intelligence like the persons with infancy, insanity and lunacy. Third, the animals which are strongly considered unwise and irrational creatures.

Some other thinkers, avoiding the above triple doubts, believe that this is the human body that is the center of rights.[8] Maybe this is the core of the theories like sociology of the body, the theory of embodiment and embodied cognition in the opinion of Merleau Ponty, Pierre Bourdieu, Paul Ferdinand Schilder, and Michel Foucault. Foucault concentrated on the relation between politics and the body, and Bourdieu believes that we do not have a body; we are nothing but the body. The pathology of this idea is that it may consider the fetus and embryo as a creature that does not deserve rights because their body is not objectively complete before birth.

5. Besouled right

Soul or psyche is the association of body and spirit. Maybe someone considers the body a thing of inferior quality and the spirit, contrary to the soma, a noble essence of humanity. Oppositely, a thinker may believe in the nobility of soma and the baseness of

[5] . see: John J. Callanan, and Lucy Allais, *Kant and Animals*, Oxford University Press, 2020, p. 3.

[6]. Rumi, *Masnavi*, edited by: Reynold A. Nicholson, Mowla publication, 1988, book 2.

[7]. Najm al-Din Razi, *Mersad ol-Ebaad*, edited by: Muhammad Amin Riyahi, scientific and cultural publication, 1986, p. 66.

[8]. See generally for the body and technology: Chris Fowler, the Archaeology of Personhood, Routledge, 2004, p. 22.

spirit. However, the soul is precisely a limbo between the duality of body and spirit. By the soul, we feel our emotions, enjoy and suffer and it has thoroughly both beauties and defects of spirit and body. The soul is human being with all his virtues and evils, and this is the reason why the soul in Persian literature is a synonym for life.[9] Saadi (1210-1291), quoting from Ferdowsi (decd. 1025), says: do not annoy even an ant that carries the grain because it has soul, and its sweet life is pleasant. The materialization of the soul, unlike the spirit, needs extremely to the body, and without bodies we could not talk about souls. Besides, although the embryo before the fourth month after its coagulation has not yet been infused with the spirit in Islamic sharia, it possesses the soul and deserves to have some human rights. Rights are for souls; the solid body of a stone does not abide by the rights, and the spirit has a limited sphere for admitting the rights. Hence, the rights are soul-oriented rather than spiritual or material. Having the rights is the utmost wish of a living existent, and this is the soul in which the wishes appear.

Since the soul, unlike the spirit, is not body free, it could be recognized more objectively than the spirit. Now, if we could achieve it by presenting an objective criterion for it, then the best criterion would be selected from the human bodies and limbs. Human limbs, despite their dispersion, have an incommensurable unity and contiguity caused by an embodied essence called soul. As Saadi says in his famous poem of Bani Adam: all human beings are members of a unique body; this means that if time afflicts a limb with pain, other limbs will no longer remain painless. It appears that we can sincerely apprehend the real meaning of the soul despite the complexity of its concept. It has been said chiefly that a fetus before the completion of the fourth month has not yet any spirit, while we can easily say that it is totally ensouled; it has life and soul due to the fact that it has limbs and is actively flattering in the mother's uterus. However, is it possible to introduce a bodily criterion for the soul? The argumentation in this field is heavily rhetorical because this is the common sense that may help us here to recognize the center of rights.

6. Soul as blood

In the midst of the struggle between the adherents of body and spirit for obtaining the basic criterion of humanity, some wise physicians have propounded the blood as the criterion for humanity. According to these wise men, man is the blood rather than the

[9]. For the suffering of animals see: Elizabeth Tyson, *Licensing Laws and Animal Welfare*, Palgrave Macmillan, 2021, p. 17

body or the spirit.[10] The reader of such a theory will be assuredly confused because he probably understands the criterion of body or spirit for recognizing the human being, but he could hardly perceive the blood as the criterion of humanity. Why should blood be preferred to be the touchstone of humanity while it is only one of the multiple parts of the human body? Besides, human is not the only creature that has got blood. However, when we deliberate on the subjectivity of the speculative and theoretical concept of soul and the philosophy of leukemia, then we probably admit the blood theory as a justified standard for the life of men and women. We know how the blood cells are our life resource so that as long as these cells are in existence, the human being exists and as soon as the body lacks blood cells, he no longer exists. So, it is not so strange to introduce red blood as the essence of humanity precisely like the "green blood of chlorophyll"[11] which is the substance of plants.

It seems that the blood for these thinkers was the best symbol for the soul because of the firm mythical and religious relationship between the two[12] to the extent that some signifier words for both soul and blood in Persian and Arabic languages are etymologically the same (*nafs*, *nefaas*). This is the case with the soul especially when it has been claimed that its room is in the heart. Human's reason lies in his brain and it is the power by which he knows the world. However, soul is a spiritual ability of human being for desiring the world, and this soul is equivalent to the heart and its tendencies. In the Iranian ancient book Yaadgaar-e Bozorgmehr, the advices of Bozorgmehr (decd. 580) it seems that the soul is translated to *jahesh*[13] (mutation) which also reminds the heartbeat.

Now, if we can recognize the reality of the existence of a man by his blood, is it possible to understand his personhood by his eyes? Is it possible to put the eyes as the most severe criterion of a human being's soul especially in the new world? Many new phenomena like artificial intelligence undoubtedly do not get any blood, but it is likely to say that they have a manifest sense of joy and sorrow that all could be represented by the state of their eyes. These statements are totally based on some abductive reasoning not a deductive or inductive argumentation; we mean by the abductive inference the reason yields a plausible conclusion but does not positively verify it. It is merely an abduction that the

[10] . Nasir al-Din al-Tousi, *Talkhis al-Muhassal*, by Abdollah Nourani, McGill and Tehran University Press, 1981, p. 379 quoted from Fakhr al-Din al-Razi. I hereby thank Dr. Asghar Dadbeh who reminded me of the blood theory of humanity.

[11] . It is a metaphor used by Iranian poet Ahmad Shamlou (decd. 2000).

[12] . see: Crawford Howell Toy, *Introduction to the History of Religions*, Harvard University, 1913, p. 12.

[13]. Op.cit. P. 62.

soul is the perceptive faculty of suffering and pleasure and these feelings leak out to the eyes.

7. soul as eyes

It seems that there are shreds of evidence in human culture considering the face as the conspicuous characteristic of the soul. The relation between the words person and persona is a good justification for this characteristic as the persona was etymologically the mask on the face of the actors who are all the persons. This is seemingly the case with what Giorgio Agamben narrates about the Auschwitz-afflicted prisoners when the jailors called them *figuren* not human, body nor corps.[14]

Moreover, chapter 6 of the first epistle to Corinthians in the New Testament asks: do you not know that your body is a temple of Holy Spirit in you, and then commends that glorify God in your body. Tracing the New Testament, there is a quotation in Islamic mysticism that states that God created Adam like his face. In Islamic sharia, the fetus before having the spirit is called the face (*sourat* or *qurrah*),[15] and it is commonsensically evident that the most notable limb on the face is the eye. Furthermore, the word pupil in many languages like English, Persian, and Arabic refers etymologically to the word people. Is there a necessary connection between eyes, soul and right? Nevertheless, my claim is that who possesses a hominid eye possesses the right.

8. Why the eyes?

The eyelike right theory seems almost more physiological than spiritual or metaphysical. The concept of the soul is closer to the body rather than to the spirit, as Spinoza believed that the human mind is nothing but the idea of his body.[16] We have a substantial physical experience of life and soul, but the spirit is a mysterious concept admitted by some religious or mystical experiences. However, the thesis may be criticized by this question that why the eyes should be the only symptom of having a soul? We can go back and single out the sperms for such a representation, or proceed forward to the special time of the fetus when its brain is completed and choose it as the symbol of the soul. In

[14] . Giorgio Agamben, *Remnants of Auschwitz*, translated by Mojtaba Golmahammadi, Bidgol publishing co., 2017, p. 58. Figuren means the figure but etymologically relates to the word figura which sometimes mean the face.

[15]. Ahmad ibn Muhammad Ardabili, *Majma al-faedah va al-borhan*, vol. 14, p. 324, and Toussi, *al-khelaaf*, vol. 5, p. 292 and 294, and Toussi, *al- Mabsout*, vol. 2, p. 150.

[16]. Brian Magee, *The Great Philosophers: An Introduction to Western Philosophy*, Oxford University Press, 2009, p. 105

response to this criticism, we have to point out that sperm or ovule, in an especial view, may include some significant degrees of human or animal being so as some mysticist surpassed this claim and declared that even a single sperm is completely a human. Moreover, in Islamic law, there is blood money (*diya*) equivalent to ten or twenty drachmas defined for the sperm disposed of in a voluntary or compulsory coitus interruptus. However, it seems that common sense shrinks from this exaggeration and does not believe in the human character of a pure sperm. The ancients supposed the sperm as a dead seed, but today many people know scientifically a lot about the living organism of sperm. However, they hardly consider the sperm as a legally accepted person due to a lack of something unknown about the personality and humanity. Suhrewardi likens the sperm to the vapor stating that though the vapor is genuinely the drops of water, we cannot see the water in the strict meaning of the steam. Sperm may also be considered a human, but there is a complete difference in the commonsensical perspective between the actual human as a man or woman and the potential human in a sperm. Whereas the believers in spiritual right theory had principally no objective sign for coming spirit into the fetus, they have occasionally introduced a complete body-oriented criterion for this entrance: the fetal fourth month. Now the soul-like theory of the rights proposes the eyes as the best pattern for the soul. These are the eyes, as the most bashful limbs in the body, which make the dogs closer to the human being than the insects. Furthermore, the shame inherited in the eyes makes the citizens more civilized in Erving Goffman's theory of "civil inattention". According to Goffman the brief eye contact with an approaching stranger makes us both to acknowledge their presence and to foreclose the possibility of more personal contact or conversation. Besides, in Nezami's romance of Khosrow and Shirin, when Khosrow sees the naked body of Shirin swimming in the pond, he looks away from her; another example of the association between shame, eyes and civilized love.[17] Moreover, the human eyes in Dostoevsky's *Idiot* and the eyes of Pot in Sadegh Hedayat's short story of *stray dogs* are all authorizing us to conclude that this particular limb has this competence to be the symbol of the life and soul.

Of course, the establishment of one fact does not negate the unmentioned facts. So, offering the eyes as the best symbol of the soul does not mean that there is nothing else that has this ability to represent the soul. The thesis of this article is that any living being with a human-like eye is entitled to have the most fundamental human rights, especially the right to life and the right to freedom from oppression. The theory of anthropocentrism denies the extension of human morality to the universe of animals as

[17] . I have to appreciate Neda Behsan the Ph.D. student of Persian literature at the University of Tabriz who remind me about the point in Nezami's tale.

it is illogical, impossible, and even immoral.[18] Mortimer Adler believes that the equality between humans and other animals jeopardizes human dignity, and dignity is the equality of all men and women in their difference with animals.[19] However, one could consider Kant's categorical imperative and issue this rule that nobody could morally change the life of a living creature to a mere mean for the others life.[20] I think that a living creature with visible eyes on its face should be legally seen as an essential purpose in itself not as a mean for the others.

9. Reduction of the right

The admission of the soul as the more critical sign for the right and the acceptance of the eyes as the best criterion for the soul have a semi-intuitional and psychological foundations rather than a philosophical and scientific one. This is a suggestion for giving the rights to a living being sooner and more extensive than the domains offered by actual legal texts. The suggestion is corresponding to common sense. Afdal al-Din Kashani (13th century) introduces the sixth day after fecundation as the date of creation of the soul, but it seems that common sense does not show any sympathy toward such an offer. But the eyes and the soul of the bulls encourage us to protect them from the cruelty exerted on them. The animal protectors hardly criticize the laws and ethics for not adhering to the rights of oysters, flies, or millipedes whose eyes are not evidently seen by the spectators. The mosquito may have a complicated sight system observing us perfectly but we could not vision its eyes easily and, therefore, we could not feel that we are being watched by the insect. Most people easily kill a fly whose eye could not be seen by their naked eyes, while they could not kill a cat, dog or a lizard that looks by its penetrating eyes into the eyes of the potential killer.[21] This is the reason why the advocates of animal rights try to endow the great apes and the chimpanzees with legal personhood. Moreover, for this reason the executioner of the sentenced to death normally blindfolds his eyes; it is not for a pity for the sentenced but for avoiding the fear of the executioner when the man gazes to him.

[18]. See: Guthrie, R.D., Anthropocentrism, in: Sterba, *Morality in Practice*, Wadsworth, 1997, p. 451.

[19] . see: Lesley Rogers and Gisela Kaplan, All Animals Are Not Equal, in: Cass Sunstein, and Martha Nussbaum, *Animal Rights*, Oxford University Press, 2004, p. 175.

[20] . see: Paul Taylor, the ethics of Respect for Nature, in Sterba, op.cit. p. 468.

[21] . For the immorality of killing the animals see: Peter Singer, *Practical Ethics*, Cambridge University Press, 1999, p. 83.

Maybe there is a kind of reductionism in soul-like rights because we reduced the entitlement of rights to holding the soul, and reduced holding the soul to getting the eyes. There may be a day in the future when the human will perceive the penetrating look of a fly; then new rights will surely be coming to be respected by humanity. Until that time we have to be contented with this rate of rights that accrues to the soul and the eyes because we are not yet respecting completely the soul-eyed existents. It seems that we could not collect all the facts and rights in our short time of life, but we should not lose what we can save of the facts and rights in this little opportunity. It is too soon for accruing the rights to all organisms, but it should not cause us to move on the immaculate eyes of rightful animals and human beings. For the time being, let us recognize the creature's rights with seeable eyes and, in the interim, we have to extend our legal glance and maintain the rights of insects and flies.

10. Dog is human

We do not make any difference between the terms person, human and the creature deserves the rights despite Peter Singer's theory of *personism*. According to the soul-like theory of law rights accrue to creatures we "consider" them human-like. The reason of this consideration is its soul, and the best objective standard for the soul is the eyes. So, from the perspective of the rights, there is no difference between human, animal, and person as long as they have a sensitive soul and eyes.[22] It does not mean that a dog is a human being and a person in reality, but it means that we have to give a dog the rights and legal identities it needs precisely as a person and human.[23] Besides, we have endowed the corporations with legal personality they need because the right is nothing but an abstract concept created by human being.[24] So, we supposed that corporations have the right to own properties and enter into contracts with others. However, a corporate does not have the right of marriage or inheritance because we, the creators of the rights, did not feel its need for marriage or inheritance. This is the human being who feels the necessity of the rights for him or for other parts of the world. By development of the corporate groups people may feel, once upon a time in the future, the corporations' need for motherhood, sisterhood, and heirhood. In this case, the corporations do not convert to the human in the real world but the human rights, which are all supposed by them

[22] . For the meaning of person see: Peter Singer, *Rethinking Life and Death*, St. Martin's Press, 1994, p. 180.

[23]. For legal identity see: Charles Foster and Jonathan Herring, *Identity*, *Personhood and the Law*, Springer, 2017, p, 43.

[24] . for legal personhood see: Visa AJ Kurki, *a Theory of Legal Personhood*, Oxford University Press, 2019.

(constructionism), are metaphorically bestowed upon the corporations. Hence, the corporations are legal persons not real persons, and this is human being who supposes the corporations as human to have some rights. This is the case with animal rights. So, soul-like law does not necessarily proscribe speciestism which assumes the human individuals as different species and morally more important than other species.[25]

Therefore, a dog that has soul and eyes is ultimately a human and also a person but only in legal meaning, not in a biological sense. This is the human beings who at last should recognize the needs and rights of the dogs exactly like the needs and rights of corporations. Moreover, this is the human beings who at last should respect the rights of the dogs exactly like his respect to other human beings or corporations. Ultimately, the courts are so effective in this respect.[26] It suffices to respect the dogs' life and protect them from torture, starvation, thirst but they do not need to be a manager of a company. Furthermore, the corporations do not need to the right to food but they need to be the manager of some other corporations. Admitting a single right does not lead to admitting whole rights on a slippery slope reasoning. However, if all human rights are bestowed upon a corporation or a dog, the corporations and the dogs are completely "as" human and person not human and person. Notwithstanding, if law says that dog is human, there is a latent metaphor in the structure of the expression.

11. Fundamental rights and soul

If law is soul-like, it requires the fundamental human rights to be recognized by a soul-like criterion, not by the referendum or other so-called democratic elections. The soul-like criterion of fundamental law is common sense and this is somehow perceived by the Golden Rule. In other words, democracy is not applicable to fundamental human rights and, therefore, a referendum on the legitimacy of the torture is invalid even if the majority of the voters give all permission to the authorities to operate the torture. The soul of human beings and animals does not accept the torture and no majority is entitled to alter its obscenity into elegance. Common sense, as a soul-like sense, does not allow cannibalism even if the voters select its correctness in a referendum. Jean Jacques Rousseau despises the legislative representative in the parliaments because one cannot represent anybody else to explain his wills and tendencies, just as nobody can express the other's consent to sexual intercourse. However, Rousseau ultimately accepts the generality of the legislative representative when the subject of the representation is

[25] . for spiecisism see: Peter Singer, *Animal Liberation*, An Imprint of Hoper Collins Publishers, 2002, p. 185

[26] . See e.g., David Favre, *The Future of Animal Rights*, Edward Elgar, 2021, p. 143

impersonal. Although Rousseau's wording is somehow vague, it seems that it is not possible for the legislature to legislate something contrary to the fundamental rights of citizens, even though these rights are entirely considered personal. This is the case with the legal topics, legal postulates, legal principles and legal archetypes that have been historically accepted by the soul of people as their fundamental rights, not by a democratic elective process. In this manner, it seems that the territorial entity of a historical nation state as well as its mythical and historical form of government should be perceived by common sense in soul-like legal system.

The struggle on how should people behave with the human bodies after death has a comprehensive history that shows the mysterious aspect of a dead body still looking with its open eyes into the corner of the ceiling a short time after his death.[27] It is possible to apply Heraclitus's recommendation and throw away the corps just like the dung, or bury it, which is the subject of the tragic battle between Antigone and Creon, or believe that all these rituals are legal ways of respecting the body not moral ones.[28] However, the soul-like theory is anxious rightly about life, not before or after life. Therefore, if there seems to be a right for a dead body after death or an embryo before to be ensouled, this is undoubtedly because of a legal fiction. According to this legal fiction people metaphorically respect the body after death or before having the soul because of the soul it already had in the lifetime or will subsequently have after the birth. The soul is inclined to be a posthumous phenomenon that likes to be respected even after the death just like the works of a dead writer which are published after his death, or like a child born after his father's death.

Conclusion:

The article proposes the soul of an existent as the core of its rights, and the conspicuous eyes of the existent as a critical evidence for the soul. Therefore, the dogs and the fetuses in the twelfth week and the dogs and robots are all persons and even humans that are entitled to have rights. There is no difference between a human being or any other persons from the legal point of view. We decline to name the corporations without souls and eyes person not human, but we may like to name the dogs and robots with soul and eyes human. When law considers a corporation or a dog or a robot as a human, it means that these phenomenons are legal persons and even legal humans; it does not mean that they are biologically human and person. When you call a corporation person, it means that it could legally possess the human rights that you think it needs. Hence, a corporation

[27] . See Maurice Maeterlinck's the Blue Bird and the traveling from the ceiling.

[28] . Agamben, *supra* note 13, at 89.

is legally considered a person as well as a human, and this does not require the real humanity and personality of that company; this is the case with the dogs and the robots.

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How to Design REPOs to be Shariah-compliant: A study of REPOs as a Mean of Corporate Financing from the Shariah Compliance Perspective

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Abstract

Basically, financing companies and business enterprise is the most important factor in production growth and improvement of the country's economic situation. Special conditions concerning the advantages, disadvantages, and functions of each financing tool should be provided for business enterprises to provide them with the possibility of financing from different channels and methods.

Considering the religious jurisprudence doubts that the framework of REPO contract may have, it is necessary to analyze the validity and the effects of a common REPO contract and design a contractual framework by optimizing the condition to be under religious jurisprudence and has functional efficiency as a financing tool.

In addition to introducing the REPO tool as one of the financing channels for companies, the validity, and effects of this contractual framework are discussed in this manuscript.

Keywords: Financing, REPO, Religious Jurisprudence Review

1. Introduction

All large economic companies and business enterprises need new financial tools to provide capital and advance their goals and activities, each of these tools will be used in different cases according to their function.

One of these financing tools is sales contracts with redeemable stock and securities bond conditions, which are used for short-term, medium-term, or long-term financing and to increase the liquidity of companies.

The main issue which is considered in this essay is the investigation of this type of financing contract as one of the most important and widely used tools in financial markets. This research examines these contracts from aspects of their validity and effect.

The validity of these contracts can be checked according to the laws and principles of religious jurisprudence, which is done in this research. An Adjustment between the conditions of these contracts and Islamic banking conditions is done and their validity or usurious is investigated.

Regarding the effects of these contracts and according to their prevalence, their effects, both in the assumption of their validity or invalidity are necessary to be investigated in various aspects, including stocks buyer and seller rights during the period of the contract, obligations of each party, etc.

Finally, the main goal of this article is to present a final model for setting up a REPO contract under Shia jurisprudence as a financing tool.

Generalities and Concepts

1 -2 - Contract of Sale

Considering that the detailed investigation of the contract of sale has been done in many books and articles, and it is not included in the main topics of this article, thus we introduce the contract of sale briefly here.

Contract of sale can be examined from different aspects. Contract of the sale in the word means selling something, which is associated with buying, and sometimes it is used under the title of buying and selling; as Arab linguists have mentioned it under the title of exchange or barter. (Fayoomi, 1993). Also, in Article 338 of the Civil Code, the legislator has defined the sale as the possession of a thing in exchange; this definition is adapted from jurisprudential sources. Although the Imamiyyah jurists have acknowledged that there is no shari'ah definition for sale, these jurists have many and sometimes contradictory definitions of this contract, which,

according to the late Saheb Javaher, does not express the true concept of the sale, and all of them are interpretations from this word. (Tafreshi and Sokooti Nasimi, 2013)

The most important characteristics of a contract of sale are that it is necessary, possessive, and exchangeable. According to this contract, the seller has an essential role as one of the parties to the contract. for this contract to take place correctly, it must have certain characteristics such as having the nature of being a property, being corpus, being possessive, and being certain.

Sales can be divided in various ways so that among the contracts, the sale contract has the most divisions. In Islamic jurisprudence books, there are more than 30 different divisions for this kind of contract. For example, based on knowing or not knowing the purchase price sale is divided into four categories:

Masavemeh, Ordinary sale (Sale without informing buy price), Murabeheh, (Sale against plus buy price), Movezeie (Resale at a loss), and Tulieh. (Shahid aval, 1411). Also, the sale is divided into four categories according to the executory sale of the purchase money or object of sale: cash, credit, salaf (short sale), and sale of Deyn. As it is clear from the title of the cash sale, the purchase money or object of sale in this sale is cash, while in the sale of credit and short sale, the object of sale and purchase money are respectively in cash, and the purchase money or object of sale is executory. The jurists have considered all three mentioned types to be correct and permissible (Karki Researcher, 1408) (Ibn Rashid 1415), but the sale of Deyn in which both purchase money or object of sale are executory, is prohibited and invalid due to a hadith attributed to the Prophet of Islam, which forbids such type of sale. (Toosi, 1415) (Zahili, 1385).

In the end, it can be mentioned that the sale of stock was one of the controversial topics in the past, although today its truth is clear to everyone. Stocks have value both from the legislator's point of view and custom and considering the scope of the sale of contract on one hand and the nature of the stocks as a seller on the other hand; the sale of stocks is approved both in terms of substance and form. (Tafreshi and Sokooti Nasimi, 2013). Of course, it is necessary to explain that several theories have been presented by jurists about the nature of stocks, such as being a Deyn, being corpus, being immaterial movable property, and being a special right, none of which have been absolutely approved and each of these analyzes is approved by a part of the legal community. (Ghamami and Ebrahimi, 2013) Although these differences have shown themselves mostly in contracts other than the sale of stocks, the sale of stocks is accepted by everyone today.

2. Loan Contract

In this part of the article, as in the previous part, and for the same reasons, we will briefly examine the subject of the loan contract

Loan in the word means to cut and because the lender separates a part of his property and gives it to the borrower, it is known by this name. (Mohebi, 2014) According to Article 648 of the Civil Code, "a loan is a contract whereby one of the parties assigns a certain amount of his property to the other party, which the said party should return the property in terms of amount, type and description, and in terms of rejection, he should pay the day-price of the property ". Also, in some sources of jurisprudence, a loan is giving a property to another in such a way that he is responsible for returning the same property or paying its price. (Khomeini, 1964)

Economists divide loans into two main categories: amortization loans and production and commercial loans. Consumer or amortization loans are those loans that are made to meet consumer needs by the borrower, while the purpose of production or commercial loans is to provide the capital needed to establish or develop or continue an economic activity. (Najafi, 1983).

Among the most important characteristics of a loan contract, we can mention being consent, being possessive, can be replaced, being necessary, forgivable, and apart of the subject of the contract. Regarding the difference between a loan contract and a common datum contract, the main difference is that the loan contract is possessive and the common datum contract is non-possessive. (Jaafari Langroudi, 1972)

One of the important cases raised in jurisprudence regarding the loan contract is the incorrectness of lending interest, as well as lending a property on the condition that the borrower returns more than the amount he had borrowed. (Khomeini, 1964) In addition, an increase or decrease in the value of money does not affect the loan contract and the law obliges the borrower to return the subject of the loan in terms of amount, type, and description. According to Article 650 of the Civil Code, "the borrower must return the exact property he borrowed, even if its price has increased or decreased." Therefore, the damage of late payment has nothing to do with the increase or decrease of money, because it is after the demand date and extension and after the expiration date that damage should be given for late payment, and if payment is on time, there won't be any damage. (Madani, 2006) (Ibn Manzoor, 1405).

According to the brief introduction that was made, it can be seen that stock borrowing itself is a controversial issue due to the lack of agreement among jurists about the nature of stocks, and in addition, using this contractual framework in REPO contracts is even more problematic due to the issues raised about usury.

3-2 Usury and its Types

Riba (Usury) in its general meaning means growth, increase, and elevation, while in its specific meaning; it means excess and extra that occurs in properties. (Ibn Manzoor, 1405) Some have defined usury as follows: selling or exchanging one or two items in exchange for returning more measure or weight, or lending on the condition of receiving an extra amount. (Shaheed Sani, 1413) (Al-Siyuri Al-Hali, 1404). According to this definition, Usury has two aspects in jurisprudence. First, the exchange of two same items, in measure or weight, which one of them is more than the other, and second, lending on the condition of receiving an extra amount.

In another definition, Usury means excess in one of the exchange items, on the condition that they are special objects on which the shari'a has been mentioned. (Helli, 1416) Based on this definition, it can be argued that usury is only specific to the cases that have been explicitly mentioned by Shariah. It should be noted that jurisprudence does not consider any difference between objective excess, which means the excess of one of the two items in measures or weights over the other, and also judged excess, which means excess, which happens between two different items. (Ghaffari Cherati et al., 2016) Of course, it is necessary to mention that there is disagreement about Usury being happened in the condition of returning a property that doesn't have possessiveness; As in the proof of usury, in the condition of returning extra there is an agreement, however, mostly jurists believe that Usury is realized in these cases. (Tabatabai, 1412) (Tabatabai, 1413) (Najafi, 1983

In the following, we will examine the types of usury:

2-3-1. Trading Usury

In general, any excess in the transaction of two objects of the same kind or a deal that is likely to exceed the excess of one of the exchange parties is a trading usury. Most jurists believe that trading usury is not a special transaction just in the sale contract and should be considered in other types of contracts such as the conclusion of a peace or gift contract. (HorAmeli 1413)

This type of usury occurs either in cash transactions or in non-cash items. Any extra amount in cash transactions is considered usury, but trading usury in non-cash items occurs on two conditions that are: being of the same type, and also both items can be measured or weighted (Mousavian, 2005).

The opinions of jurists differ on the fact that in usurious transactions, only the received extra amount is corrupt and invalid, or the whole transaction is absolutely invalid, although there is a relative agreement on the invalidity of the entire transaction. (Najafi, 1983) If a jurist gives the sentence of corruption and invalidity only in the received extra amount, returning the extra amount to the owner is obligatory, while in the case of the nullity of the transaction, again the jurists have different opinions and some believe in returning extra amount and some believe in returning the original and extra amount to the owner, the second opinion is the consensus. (Al-Tabatabai Alyazdi 1414) (Sabzevari, 1388).

2- 3 -2. Debt Usury

This type of usury has always been the most common type of usury and its structure is such that a person requests a loan for any reason and undertakes to return the borrowed item to the lender along with an extra amount. (Teachers of Qom, 2002) In this type of usury, there is no difference between measurable or weighable properties, and any additional receipt is considered as usury. The jurists have different opinions on whether a usurious loan is invalidated by the condition of receiving an extra amount or only the extra amount stipulated, although the final opinion of the jurists is that the usurious loan is invalid. (Dadgar, 1996)
Jahili usury is also a type of loan usury that is claimed to have been common among people in the Jahiliyyah era and before Islam. In this type of usury, the borrower does not have the financial ability to repay on the due date and asks for an extension, and the lender agrees to the extended due date only by increasing the interest rate. This type of usury is also subject to the conditions of usurious loans and according to famous jurists, it is void.

Of course, it is necessary to explain that some jurists believed in the theory of non-sanctity of usury in production and commercial loans, and in their opinion, there is a major difference between amortization and production loans in the realization of usury. In the following, we will examine this theory and the possibility of designing a REPO contract within the framework of a collateralized loan.

2- 3 -3. The reason behind the forbiddance of Usury in Islam

The main reason that Muslims consider interest prohibited is that the Qur'an which instructs them in many places to stay away from interest. In reality, many Muslims do not know any practical reasons for the prohibition of interest other than religious beliefs. Here are a few rational reasons for the prohibition of interest in Islam:

1. Interest concentrates wealth in the hands of a small minority
2. Interest can cause over-consumption that later can be life-destroying Interest
3. Interest is a cause of injustice and exploitation

2-4. Uncertainty and Risk

Uncertainty means danger in the word (Al-Zubaidi, 1414) but it is used in different meanings. Imamiyyah jurists have presented several definitions of Uncertainty based on the differences in their opinion. For example, some of them consider it ignorance (Naini, 2018), while others consider it as but not the absolute concept of risk. (Najafi, 1983) According to the Sunnis, Uncertainty is the sale of something in which its existence or nonexistence is not known, or its quantity is unknown, or there is no possibility to return it. (Ibn al-Morteza, 1987)

In general, Uncertainty can be defined as follows: " Uncertainty is the possibility of loss in a trade, which is caused because of ambiguity in some aspects of the trade, and this ambiguity is also caused by ignorance " (Mesbahi Moghadam and Rostamzadeh Ganji, 2007) In general, there are three main cases in Uncertainty include Uncertainty caused by ambiguity in the existence of the sale subject, its attributes and possibility of returning. (Ali Dost, 2003)

In Islamic law, avoidance of uncertain and risky transactions is based on narrations and there is no explicit text or reference in the Qur'an that independently indicates the invalidity of these kinds of trades. Uncertainty and being risk are effective in financial transactions and are ineffective in free or non-financial contracts. Also, there are no coherent provisions about uncertainty and being risky in civil law, and the legislator has emphasized avoiding it in discussions related to trades. (Taleb Ahmadi, 2001)

There are several definitions for the word risk that one of the best definitions is as follows: financial risk means fluctuation in actual return compared to the expected return. In another

sense, this concept is a combination of uncertainty in the occurrence of unfavorable results and favorable results.

Entering into any type of economic activity requires acceptance of some amount of risk and Islam has confirmed the principle of risk acceptance in many cases, including the rule of profit and loss depending on cost and investment, acceptance of partnership contracts, and many other cases, and while explaining the bond between accepting risk, and creating wealth in some way encouraged the acceptance of risk.

Regarding the relationship between risk and uncertainty, it can be said that the risk resulting from the existence of uncertainty in the trade is an unacceptable risk that is related to confidence in the elements of the contract and can be reduced by transparency in the elements of the contract, but the risk in the concept of financial risk is an acceptable risk related to the future of the property. (Mousavian and Alizadeh Asl, 2014).

Finally, it can be concluded that the main difference between risk and uncertainty is that risk involves both threat and opportunity, but there is no opportunity in uncertainty.

3. Validity of REPO Contract

In this part of the article, we examine the validity of REPO contractual frameworks and the doubts in them from the perspective of Shia jurisprudence.

3- 1. Feasibility of Designing a REPO Contract in the Framework of Collateralized Loan

In this contractual framework and considering the interest of the REPO contract, there is always the question of the contract usury. The only theory that negates the usury of this contract is the theory of usury being disrespected in production and commercial loans.

With the expansion of the capitalist and banking system to Islamic countries, traders, businessmen, and bankers have faced the problem of usury prohibition, and jurists tried to solve this problem through two different approaches. By accepting the usurious banking system, a group of jurists tried to present a new interpretation of usury to be compatible with banking transactions, and another group tried to design new banking transactions based on Islamic rules, the pattern of the usury-free banking system was the result of their work. (Moosavian, 2005)

One of the new interpretations of usury to solve the banking system's problem is the theory of usury disrespecting production loans. This theory was initially proposed by some Sunni

scholars such as Rashid Reza, Mostafa al-Zargha, and Sheikh Shaltoot, and then some Shia scholars such as Ayatollah Bojnordi, Marefat, and Sanei joined the supporters of this theory. (Moosavian, 2005) For example, Ayatollah Sanei, after explaining the production loan and usury concepts, says: (Famous jurists banned usury and have cited verses and narrations, but we claim that this concept is not haram and avoidance does not include it (Sanei, 2004).

To prove this claim, this group has presented their arguments in different frameworks. Among these cases, we can refer to the "attribution of Jaheli usury to the interest of consuming loans", "the non-cruelty of usury in production and commercial loans", "just enrichment of property due to the non-invalidity of usury in production loans" and "the correctness of production usury according to scholars". (Moosavian, 2004)

On the other hand, a group of jurists is strongly against this issue regarding "the Qur'anic verses and hadiths that indicate the sanctity of usury" and by rejecting the reasons and arguments of the first group, they strongly oppose this issue and emphasizing the sanctity of usury for whatever purpose it may be. (Moosavian, 2004) (Ahmadvand and Toheedi, 2016).

According to the mentioned cases, in general, the consensus of jurists is on the sanctity of loan usury, both production, and consuming type. the theory of non-sanctity of usury in production loans is not accepted by the majority of jurists and criticized by some researchers and serious doubts have been cast on the arguments of the supporting group. Also, the country's legal, banking, and economic system has not accepted this theory and tried to design a usury-free Islamic banking system.

As it was mentioned, the only theory that makes it possible to design REPO in the framework of collateralized loans is the theory of usury disrespecting productive loans, and according to the cases mentioned in the previous part of this article, this theory is rejected by most jurists and has not been approved by the country's legal and banking system, and in general, designing of REPO contract in this framework will not only be very controversial but also will not be accepted by many experts and jurists, as well as the current practical banking system.

3-2.REPO in the Framework of Sale and its jurisprudential Doubts

Although designing the REPO contract in the framework of the sale contract, is not as problematic as designing it in the framework of collateralized loans, it also faces many doubts itself.

Considering the nature of this contract, in which the buyer of the REPO is committed to buying negotiable securities and selling them at a higher price to the seller on the due date of the contract, doubts such as Conditions contrary to the requirements of the contract, purchase on credit,

optional sale of the contract, the uncertainty of the contract, and even the contract being non-sale type considering its intention, which is to borrow money come up.
In the following, with a brief definition of each of these cases, we will examine the doubts.

3-2-1. REPO being purchased on Credit

Purchase on credit (Biy al-Aina) means financing through buying a property on credit and selling it again in cash at a lower price. (Ansari, 2010) (Moosavi Khoei, 1997) In purchase on credit, the goal of the seller and the buyer is to provide financing for the initial seller in the short term and to collect interest for the other party, and for this reason, both Shia and Sunni jurists consider it as a type of usury.
In general, there are two types of purchases on credit:

• financing a needed person buys a product on credit and then sells it for a lower price in cash.
• To collect his debt, the creditor sells a certain product on credit to a person who cannot pay his debt and then buys the same product at a lower price in cash so that the debtor can pay his previous debt with the money received from the creditor.(Moosavian et al., 2015)

It should be mentioned that there are narrations according to which, whenever there is a repurchase condition in purchase on credit, the trade is considered void, while if there is no repurchase condition and the buyer is free to resell or not resell the product, and the seller is free to repurchase or not, then the trade will be is valid. We can refer to Hamiri's narration from Ali Ibn Ja'far and also another narration regarding Hossein Ibn Manzar's question from Imam Ja'far Sadigh, both of which explicitly mention this matter. (Hor Ameli, 1413) In addition to the above point, some researchers also believe that the condition of buying or selling an asset does not lead to purchase-on-sale trading. (Masoominia, 2019)
It is also necessary to explain that REPO has fundamental and significant differences with purchase on sale, which practically rules out the issue of REPO contract being purchase on sale type. Among these fundamental differences, the following can be mentioned:

• In purchase on sale, the second sale happens at the same time as the first sale, and the subject of the sale leaves the seller's ownership only for a moment, and if the seller does not fulfill this condition, the buyer can cancel the trade, while in the REPO, the second contract occurs in a

significant interval amount of time (especially in the case of REPO for corporate financing) and also if the seller does not fulfill this condition, the first contract will be still valid.

• In purchase on sale, it is stipulated that the same product will be sold to the seller, while in REPO, it is possible that the traded bonds or stocks are replaced by similar ones in the market, and the same bonds or stocks are not necessarily transacted.

In the end, it should be mentioned that in purchase on sale, practically no special economic activity happens in the interval between two trades, while the purpose of REPO is to provide financing to solve the lack of liquidity and to carry out the economic activity with this liquidity. As a result, not only REPO has very significant differences with purchases on sale, but also it is possible to eliminate all jurisprudential doubts by making the repurchase of bonds optional. Of course, this will naturally bring many negative effects and risks for both parties, which destroys many of the economic functions of REPO.

3-2-2. REPO being optional Sale of Contract

Sale with an option or sale under condition is a kind of sale in which the seller stipulates that if he returns the price of the product within a certain period of time, he will have the option of canceling the trade and can return the product to himself, and if the specified period of time passes and he does not return the product price, his right of canceling the trade is forfeited and the deal will be valid. (Mirmoezi, 2007).

From the point of view of the majority of Shia jurists, this type of sale is considered without any juristic problem and its authenticity is confirmed, while its authenticity is disputed from the point of view of Sunni jurists. However, in general, sale with an option has very noticeable differences from the REPO contract. Some of these basic differences include the following:

• In a sale with an option, the seller has the right to cancel the trade by returning the price of the product, while in REPO, the first contract is not canceled and a reverse sale occurs on the due date.

• In the REPO contract, the price of the second trade is proportionally higher than the first trade, while in a sale with an option, the same price will be paid to terminate the contract.

• In a sale with an option, the interests of the subject of trade belong to the buyer until the termination of the trade, but in the REPO contract, these interests can be owned by each of the parties, depending on the REPO type.

As a result, in addition to the fact that a sale with an option is fundamentally different from a REPO contract, in general, from the point of view of Shia jurists, a sale with an option does not invalidate or cause doubts in that trade.

3 -2- 3. The Uncertainty of REPO Contract

Uncertainty means danger in the word (Al-Zubaidi, 1414) and it is used in different meanings. Imamiyyah jurists have presented several definitions of this word based on their different opinions about its nature. For example, some consider it as ignorance (Naini, 2018), while others consider it as ignorance about the quantity and quality of the subject of sale and not the absolute meaning of risk. (Najafi, 1983) According to the Sunnis, uncertainty is the sale of something whose existence or nonexistence is not known, its quantity is unknown, or there is no power to give it. (Ibn al-Morteza, 1987).

In general, Uncertainty can be defined as follows: " Uncertainty is the possibility of loss in a trade, which is caused because of ambiguity in some aspects of the trade, and this ambiguity is also caused by ignorance " (Mesbahi Moghadam and Rostamzadeh Ganji, 2007) In general, there are three main cases in Uncertainty include Uncertainty caused by ambiguity in the existence of the sale subject, its attributes and possibility of returning. (Ali Dost, 2003)

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There are several definitions for the word risk that one of the best definitions is as follows: financial risk means fluctuation in actual return compared to the expected return. In another sense, this concept is a combination of uncertainty in the occurrence of unfavorable results and favorable results.

Entering into any type of economic activity requires acceptance of some amount of risk and Islam has confirmed the principle of risk acceptance in many cases, including the rule of profit and loss depending on cost and investment, acceptance of partnership contracts, and many other cases, and while explaining the bond between accepting risk, and creating wealth in some way encouraged the acceptance of risk.

Regarding the relationship between risk and uncertainty, it can be said that the risk resulting from the existence of uncertainty in the trade is an unacceptable risk that is related to confidence in the elements of the contract and can be reduced by transparency in the elements of the contract, but the risk in the concept of financial risk is an acceptable risk related to the future of the property. (Mousavian and Alizadeh Asl, 2014).

Finally, it can be concluded that the main difference between risk and uncertainty is that risk involves both threat and opportunity, but there is no opportunity in uncertainty.

According to the explanations provided about the difference between uncertainty and risk, it can be said that if the time and amount of repurchasing are clearly specified in the REPO contract, and considering the truth that the parties of REPO contract mainly benefit from experts in financial and economic fields, and also very high trade costs, experts carry a lot of investigations on traded papers and terms of the transaction, so there won't be any uncertainty in these contracts and the risk of these transactions is acceptable from Shari'a point of view.

Also, getting help from an intermediary person for the transaction of bonds, stocks, and cash, ensuring the fulfillment of the obligations of the parties, checking the quality of bonds and stocks, checking the credit conditions of parties, conducting market operations to maintain the favorable price of the parties, etc can facilitate the contract fulfillment, and also helps to make the transaction transparent and non-aggressive.

3- 2- 4. Existence of the Condition Contrary to the requirements of the Contract in REPO

Every contract has its effects, conditions, and characteristics that distinguish it from other contracts, although these effects are not on the same page in terms of their relationship with the nature of the contract. In general, every contract has two requirements:

• Requirements of the nature of the contract: these effects and features are somehow related to the nature of the contract, without which the contract loses its legal nature.

• Requirements of applied conditions to the contract: these effects and features are secondary matters related to the contract, which are not the main purpose of the contract, and only if the contract is concluded unconditionally those matters will be necessary.

In general, doctrine and jurists believe that if there is a condition in a contract that is contrary to the requirements of that contract, that contract will be invalid, even though the contrary

condition of Requirements of applied conditions to the contract will be valid and in many cases, the law has prescribed these conditions. (Katouzian, 2008).

As discussed in the previous discussions, the existence of a repurchasing condition in the sale contract is not against the requirements of the nature of the contract, and also optional sale of the contract and conditional sale, which is approved by Shiite jurists, caused REPO contract to be correct from this point of view.

It is also necessary to mention that in the case of using repurchasing conditions in the REPO contract, we consider the possibility of optional buying and selling, practically there won't be any subject against the nature of the sale and ownership contract.

4. The Proposed Framework of REPO Contract under Shia Jurisprudence as a Financing Tool

4- 1. Basic Framework

According to the mentioned cases, the primary framework of a REPO contract under Sharia should have the following features:

1. Should be based on the contract of sale.
2. The securities subject to the REPO contract should be legitimate.
3. The sale of bonds must be accompanied by the right of optional buying and selling.
4. The due date and repurchasing price of bonds or stocks should be clearly defined.
5. The sale of bonds should be in a non-profit way.

According to the mentioned features, this type of contract can be defined as follows:

REPO is an exchange in which the REPO seller hands over his securities to the REPO buyer in a non-profit way and exchange for cash, and at the same time undertakes to repurchase those securities or their equivalents at a specified price on a specified due date or at the time of demand.

The main effects and features of this type of contract are as follows:

• The obligations of REPO buyer and seller are exactly in accordance with CLASSIC REPO, and REPO seller has the right to repurchase the bonds on the due date and with a certain price, and unlike REPO, selling/repurchasing two sales contracts at the same time, will not be concluded because of elimination the doubts REPO sales are objective.

• Just like CLASSIC REPO the securities are transferred to the seller of the REPO profit and all the profits belonging to the securities are transferred to the seller instantly.

• The right to vote and attending in meetings relevant to traded securities is in the hands of the REPO buyer, while it is also possible to transfer these rights to the seller.

• In terms of the conditions after the default of each party, as well as the risks related to the absence of a central intermediary, this contractual framework is exactly similar to CLASSIC REPO

• The main difference between this contract and CLASSIC REPO is that to prevent the transaction from becoming uncertain, the due date and repurchase price must be determined, which can increase the probability of default by the parties.

In the end, it is necessary to explain that considering that the purpose of this article is to examine the REPO contract as a financing tool for economic enterprises and companies, and in this situation, the traded bonds are the stocks of companies whose prices can fluctuate a lot. It seems that this proposed framework is risk more than the desired amount, and in the continuation of this article, an attempt has been made to modify this framework.

4 -2.Final Framework to Optimize the Effects

It is obvious that this initial framework is very risky in terms of its effects and is not optimal and practical in using REPO as a financing tool. For this purpose, the final framework should not only be approved by Shariah but also be an effective tool in financing companies from a functional aspect. The features of the final REPO model which is under Shariah and a practical financing tool are as follows:

1. It is based on buying and selling.
2. The securities subject to the contract (company stocks) must be legitimate.
3. The sale must be accompanied by the right of buying and sell.
4. The price and due date of repurchasing should be determined precisely and clearly.
5. The sale of bonds should be made at profit.

6. REPO should be made tripartite.

7. The scope of powers should be explicitly agreed upon by both parties or determined by regulatory bodies such as the Securities and Exchange Organization depending on the value of the traded stocks.

8. The right to attend meetings and the right to vote related to stocks belongs to the REPO seller by default, although other agreements are also accepted.

5. Conclusion

Based on the cases mentioned in this article, REPO faces many doubts from a jurisprudential point of view as a funding tool. Based on the investigations that have been done, we concluded that the loan contract has doubts about the contract being usury and is not a suitable basis for designing the REPO contract.

Therefore, the basis of the sale contract and application of a contract package including a sale contract and two buying and selling options were considered as the suitable basis for setting up such contracts, and also by examining the doubts such as whether these trades were uncertain, risky or usurious, we concluded that it is possible to resolve these doubts by applying some special articles.

In the end, after presenting the initial REPO model in accordance with Shia jurisprudence, it was tried to present the optimized REPO model as a financing tool that has the desired economic and market functions with removed Shariah doubts. This final model, while having all the features of the initial model, is a tripartite framework, which reduces contractual risks and facilitates the execution process of this contract.

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