



# IRANIAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

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## “SOFT LAW”; THE NATURE AND EXISTENCE OF SOFT LAW IN INTERNATIONAL LAW: REAL OR UNREAL

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The term “soft law” represents a comparatively recent conceptual development in international law, denoting rules and principles that are currently non-binding, inchoate, or predominantly politically motivated. The nature and extent of such norms are intrinsically shaped by political contexts and developments, which may appear to lie beyond the legal domain. Nevertheless, the term of soft law is not used in a vacuum devoid of a legal community and system; to do so would strip of meaning and applicability. Instead, it is invoked in contexts where it has been scrutinized within the fabric of the international community and the international legal system. A pivotal issue in analyzing these norms is whether such a designation corresponds to a genuine legal category or is, in fact, illusory. In this article, we carefully examine this term, the context underpinning the proposal and establishment of such norms in international law, and assess it through the lens of general principles. We contend that the designation “soft” is inapposite and argue for its unreal character under certain conditions. The central thesis advanced herein is that no substantive distinction exists between “soft law” and “hard law”; rather, the rules and principles in question should be analyzed through modern insights and interpretive methods stemming from societal developments. Consequently, the use of dichotomous terms such as “soft” or “hard” - and the demarcation between rights and laws - becomes otiose, highlighting the significant role of general principles and their interplay with such norms. Although certain doctrinal approaches and schools (such as the New Haven School) have not engaged in the etymological and pathological analysis of this concept, they have nevertheless treated it as a component of a political governance system, resulting in a blurring of the precise boundary between law and politics.

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- Conclusion

## 1. The Term “Soft Law”

Soft law should be defined based on its usage; such a pragmatic approach to issues such as respect for human rights by companies and businesses has been acknowledged by the United Nations.<sup>1</sup> Although it has been claimed that some proponents of relative normativity emphasize the concept of soft rights.<sup>2</sup> “While there is no entrenched definition of what constitutes soft law, in the context of international law it might commonly include an ‘international instrument other than a treaty that contains principles, norms, standards or other statements of expected behavior.’”<sup>3</sup> This term and its implications indicate its application in situations where the international community is navigating tense conditions amidst global changes on specific issues. Thus, instead of expressing legal necessity within the framework of traditional sources of international law, it becomes necessary to utilize flexible tools.

*Boyle* argues that soft law can be determined by the status of the obligations it imposes. Soft law is not (legally) binding, consists of general norms or principles but not rules, and is not readily enforceable through binding dispute resolution mechanisms; consequently, any clear demarcation between hard and soft law is challenging and complicated.<sup>4</sup>

Some other scholars of international law, like *Prosper Weil*, argue that these provisions are not law at all - neither soft nor hard;<sup>5</sup> indeed, they contend that the notion of soft law is undesirable. Conversely, other scholars maintain that due to the existence of such regulations in certain international documents, including the Universal Declaration of Human Rights and some judgments of the International Court of Justice, they possess a quasi-legal nature.<sup>6</sup> Soft law, as noted by *Daniel Thürer* in the *Max Planck Encyclopedia of Public International Law*,

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1 John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (United Nations 2011) HR/PUB/11/04.

2 Matthias Goldmann, ‘We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law’ (2012) 25 Leiden Journal of International Law 335, 341.

3 Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 American Journal of International Law 291, 319.

4 Alan E Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 International and Comparative Law Quarterly 901, 901-02.

5 Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 American Journal of International Law 413.

6 Andrew T Guzman and Timothy L Meyer, ‘International Soft Law’ (2010) 2 Journal of Legal Analysis 171 <https://watermark.silverchair.com/2-1-171.pdf?> Accessed 30 May 2025.



refers to “social norms with varying characteristics influencing the behavior and decisions of international relations actors, to the extent that their binding nature spans a spectrum from social and political obligations to strictly legal ones.”<sup>1</sup> Based on this variability, it has been posited, “The use of soft law has the additional benefit of eliminating the positivist equation of obligation and legal rule.”<sup>2</sup> Some, like *Ellen Hay*, consider soft law to have varying degrees of influence, serving as a lever for extending development to legal infrastructures, determining the competencies of international law actors to regulate their activities, and influencing policy-making towards hard law.<sup>3</sup> Moreover, *Lord Arnold McNair* introduced soft law into the fragmented and inconsistent realm of international law while discussing existing and desirable rules. A close examination of his work and those of subsequent scholars who have identified soft law in international law reveals that the main foundation of this concept is its non-binding character, which is intrinsic to the norm’s substance, not its form.

Some, like *Sir Robert Jennings*, have stated that any unilateral or contractual legal act that imposes no obligation on its creator(s) is considered soft law;<sup>4</sup> however, this interpretation arises from the belief in the necessity of compliance with the provisions of the frameworks in which soft law manifests, such as resolutions, declarations, and other documents that ostensibly promote or affirm its legal status. The term “soft law” has infiltrated the structure and fabric of the dispersed and non-hierarchical sources of international law; its influence can be seen from treaties to the general principles of the international system, which play a crucial role in discovering and shaping so-called hard international rules.

Some have considered the establishment of the *human rights discourse* in the international legal system to be effective in making the sources of international law more dynamic and flexible, and soft law has also been described in this vein;<sup>5</sup> that is, while accepting the existence of such rules, they have considered its existential nature to be attributable to the influence of human rights discourse in the international legal system.

Some scholars, while neither denying nor fully accepting such norms, consider them *de facto* rules that can sometimes be used to interpret hard law and which exhibit a technical nature.<sup>6</sup> Others argue that these instruments should be regarded as behavioral rules stemming from normative principles.<sup>7</sup> This indicates that the term “soft law” has asserted its existence in both form and substance, and the insistence that necessity and obligation stem solely from form appears to have been largely abandoned.

However, the notion of soft law, useful as it may seem at first sight, is conceptually awkward and may give rise to some undesirable consequences.<sup>8</sup>

Therefore, it is evident that this research aims to answer the question of what role general

1 Daniel Thürer, ‘Soft Law’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2021) <https://opil.ouplaw.com/display/10.1093/epil/> accessed 30 May 2025.

2 Hedayatollah Falsafi, *Eternal Peace and the Rule of Law* (Nashr No 2015) 449.

3 Ellen Hey, ‘Making Sense of Soft Law’ (2024) 439 *Recueil des Cours* 102.

4 Robert Y Jennings, ‘An International Lawyer Takes Stock’ (1990) 39 *International and Comparative Law Quarterly* 513.

5 Hedayatollah Falsafi, *The Path of Reason in the System of International Law* (Nashr No 2017) 228-230.

6 Daniel Bradlow and David B Hunter, ‘International Law: Exploring the Choice between Hard and Soft International Law’ in David B Hunter and others (eds), *Advocating Social Change Through International Law* (Brill Nijhoff 2020) 285.

7 Mariolina Eliantonio, Emilia Korkea-aho and Ulrika Mört (eds), *Research Handbook on Soft Law* (Edward Elgar Publishing 2023) 394.

8 Jan Klabbers, ‘The Undesirability of Soft Law’ (1998) 67 *Nordic Journal of International Law* 381.



principles play in the nature and existence of the term “soft law” and whether it is real or unreal. Our hypothesis is that the international community, the normative commonalities that have emerged, and other existing necessities have all contributed to the creation of legal rules, which are situated within the legal domain rather than existing in nonlegal spheres; this issue transcends the formal necessity of existence and obligation in rules for them to be considered soft or hard.

## 2. The Role of Non-Legal Agreements and Soft Law

Some contend that in the fragmented and heterogeneous international landscape, the existence of something akin to soft law - rules that do not contain definitive obligations but reflect a kind of political agreement and consensus on a specific issue - is acceptable. If the ontological nature of soft law is perceived as a result - albeit somewhat unstable and provisional - of achieving international peace and security, then soft law is not only ontologically and substantively verifiable but is also recognized.<sup>1</sup>

It is clear that such a perception focuses solely on an extrinsic issue unrelated to the so-called soft rule, namely leading to international peace and security, which is an idealistic and entirely non-legal, but rather political, outcome.

The salient question is whether this perception or acknowledgment of the nature and existence of soft law ultimately undermines the entirety of international law. As mentioned, the nature and existence refer to matters outside of law, and another important question is whether the absence of obligation or the lack of legal commitment in a rule serves as a sound criterion for recognizing the nature and existence of soft law. What becomes of unconditional rules and principles or policy-making? Lastly, what constitutes the limit of this category of norms and its distinction from other so-called hard rules, and how far will politics influence the underlying philosophy and legal nature?

Some argue that certain policies in specialized fields, such as the role of United Nations Environment Programme in environmental matters under the title of environmental impact assessment, gradually became recognized as part of general international law through the adoption of the Rio Declaration and certain decisions of the ICJ;<sup>2</sup> this means that mere policy-making does not transform the content of environmental impact assessments into a rule of general international law, but rather subsequent formal and substantive developments have influenced this content's association with international law, leading to its classification as soft law. In this regard, it seems that mere policy-making or related documents do not create the content of soft law or associate it with general international law; instead, subsequent substantive, formal, and judicial developments are deemed effective in attributing legal status to those policies. This analysis, based on our hypothesis, does not seem accurate; it is illogical to dismiss a norm like the principle of environmental impact assessment as a non-legal principle due to its generality and lack of specificity and to regard its nature as dependent on subsequent developments. This undermines the existence of norms mentioned in

1 Falsafî (n 8) 450-451.

2 Hey (n 9) 102.



international documents that often have legal effects and makes the legal status of a provision contingent upon external factors. In this context, one notable international experience regarding international documents is reflected in the *Aegean Sea Continental Shelf* case, where Greece filed a lawsuit based on a joint declaration by the Prime Ministers of Greece and Turkey, invoking the legal nature of that document; the ICJ, disregarding the document's formal designation, focused on the legal exchanges between the two states and the terms and phrases used and other relevant circumstances.<sup>1</sup>

In summary, the Court's attention to the substance of terms rather than mere form indicates that the realization of a legal event transcends textual forms; although documents with an entirely political nature, such as the Yalta Declaration, can create notable political obligations, the legal perception and nature of a term or document must fulfill the conditions of its legal community and system to speak of so-called soft law, whether in a real or unreal sense.

With this in mind, it must be acknowledged that excessive use of soft law instead of hard law can lead to Realpolitik exploitation and abuse by powerful countries and challenge trust in legal obligations and the credibility of international law;<sup>2</sup> however, if they are reflected in non-legal documents of a political nature, this challenge is even more serious.

Answering the above questions requires a thorough examination of the term soft law within the realm of international law, which we will address in the continuation of this research.

### 3. The Role of General Principles in the Existence of Soft Law; Interrelations

The lack of coherence and fragmentation in the sources of international law, stemming from the absence of a hierarchy among sources and the nature of sovereign subjects of the international legal system, has underscored the importance of general principles and their connection to the term soft law. In a legal system where there is no clear distinction between *lex lata* and *lex ferenda*, the existence of general principles is felt more acutely, and this is a matter we have referred to in explaining the existence and nature of so-called soft law - rules that exist in a twilight zone between existing rules and desirable rules.<sup>3</sup>

1 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3.

#### OVERVIEW OF THE CASE

On 10 August 1976, Greece instituted proceedings against Turkey in a dispute over the Aegean Sea continental shelf. It asked the Court in particular to declare that the Greek islands in the area were entitled to their lawful portion of continental shelf and to delimit the respective parts of that shelf appertaining to Greece and Turkey. At the same time, it requested provisional measures indicating that, pending the Court's judgment, neither State should, without the other's consent, engage in exploration or research with respect to the shelf in question. On 11 September 1976, the Court found that the indication of such measures was not required and, as Turkey had denied that the Court was competent, ordered that the proceedings should first concern the question of jurisdiction. In a Judgment delivered on 19 December 1978, the Court found that jurisdiction to deal with the case was not conferred upon it by either of the two instruments relied upon by Greece: the application of the General Act for Pacific Settlement of International Disputes (Geneva, 1928) - whether or not it was in force - was excluded by the effect of a reservation made by Greece upon accession, while the Greco-Turkish press communiqué of 31 May 1975 did not contain an agreement binding upon either State to accept the unilateral referral of the dispute to the Court.

2 Falsafi (n 11) 450.

3 Although some have attributed a greater role to soft law and have considered these rules as the basis for the emergence of general principles. Although this role seems extreme and beyond the limits of soft law, it has nevertheless been raised in legal doctrine and seems to be considered a serious challenge to the consistency and stability of the international legal system.



Therefore, this is one of the most significant reasons for understanding soft law through general principles. It is thus necessary to define general principles, and from their essence, to derive the relationship with soft law. General principles are essentially conventional principles in national and international systems that are adapted through analogy to certain international issues that either face a source problem (not mentioned in primary sources, i.e., treaties and customs) or lack enforceable rules. However, some do not consider these principles an independent source and regard them merely as part of international custom; nevertheless, this view does not seem very accurate.<sup>1</sup> General principles possess a very distinctive characteristic; sometimes they are considered a source independent of the direct will of states, and sometimes, as *Georges Selle* and *Grigory Tunkin* have expressed, they are the result of inferences from the same primary sources that exist in the spirit and essence of the international legal system.<sup>2</sup>

General principles of law have also permeated various branches of contemporary international law, such as international environmental law and international criminal law. The reason for this influence is the role of the aforementioned principles in regulating new branches of international law, in that they fill the gaps in these branches that custom has not been able to fill, and this is due to the great ability of general principles to set the international system in motion.<sup>3</sup>

The Permanent Court of International Justice (PCIJ) and the ICIJ have utilized these principles in numerous cases when resolving state disputes or issuing advisory opinions. As *Ellen Hey* has stated, referencing soft law in both contentious cases and advisory opinions by the Court leads to the development and growth of normative rules.<sup>4</sup> The soft laws referenced, which have been deemed to promote and develop rules, are manifestations of general principles. What is certain is that general principles play an undeniable role in the dynamism and growth of sources and the entirety of international law. However, the actions of the aforementioned Courts in using general principles as a mere source are not the only factors that have led to the evolution and emergence of topics like soft law; general principles, as indicated and claimed in the jurisprudence of these Courts, have not only been identified and discovered within the framework of a treaty or custom but possess a more powerful nature during times of resource and normative gaps, a phenomenon arising from fundamental and philosophical transformations within the international community. Here, it is essential to briefly discuss the transformation in the international community and the evolution and manifestation of some commonalities to clarify the status of rules like soft law and the mutual influence of general principles. In today's international law context, some rules influenced by the priority of shared values have a nature that is no longer merely consensual or deliberative; as the commonalities of the community on issues of peace, security, and humanity as global public

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Therefore, in this article, we attempt to explain the limits and limitations of the term soft law within a framework and structure that can be considered as a rule of law and legal certainty.

For more studies, see: Falsafi (n 8) 450.

1 Seyed Fazlollah Mousavi, *The Nature, Developments and Sources of Public International Law 1* (Tehran SAMT 2024) 90 [In Persian].

2 Falsafi (n 11) 536.

3 Ibid.

4 Hey (n 9).



goods of the international legal system have strengthened, rules that transcend mere state will have increased and acquired a more objective character. In the current era of international law, how can we discuss objective rules like peremptory norms, the right to self-determination, the right to a healthy environment, and the principle of border stability without acknowledging the role of general principles in understanding, discovering, and interpreting such rules that have been established based on shared international commonalities, sometimes even against the will of states? Moreover, the role of general principles, where they have emerged beyond formal sources and addressed gaps - not merely as natural law or ethical principles but in the guise of, for instance, principles of international environmental law - cannot be denied, as this stems from shared interests that transcend mere state agreements. In a book entitled "*The Responsibility of States for Transboundary Pollution*," it is stated: "Legal analysts have resorted to the principles of international law, which are general, to develop a comprehensive framework for environmental protection."<sup>1</sup> It is here that the core argument of this work, namely the existence and nature of soft law, emerges; now the questions that must be answered are: Are general principles arising from transformations in the international community, which have manifested both as sources and as the essence of rules in addressing gaps, not legal? Is the notion of creating a designation such as "soft law," which has primarily arisen from the mutual relationships between general principles and these norms, a correct terminological choice? And is there fundamentally anything like soft law or hard law in legal systems, particularly in the international context? Does the introduction of the term soft law not render the construction and validation of legal rules contingent and dependent on enforcement mechanisms? In reality, what is the precise answer to these key questions?

When we refer to general principles as a source, namely Article 38(1) of the Statute of the ICJ, it may not yield results that lead judges to rules that are seemingly new or soft, but it has not been without impact;<sup>2</sup> as seen in cases and issues of international environmental law, soft law has been most frequently applied. For instance, one can refer to the recognition of certain environmental principles, such as the principle of prevention, by the ICJ as a means of formulating and adopting an up-to-date judicial policy aligned with developments in the international community and the commonalities that have emerged in the environmental domain, as evidenced in the 2010 *Pulp Mills* case.<sup>3</sup> Especially in times of encountering gaps in primary sources of international law, the role of general principles and the notion of discovering soft law become very evident. A gap, in this context, arises when a rule cannot be found to

1 Seyed Fazlollah Mousavi, *International Environmental Law* (3rd edn, Tehran Mizan 2016) 41-42 [In Persian]. See Also: Jutta Brunnée, *Acid Rain and Ozone Layer Depletion: International Law and Regulation* (Martinus Nijhoff Publishers 1988).; Kernaghan Webb, 'Acid Rain and Ozone Layer Depletion: International Law and Regulation' (1990) 13 Dalhousie Law Journal 474.

2 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 38.: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

3 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 4. For more see: Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, 2006).

address a specific issue within the primary sources available to a judge or legal scholar; in such instances, if a rule cannot be found in two primary sources of international law (namely treaties and customs), one must refer to general principles to “fill” that gap.<sup>1</sup> In this context, considering general principles as gap-filers for normative lacunae in primary sources can be regarded as a non-original but independent source according to Article 38(1) of the Statute of the ICJ, as mentioned earlier, to prevent the establishment of *non liquet*. However, it should be noted that in positivist thought, a reality called the state and the sovereignty derived from it exists, which largely governs law. In this case, the will of the state is the determining factor in the existence or non-existence of that source, rule, or general principle. Here, it is the state that propels law forward, but in opposing views, which have accompanied transformations in the international community and the influence of human rights perspectives and attention to commonalities, a kind of suprapositive and objective legal system has emerged. In such a view, the needs of social life and the principle of solidarity take precedence over any purely state-centric perspective.<sup>2</sup> This does not mean negating states or sovereignties but recognizing and acknowledging commonalities that are essential for the current existence of all subjects in the international community. Therefore, this perspective, which has recently been evident in many rulings that have somehow contributed to the existence and articulation of soft law, especially in cases and opinions related to rights that are inherently social and transnational, such as international environmental law, is clearly observable. In this case, although the judge is not a legislator, within the scope of their authority and based on the endorsement and utilization of general principles, without offering dogmatic or narrow interpretations and using broad interpretive techniques, sometimes hermeneutic or teleological, while incorporating social elements into their interpretations, they discover and articulate rules through the lens of general principles. These interpretations arise from the judge’s inference from the legal system and, while filling gaps, become a factor in the dynamism of the system; at this juncture, states and some legal scholars, in justifying the judge’s actions, which closely resemble law-making but are not, are compelled to invent or utilize terms like soft law; whereas, as stated, even if general principles mentioned in Article 38(1) of the Statute of the ICJ are merely regarded as a non-original source, they play a critical role in filling gaps and invigorating the legal system and discovering credible rules. This is undoubtedly a legal process, neither artificial nor unreal; however, the decisions of international judges, whether in the context of peacefully resolving international disputes (binding judgments) or issuing advisory opinions (non-binding decisions), indicate an inquiry within an existing legal community and system and provide legally substantiated results. Thus, certainly, something called soft law in this context appears to be an imprecise concept. However, when not only judges but also the international community and legal scholars face a gap regarding an issue, and that gap or new external reality has not occurred within a judicial process and requires legal adaptation to new matters, opposing positivist thoughts, as they have granted judges the authority to discover based on general principles, also provide approaches to states and members of the international community in announcing new rules, some of which have been referred to as

1 Falsafi (n 11) 678.

2 Ibid.



soft law in international law. The answer is that whether in the context of interpretation by a judge or in the context of declaration in a document or resolution, what has been created is law, and it is unlikely that anyone would doubt the attribution of this title to what has been discovered or emerged; however, our central emphasis and hypothesis here is that if general principles are discovered by legal actors and announced and created by states or any of the members of the community, this phenomenon arises from commonalities that, in some cases, have taken on an objective form and stem from the human-centered transformations of international law, rather than creating an artificial category that, by applying the term soft, faces conceptual instability despite being unable to refute it; if so, then what will be the fate of unconditional principles<sup>1</sup> and very important and credible norms in national legal systems?

Thus, certainly, in no legal system do the terms soft law and hard law exist; what exists is merely law, nothing more; whether it be unconditional (principles) or conditional (rules).<sup>2</sup> In this context, general principles, both as a source and as normative principles mentioned in certain resolutions, cannot be non-legal; this issue is reinforced by the formalistic nature and the manner of presenting and declaring those principles, not merely by their substantive existence and legal nature. This is a very subtle and significant point that has a close connection with the community and legal system from which they emanate;

To confirm and analytically compare this, we refer to Principle 50 of the Constitution of the Islamic Republic of Iran:

*"Principle 50 of the Constitution of the Islamic Republic of Iran states: 'In the Islamic Republic, the protection of the environment, in which the present and future generations must have a growing social life, is considered a public duty. Therefore, economic and other activities that are associated with environmental pollution or irreversible destruction are prohibited.'"<sup>3</sup>*

In this article, three very important points are mentioned:

- The subject is the protection of the environment and not another domain.
- The obligation is a duty indicating a commitment beyond mere moral or social recommendations.
- The prohibition represents a relatively strict condition in preventing conflicting activities.

In this context, one can also refer to the very important Stockholm Declaration of 1972,<sup>4</sup> the Johannesburg Conference, and the Rio Declaration, which initially stated:

Principles that arise from the general and fundamental norms and values of the legal system. Such as the principles contained in constitutional laws, which are more general and inclusive than conditional and some punitive laws. In the law of the international system, unconditional rules and principles are more reflected in the form of declarations and principled resolutions. These rules are commonly non-general rules, in other words, they are detailed rules that contain both behavioral and punitive rules; like most criminal, civil, etc. rules and regulations in the ordinary laws of domestic systems and the rules contained in executive protocols in the international legal system.

<sup>3</sup> Constitution of the Islamic Republic of Iran (adopted 24 October 1979, amended 28 July 1989) art 50.: [Preservation of the Environment] the preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence, is regarded as a public duty in the Islamic Republic. Economic and other activities that inevitably involve pollution of the environment or cause irreparable damage to it are therefore forbidden.

<sup>4</sup> United Nations Conference on the Human Environment, 'Stockholm Declaration' (16 June 1972) UN Doc A/CONF.48/14/Rev.1. The 1972 United Nations Conference on the Human Environment in Stockholm was the first world conference to make the



*“We, the representatives of the peoples of the world, gathered in Johannesburg, South Africa, from September 2 to 4, 2002, at the World Summit on Sustainable Development, reaffirm our commitments to sustainable development.”*

All the provisions and principles mentioned in the above document are unconditional provisions and principles. Additionally, one should add other foundational documents such as Resolution 2625, which, although it has entered the sources of treaties and customs by fulfilling other formal conditions, contains unconditional rules, and one cannot merely consider formalism as determinative of the legal status of its provisions.

Now, it must be examined what has led to the legal status of the principles mentioned, for instance, in the Constitution of a country or in a declaration like the one above, and why they are not to be regarded as political; the difference being that there is hardly any legal scholar who claims that constitutional principles, due to their generality and unconditional nature or lack of specific enforcement in the provision itself, are non-legal or are assigned a soft status, while international environmental law is sometimes referred to as soft even in cases under judicial review. It seems that the challenge arises when the legal scholar or legal actor unconsciously focuses on the issue of enforcement or a punitive rule; here, we are not seeking to elucidate legal opinions and schools of thought, but it must be acknowledged that one of the reasons for attributing a soft status to the law in question is the absence of a unified community and subjects like national societies, the lack of a coherent legal system based on hierarchy, and the absence of a foundational or constitutional identity in international law in the perspectives of these scholars. That is, in the view of positivists and those who deny the attachment of certain rules beyond the mere will of states, there is no conclusive evidence, and that will has not been buttressed by enforcement mechanisms; thus, skepticism arises regarding the legal status or the so-called hardness of those phenomena in that system.

The issue lies here: we believe that although the absence of a constitution and other factors that create certainty regarding the legal status of a provision (like Principle 50 of the Constitution of the Islamic Republic of Iran) is evident in the international legal system, several points regarding the community and the international legal system are undeniable:

- Although the specific nature and form of the international community and the international legal system differ entirely from domestic systems and the existence of a constitution is not applicable, the existence of some core and fundamental principles and rules, such as Articles 2 and 103 of the UN Charter, the Statute of the International Criminal Court, fundamental human rights, and other rules and

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environment a major issue. The participants adopted a series of principles for sound management of the environment including the Stockholm Declaration and Action Plan for the Human Environment and several resolutions. The Stockholm Declaration, which contained 26 principles, placed environmental issues at the forefront of international concerns and marked the start of a dialogue between industrialized and developing countries on the link between economic growth, the pollution of the air, water, and oceans and the well-being of people around the world. The Action Plan contained three main categories: a) Global Environmental Assessment Programme (watch plan); b) Environmental management activities; (c) International measures to support assessment and management activities carried out at the national and international levels. In addition, these categories were broken down into 109 recommendations. One of the major results of the Stockholm conference was the creation of the United Nations Environment Programme (UNEP). Available at: <https://www.un.org/en/conferences/environment/stockholm1972>



principles indicating the humanization process of the relevant system that transcend mere state will and are now considered objective law cannot be denied.<sup>1</sup>

- Moreover, attributing a legal term or status to principles and rules merely due to their conditionality or enforcement mechanisms is the most reductive form of perceiving legal status or the so-called softness or hardness of those provisions; in this regard, a deeper perspective should be adopted. Today, the international community possesses commonalities arising from the humanization process, which is evident in the philosophical-analytical perspectives and interpretations of international law; in this context, a view like that of *Santi Romano*, who is regarded as a proponent of moderate normativity, does not regard the legal system merely as a collection of rigid and inflexible rules; rather, it posits that an organized social system must exist that operates institutionally. Therefore, the transformations in the society that function institutionally represent a far deeper and more nuanced issue than merely the existence or non-existence of a punitive rule concerning the legal status or the softness and hardness of international principles and rules.
- Thus, it has been observed that the legal status of a declaration like Stockholm 1972 or Resolution 2625 is not merely due to its form and framing but stems from the legal content arising from social transformations and the international legal system. This content tells us today that the movement of the international community has shifted from a Society of States to an International Community of Solidarity, entering more areas of creation, implementation, interpretation, and analysis, and emphasizing that the purely positivist equation of obligation and legal rule does not encompass all existing realities; on one hand, this attention to transformations has led some scholars to accept these developments in the realm of rule-making while still being unable to avoid the non-legal term "soft".
- These regulations and principles are legal, even in the form of unconditional rules, without an enforcement mechanism or punitive rule. In conditions where even such principles and rules are undeniably legal, attributing the title or status of soft and hard seems futile and somewhat imprecise and unrealistic.
- The role and connection of general principles in the discovery and declaration (by legal actors in times of gaps) and law-making (by subjects of the international community) are direct, undeniable, and beneficial, and indeed prevent the drowning of international principles and rules in the flood of politicization because *law is law*, not merely a *soft or hard* tool. However, some experts, such as *Dinah Shelton*, believe that it is not possible to draw a precise line between legal and non-legal in the case of what is called soft law.<sup>2</sup>

<sup>1</sup> Seyed Hossein Mousavifar, *Legal Certainty in International Law* (Tehran Judiciary Press 2021) 132-148 [In Persian].

<sup>2</sup> Dinah Shelton, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013).



## Conclusion

As demonstrated in this article, our hypothesis regarding the term “soft law” in the context of rules and principles in the international legal system whether arising from processes of peaceful dispute settlement, the issuance of advisory opinions, or the direct will and decisions of subjects of international law in the form of various documents and resolutions that result from specific legal processes and have legal effects and outcomes - is that it is an imprecise and extra-legal term. We cannot discuss legal processes recognized in the international legal system while disregarding or deeming the results as uncertain. It is clear that what results from operation within the international legal system is inherently legal, and the application of the dichotomies “soft” or “hard” law will only create disarray, a lack of legal certainty, and an oversight of transformations in the international community, thereby destabilizing legal logic.

Moreover, as stated, soft law, then, contributes to a paradox: using soft law, we may end up in precisely the type of trouble that resort to soft law was supposed to help us overcome. By creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system.<sup>1</sup> Once political or moral concerns are allowed to infiltrate the law, the law loses its relative autonomy from politics or morality, and thereby becomes nothing else but a fig leaf for power.<sup>2</sup>

As a result of this article and the evaluation of its central question and hypothesis, it can be stated that the application of the term “soft” to laws created or discovered, whether akin to claims made by some, such as behavioral rules or *de facto* rules or policy-making, has not aided in the precise understanding of established principles and rules, but rather ignores the reality of transformations in society and the movement of the international legal system toward its authentic ideals; as the analyses indicate, due to the impact of such laws on subjects of international law, these rules and principles cannot be considered soft.

That said, it seems that if the term “soft” is used to indicate a degree of normative flexibility concerning rules that reflect norms beyond the mere will of states and exist between *lex lata* and *lex ferenda* it may not be entirely unacceptable; however, it still does not indicate the non-legal status or nature of certain legal rules compared to others within any legal system.

Therefore, the use of the attribute “soft” is a kind of verbal simplification to justify the high degree of flexibility in the rule in question compared to other established rules in the international legal system. Of course, one cannot ignore the important role of human rights theory and its influence on the rules and sources of international law; (for instance, even the pragmatist approaches in some spheres toward the evolution of human rights, such as those of the Special Representative of the Secretary-General (SRSG), are understandable, but inadequate). This establishment and influence play an important role in the flexibility of

<sup>1</sup> The New Haven school does not care much about questions of validity, but about the policy implications of law. This has the advantage that its representatives do not consider soft law as pathological, but rather as a regular component of democratic governance in liberal societies.

Michael Reisman, ‘The Concept and Function of Soft Law in International Politics’ in Emmanuel Bello and Prince Bola Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (vol 1, Martinus Nijhoff 1992) 435.; Michael Reisman, ‘A Hard Look at Soft Law’ (1988) 82 Proceedings of the American Society of International Law 371, 375.

<sup>2</sup> Klabbers (n 14) 391.



emerging rules, including rules with greater flexibility through general principles, which are leniently, and unrealistically, labelled *soft law*.



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## EXHAUSTION OF LOCAL REMEDIES AND MIXED CLAIMS IN INTERNATIONAL LAW: AN ANALYSIS OF INTERNATIONAL COURT OF JUSTICE JURISPRUDENCE

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The rule of the exhaustion of local remedies serves as an indispensable prerequisite for the admissibility of claims invoked in various fields of international law, including the law of diplomatic protection and international human rights law. A State may invoke the responsibility of another State for injuries suffered by its nationals by exercising diplomatic protection, subject to the satisfaction of certain conditions. Where the legal basis for an application instituting proceedings is predicated upon injury to both the direct rights of the State and the derived rights of its nationals, the characterization of the claim becomes complex. In such instances of "mixed claims," the jurisprudence of the International Court of Justice (the Court, ICJ) applies a "preponderance" test to determine whether the claim is essentially founded upon an injury to the State or to its nationals. Should the claim be determined to relate preponderantly to the interests of the national, its admissibility before the Court is contingent upon the prior exhaustion of local remedies, a fundamental condition for the exercise of diplomatic protection. This article analyses the approach of the ICJ to the exhaustion of local remedies rule, with a particular focus on its jurisprudence concerning mixed claims, to clarify the underlying rationale for the Court's determinations on admissibility.

### Keywords:

Exhaustion of Local Remedies, Mixed Claims, Certain Iranian Assets, Admissibility, Diplomatic Protection.

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## Introduction

“Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”<sup>1</sup> Pursuant to the commentaries to the Draft Articles on Diplomatic Protection, the International Law Commission (ILC) has neither provided nor purported to provide a comprehensive definition of diplomatic protection.<sup>2</sup> This is a right accorded to States under international law,<sup>3</sup> which has its origins in the 1758 statement of Emer de Vattel that “[w]hoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen.”<sup>4</sup> The Permanent Court of International Justice (PCIJ), in the oft-cited dicta of the *Mavrommatis Palestine Concessions* and *Panvezys-Saldutiskis Railway* cases, affirmed the rule that by resorting to diplomatic protection, a State is in reality asserting its own right - to ensure, in the person of its subjects, respect for the rules of international law.<sup>5</sup>

For a State to exercise diplomatic protection, two requirements must be satisfied; first, the matter of nationality,<sup>6</sup> which falls outside the scope of the present analysis, and second, the exhaustion of local remedies.<sup>7</sup> International claims may arise from injuries directly inflicted upon the State itself, from injuries to its nationals, or from a combination thereof. The doctrinal and practical complexities are most pronounced when a claim partakes of this latter, hybrid character.

On 14 June 2016, the Islamic Republic of Iran filed an Application instituting proceedings against the United States of America, alleging violations of the Treaty of Amity, Economic

1 International Law Commission, ‘*Draft Articles on Diplomatic Protection*’ in ‘Report of the International Law Commission on the Work of its Fifty-eighth Session’ (2006) UN Doc A/61/10, art 1.

2 *ibid*, Commentary to art 1, para 1.

3 *ibid*, art 2.

4 Emer de Vattel, *The Law of Nations* (1758) Book II, Ch VI, para. 71.

5 *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ (Ser B) No 3, 12; *Panvezys-Saldutiskis Railway (Estonia v Lithuania)* [1938] PCIJ (Ser A/B) No 76, 16.

6 International Law Commission (n 1) 2.

7 *Ibid*, 3.



Relations, and Consular Rights,<sup>1</sup> arising from a series of legislative and executive measures adopted starting from 2012.<sup>2</sup> In the preliminary objections phase of this case, *Certain Iranian Assets*, the United States raised objections to the jurisdiction of the Court and the admissibility of Iran's claims. The salient objections were, first, that the Court lacked jurisdiction *ratione materiae* to hear claims concerning whether Iran's Central Bank qualified as a 'company' under the Treaty,<sup>3</sup> and second, that Iran's failure to exhaust local remedies rendered its claims inadmissible.<sup>4</sup> Regarding the first objection, the Court determined that the Central Bank exercised sovereign powers and thus was not a 'company' under the Treaty, and concluded that it lacked jurisdiction *ratione materiae* over a substantial portion of Iran's claims.<sup>5</sup>

Regarding the second objection - the main concern of this article - the United States contended that for the Court to hear Iran's claims, Iran was required to demonstrate that "each company has exhausted local remedies in each case"<sup>6</sup>, a demonstration which Iran had failed to make. The Court initially observed that in cases of mixed claims, the necessity to exhaust local remedies does not arise where the claim is preponderantly based on an injury to the State itself;<sup>7</sup> however, it continued that in this particular case, it need not undertake a determination of whether the claim was preponderantly of a direct character. Instead, it would examine whether effective local remedies were, in fact, available to be exhausted.<sup>8</sup>

What, therefore, is the governing jurisprudential principle concerning the rule of exhaustion of local remedies in international law, particularly in mixed claims cases, as illustrated by the ICJ decisions in cases such as *Interhandel*, *ELSI*, and *Certain Iranian Assets*? The jurisprudential trend of the ICJ indicates that the exhaustion of local remedies is not rigidly imposed in mixed claims where the claim is preponderantly based on a violation of the State's own interests. Nevertheless, in instances where the Court deals with mixed claims, as in *Certain Iranian Assets*, it may elect to scrutinize the availability and exhaustion of local remedies as a threshold question of admissibility.

This article is a doctrinal legal research utilizing a specialized case-law analysis of ICJ jurisprudence related to the exhaustion of local remedies, aiming to elucidate the evolution and application of the governing principles. It is worth noting that numerous scholarly works have assessed various aspects of this judgment.<sup>9</sup> In this article, we will first study Exhaustion

1 Treaty of Amity, Economic Relations, and Consular Rights (United States of America-Iran) (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93.

2 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Application Instituting Proceedings, 14 June 2016).

3 *ibid* (Counter-Memorial of the United States of America, 14 October 2019) 63-72.

4 *ibid*, 72-76.

5 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 54.

6 *Certain Iranian Assets* (Counter-Memorial of the United States) (n 10) 72.

7 *ibid*,66.

8 *ibid*, 67.

9 See, for example, Ali Reza Mashhadizadeh and Amirhossein Ghodratnama Shabestari, 'Central Bank: an Independent Company or a Sovereign Organ (with an Emphasis on the Judgment of the International Court of Justice Issued on March 30, 2023)' (2024) 41 (73) *International Law Review* 31; Meisam Norouzi, Saber Habibi Savadkohi, Mehdi Shayanmehr and Seyyed Ali Tabatabai Nesab, 'Jurisdictional Immunities of States and Their Property in International Law: Analyzing the ICJ Decision in the Case of Certain Iranian Assets' (2024) 41 (73) *International Law Review* 45; Ehsan Shahsavari, 'The Status of Clean Hands Doctrine in the Certain Iranian Assets Case' (2024) 41 (73) *International Law Review* 121; Sattar Azizi, 'The Individual Opinions of the ICJ Judges in the Certain Iranian Assets Case: Exclusion of Bank Markazi from the Scope of the Treaty of Amity' (2024) 41 (73) *International Law Review* 157; Mohamad Setayeshpur, 'Realization of the International Responsibility of the United States for "Not Recognizing the Legal Status of Iranian Companies" in the Case of Certain Iranian Assets' (2024) 41 (73) *International Law Review* 181; Seyed Ghasem Zamani and Zohreh Shafiei, 'The International Responsibility of the



of local remedies in international law and its prerequisites; *Second*, we will briefly address the concept of mixed claims; and *finally*, we will analyse the Court's approach in *Certain Iranian Assets* regarding the interplay between exhaustion of local remedies and mixed claims.

## 1. Exhaustion of Local Remedies in International Law

Exhaustion of Local Remedies (ELR) is a rule that arose out of the debates around dualism and monism.<sup>1</sup> It is defined as “the satisfaction by individuals of a requirement to resort to all available and effective local remedies that exist in a domestic legal order”.<sup>2</sup> The rule is firmly established in customary international law, as recognized in various cases, including the *Interhandel*,<sup>3</sup> *ELSI*,<sup>4</sup> *Ahmadou Sadio Diallo*,<sup>5</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation),<sup>6</sup> *Certain Iranian Assets*,<sup>7</sup> and the ILC's 2006 Draft Articles on Diplomatic Protection.<sup>8</sup> Also, it is a well-established rule in other *lex specialis* regimes of international law, such as International Human Rights Law and International Investment Law. In International Human Rights Law, Article 41(1)(c) of the International Covenant on Civil and Political Rights provides:

*“The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;”*<sup>9</sup>

Similarly, Article 35(1) of the European Convention on Human Rights states:

*“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.”*<sup>10</sup>

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United States of America for the Violations of the Treaty of Amity in the Framework of the Judgment of March 30, 2023, of the International Court of Justice' (2024) 41 (73) *International Law Review* 205.

1 A A Cancado Trindade, 'Exhaustion of Local Remedies in International Law and the Role of National Courts' (1978) 17(3/4) *Archiv des Völkerrechts* 333.

2 Berk Demirkol, 'Exhaustion of Local Remedies' *Jus Mundi* (8 October 2025) <https://jusmundi.com/en/document/publication/en-exhaustion-of-local-remedies> accessed 15 November 2025.

3 *Interhandel Case (Switzerland v United States of America)* (Judgment) [1959] ICJ Rep 6, 27.

4 *Elettronica Sicula S.P.A. (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 50.

5 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, 42.

6 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558, 129.

7 *Certain Iranian Assets* (Judgment) (n 12) 61.

8 International Law Commission (n 1) art 14 and Commentary.

9 UN General Assembly, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS, art 41(1)(c).

10 Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos 11, 14 and 15, ETS No 005 (4 November 1950), art 35(1).



In International Investment Law, the rule can be seen in Article 26 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States:

*“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”<sup>1</sup>*

ELR serves as a prerequisite for an international claim where the claim is brought on the basis of an injury to an individual.<sup>2</sup> Local remedies encompass all judicially or administratively available legal avenues of redress open to an injured person.<sup>3</sup> Although the rule, as a procedure, may slow down the justice and burden extra expenses of proceedings,<sup>4</sup> its underlying rationale is widely regarded as the significant interest for a claim to be legally and factually heard by a domestic court prior to its interposition at the international level.<sup>5</sup>

The classification of ELR as either substantive or procedural is a controversial subject. In investment disputes, as Mohebi and Khakpour have explained, the rule is considered procedural,<sup>6</sup> meaning that although a breach of international law may exist, there is a jurisdictional precondition for the valid presentation of a claim.<sup>7</sup> On the other hand, ILC has accepted the view of Special Rapporteur, Mr. Roberto Ago, that in diplomatic protection, the rule has been treated as a substantive requirement, such that no internationally wrongful act is deemed to have occurred until local remedies have been exhausted without satisfaction.<sup>8</sup> Sabahi and Rubins, in their book on Investor-State Arbitration, note that the substantive conception of the rule is specifically reflected in cases alleging a denial of justice or the ‘effective means’ standard.<sup>9</sup> Given that Fitzmaurice and Amador believed that the applicable characterization depends on the facts of the case, the rule may function procedurally where the initial act constitutes an independent breach; however, it operates substantively where the only breach is a denial of justice occurring during the exhaustion process itself.<sup>10</sup>

<sup>1</sup> *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention, Regulations and Rules, Washington DC: International Centre for Settlement of Investment Disputes, 2003), art 26.

<sup>2</sup> International Law Commission (n 1), arts 14(1), 14(3).

<sup>3</sup> *ibid*, art 14(2).

<sup>4</sup> Matthew H Adler, ‘The Exhaustion of the Local Remedies Rule After the International Court of Justice’s Decision in *Elsi*’ (1990) 39 *International & Comparative Law Quarterly* 641, 642.

<sup>5</sup> *ibid*, 641; F V Garcia-Amador, L Sohn and R Baxter, ‘Recent Codification of the Law of State Responsibility for Injuries to Aliens’ (Oceana Publication, 1974) 72.

<sup>6</sup> Eeta Khosro Khakpour, Mohsen Mohebi, ‘Exhaustion of Local Remedies Rule in Investment Lawsuits with an Emphasis on the Denial of Justice Lawsuit in *Loewen v United States of America Case*’ (2023) 40(69) *International Law Review* 61, 79.

<sup>7</sup> Hugh Thirlway, ‘The Rule of Exhaustion of Local Remedies’ in *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol II, Oxford University Press 2013) 1053.

<sup>8</sup> Roberto Ago, *Sixth Report on State Responsibility* (1977) UN Doc A/CN.4/SER.A and Add.1, 22-33; See also ILC, *Draft Articles on Diplomatic Protection* (n 10) art 15(e); Viviana Gallardo and others (Decision of 13 November 1981) Inter-American Court of Human Rights, Series A: Judgments and Opinion, No G 101/81, para 26.

<sup>9</sup> Borzu Sabahi and Noah D. Rubins, ‘Exhaustion of Local Remedies’ in *Investor-State Arbitration* (2nd edn, OUP 2019) 443; Don Wallace Jr, ‘Fair and Equitable Treatment and Denial of Justice: From *Chattin v Mexico* and *Loewen v US*’ in *International Investment Law and Arbitration: Leading Cases from the ICSID* (2005) 669, 671-2.

<sup>10</sup> Malgosia Fitzmaurice and Francisco V García-Amador, ‘[Title of the Specific Article or Speech]’ (1961) 37 *International Court of Justice Yearbook* 32.; *Collected Edition* II, 686; F V Garcia-Amador, ‘State Responsibility-Some New Problems’ (1958) 94 *Recueil des Cours* 449.



## 2. Exceptions to the Exhaustion of Local Remedies

The exhaustion rule is not absolute and is subject to recognized exceptions; indeed, these exceptions constitute a large part of the rule's practical application. The ILC draft Articles on Diplomatic Protection enumerate exceptions in Article 15.<sup>1</sup> Pursuant to this Article, there is no requirement for local remedies to be exhausted where such exhaustion would be "futile".<sup>2</sup> ILC equates "futility" and "ineffectiveness" and under this rubric, describes three formulations for an exception: first, where the local remedies are obviously futile; second, where they offer no reasonable prospect of success; and third, where they provide no reasonable possibility of effective redress.<sup>3</sup>

The rule is also inapplicable where there is an undue delay in the implementation of local remedies. The concept of unduly prolonged domestic procedures is inherently fact-specific, and no fixed temporal standard exists; as the ILC notes, the delay must be "unreasonable" and the circumstances of each case must be taken into account.<sup>4</sup> In *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, the African Commission on Human and Peoples' Rights stated that, in order to indicate whether a procedure is unduly delayed, the legal doctrine of *reasonable man's test* could be useful.<sup>5</sup> This test entails an assessment of whether the delay is both "excessive" and "unjustifiable," an assessment which must be conducted on a case-by-case basis.<sup>6</sup>

The ILC specifies further exceptions. It states that it is unfair to expect an injured person to pursue domestic remedies where there is no reasonable connection, such as a voluntary link or territorial nexus, between the injured person and the respondent State.<sup>7</sup> Moreover, the requirement is waived where the respondent State itself precludes exhaustion, for instance, by preventing the injured person from entering its territory and thereby denying access to its domestic courts.<sup>8</sup> Finally, the requirement is dispensed with if the respondent State waived it, whether expressly or impliedly.<sup>9</sup> The Inter-American Court of Human Rights in *Viviana Gallardo and others* stated that since the exhaustion requirement operates for the benefit of the State, it can be waived by the State, "even tacitly".<sup>10</sup>

A survey of the exceptions presented by the ILC and in jurisprudence suggests that they are not objective or fixed for all circumstances. The recurrent use of the term "reasonable" in the text and commentaries indicates a return to the *reasonable man's test*, as the determination of reasonableness is not amenable to a purely technical or dogmatic

1 International Law Commission (n 1) art 15: "Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted."

2 Marjorie Millace Whiteman, *Digest of International Law* (Vol 8, US Department of State 1967) 777.

3 International Law Commission (n 1) art 15(a), commentary 2.

4 *ibid*, art 15(b), commentary 5.

5 *Zimbabwe Lawyers for Human Rights v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) 60.

6 *ibid*.

7 International Law Commission (n 1) art 15(c), commentary 7.

8 *ibid*, art 15(d), commentary 11.

9 *ibid*, art 15(e).

10 *Viviana Gallardo and others*, (n 34) 26.



analysis.<sup>1</sup> This underscores the subjective, context-dependent nature of the exceptions, in which necessitate a case-by-case approach, a rule affirmed by the ICJ in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, which held that “what is reasonable and equitable in any given case must depend on its particular circumstances.”<sup>2</sup>

### 3. The Question of Mixed Claims in the Jurisprudence of the ICJ

Mixed claims are those which involve allegations of injury to both the rights of the State and the rights of its nationals.<sup>3</sup> The ILC in Draft Articles on Diplomatic Protection, observed the difficulty in deciding whether a claim is “direct” or “indirect” where it is mixed, since it contains elements of both.<sup>4</sup> The ICJ has addressed the concept of mixed claims in several cases, including the *United States Diplomatic and Consular Staff in Tehran*,<sup>5</sup> *Arrest Warrant of 11 April 2000*,<sup>6</sup> and *Avena*.<sup>7</sup> To conduct a detailed examination on this concept, an analysis of the ICJ’s most instructive jurisprudence is required: first, the *Interhandel*, and second, the *ELSI* case.

#### 3.1. The *Interhandel* Case

On 2 October 1957, the Government of Switzerland instituted proceedings against the United States for a dispute arising from the vesting of the shares of a Swiss company (Interhandel) in the United States on the grounds that they were ultimately owned or controlled by German interests.<sup>8</sup> Switzerland’s submissions encompassed allegations of injury to both State and nationals rights.

The Court held that although a customary rule of international law required the exhaustion of local remedies, exceptions might apply where a claim is based on a direct injury to the State itself.<sup>9</sup> To reach such a determination, it was necessary to consider the “principal submission” and determine whether the claim was fundamentally based on injuries directed to the State or to its nationals.<sup>10</sup> Ultimately, the Court found that Switzerland’s claims were predominantly indirect, thus necessitating the exhaustion of local remedies.<sup>11</sup>

#### 3.2. The Case Concerning *Elettronica Sicula S.P.A. (ELSI)*

The *ELSI* case revolved around the dispute between the United States and Italy regarding the requisition of an Italian company owned by two American corporations.<sup>12</sup> Italy raised a preliminary objection contesting the admissibility of the US claim, arguing that the local

1 Olivier Corten, ‘The Notion of “Reasonable” in International Law: Legal Discourse, Reason and Contradictions’ (1999) 48(3) *International and Comparative Law Quarterly* 613.

2 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, para 72.

3 Adler (n 30) 642.

4 International Law Commission (n 1) art. 14, Commentary 10.

5 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

6 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 40.

7 *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, para 40.

8 *Interhandel*, Application Instituting Proceedings, 1957, 9-14.

9 *Interhandel* (n 19) (Preliminary Objections) 28.

10 *ibid.*

11 *ibid.* 29.

12 *Elettronica Sicula S.P.A. (ELSI)* (n 20).



remedies rule had not been satisfied.<sup>1</sup> Although the Court concluded that local remedies had in fact been exhausted and proceeded to the merits,<sup>2</sup> it addressed the issue of mixed claims in *obiter dicta*.

The United States argued that certain components of its claim alleged direct injuries to its own rights under the 1948 Treaty of Friendship, Commerce and Navigation (FCN Treaty), hence the exhaustion rule was inapplicable to those parts.<sup>3</sup> The Court, referring to its *Interhandel* judgment, applied the “principal submission” test<sup>4</sup> and rejected the US argument, finding that the claims were in essence brought on account of injuries to its nationals; consequently, no parts of the US claims would be understood as rendering the local remedies rule inapplicable.<sup>5</sup>

As demonstrated above, to adjudicate a claim alleged to be mixed, ICJ jurisprudence indicates its dominant approach of using the “preponderance” test which evaluates “principal submission.” A closely related test is the *sine qua non* or “but for” test, which inquires whether, in the absence of the injured national, the State would still have brought the claim.<sup>6</sup> A negative answer indicates that the exhaustion rule applies.<sup>7</sup> The ILC, in its Draft Articles, provides factors for this assessment, including the subject of the dispute, the legal basis of the claim, and the nature of the remedy sought.<sup>7</sup>

### **3.3. Certain Iranian Assets and the Unavailability of Local Remedies**

The *Certain Iranian Assets* case represents one of the more recent cases before the ICJ. Instituted by Iran against the United States on 14 June 2014, the Application alleged violations of the 1955 Treaty of Amity resulting from measures taken against the Central Bank of Iran (Bank Markazi) and other Iranian companies.<sup>8</sup> The Court noted that Iran’s claims in this case concerned a series of legislative, executive, and judicial measures.<sup>9</sup>

The United States challenged the admissibility of Iran’s claim, arguing that the Iranian companies had failed to exhaust local remedies, given that the claims are based on alleged injuries to those entities.<sup>10</sup> The United States maintained that an exception to the rule arises only where domestic courts are ineffective.<sup>11</sup> Additional objections to admissibility were raised by the United States, such as Iran’s alleged lack of clean hands and abuse of rights.<sup>12</sup>

1 *ELSI* (Counter-Memorial of Italy; Reply; Rejoinder, 16 November 1987) 2729-.

2 *Elettronica Sicula S.P.A. (ELSI)* (n 20) 63.

3 *ibid*, 51.

4 *ibid*, 52.

5 *ibid*.

6 International Law Commission (n 1), art 14, commentary 11.

7 *ibid*, commentary 12.

8 *Certain Iranian Assets* (n 9) 4.

9 *Certain Iranian Assets* (n 12) 111; Abdollah Abedini, ‘Breach of the Obligation Arising from the Adoption of Inconsistent Domestic Law: Analysis of the Judgment of the International Court of Justice in the Case of Certain Iranian Assets’ (2024) 41(73) *International Law Review* 11, 20.

10 *ibid* (n 10) 73-75.

11 *ibid*.

12 See Seyyed Fazlallah Mousavi and Amir Lohrasbi, ‘An Analysis of the Objections Raised by the United States Regarding the Admissibility of Iran’s Claim in the Case of Certain Iranian Assets before the International Court of Justice’ (2024) 41(73) *International Law Review* 91.



Opposing this argument, Iran contended, first, that its claim was inextricably linked to the rights of its nationals, and second, that no effective redress was available in US courts.<sup>1</sup>

Iran's position was informed by litigation previously pursued in US courts by Iranian entities, including Bank Markazi and Bank Melli. Bank Markazi had challenged the discriminatory treatment before the District Court, the Court of Appeals, and the Supreme Court.<sup>2</sup> Section 502 of the Iran Threat Reduction and Syria Human Rights Act effectively guaranteed that all potential defenses by Bank Markazi would be rejected, a fate which also befell Bank Melli in the US domestic legal system.<sup>3</sup> These experiences suggested that Iran could rely on the futility exception codified in Article 15 of the ILC Draft Articles on Diplomatic Protection.<sup>4</sup>

The Court first addressed the US objection that the Court lacked jurisdiction due to non-exhaustion, referencing its finding in *Interhandel* that where proceedings are initiated on the basis of diplomatic protection, of the rule relates to admissibility, not jurisdiction.<sup>5</sup> The Court also reiterated the customary nature of the rule.<sup>6</sup> Citing its judgment in the *Avena* case, it held that the obligation to exhaust local remedies does not apply where the claim involves violations of both State rights and rights accorded to its nationals.<sup>7</sup> The Court further noted the provision of Article 14(3), of the ILC's Articles, which implicitly provides that for a mixed claim, it is necessary to examine whether the 'preponderance' of the injury was suffered by the State or its nationals to determine the rule's applicability.<sup>8</sup> Although the Court reaffirmed the preponderance test for mixed claims,<sup>9</sup> it declined to determine whether Iran's claims were preponderantly based on its own rights or those of its nationals, assuming such a determination unnecessary for its decision.<sup>10</sup> The *ratio decidendi* of the Court on this point was its prior ruling on Bank Markazi's non-qualification as a 'company' under the Treaty of Amity.<sup>11</sup> Consequently, the Court lacked jurisdiction over that part of Iran's claims which alleged direct injury to State rights,<sup>12</sup> rendering that it did not view the case as presenting a mixed claim for the purposes of the admissibility objection.

Nevertheless, the Court proceeded to examine the argument concerning the unavailability of effective redress. Based on the ILC Draft Articles and the specific circumstances, the domestic legal system of the respondent State must be taken into account.<sup>13</sup> Judge Sir Hersch Lauterpacht, in his separate opinion in *Certain Norwegian Loans*, held that international Tribunals apply the exhaustion rule "with a degree of elasticity," noting that it is excluded

1 *Certain Iranian Assets* (n 12) 60.

2 The District Court observed that Bank Markazi "filled the proverbial kitchen sink with arguments," quoted in *Bank Markazi v. Peterson, et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1, 9-10.

3 Ahmad Reza Tohidi and Fatemeh Mirakhorli, 'ICJ's Approach to the Objection of the United States Regarding Compliance with the Exhaustion of Local Remedy Rule: A Focus on the Certain Iranian Assets Case' (2024) 41(73) *International Law Review* 101, 113.

4 *Certain Iranian Assets* (I.C.J. pleadings), Reply of Islamic Republic of Iran, submitted 17 August 2020, 199–201.

5 *Certain Iranian Assets* (n 12) 56.

6 *ibid*, 61.

7 *Certain Iranian Assets* (n 12) 63; *Avena and Other Mexican Nationals* (n 53).

8 *Certain Iranian Assets* (n 12) 66.

9 *ibid*, 66.

10 *ibid*, 67.

11 *ibid*, 54.

12 *ibid*.

13 International Law Commission (n 1), art 15(a), commentary 3.



where no available remedy exists in the legal order of the respondent State.<sup>1</sup> In *Certain Iranian Assets*, the Court held that the US measures were legislative and executive in nature, and that under US legal system and jurisprudence, domestic courts are obliged to apply a subsequently enacted federal statute even if it conflicts with a treaty obligation.<sup>2</sup> As held in *Weinstein v. Islamic Republic of Iran*, “[i]n any event, to the extent that TRIA § 201 (a) may conflict with Article III (1) of the Treaty of Amity, the TRIA would ‘trump’ the Treaty of Amity.”<sup>3</sup> This rule was subsequently affirmed in *Bennett v. Islamic Republic of Iran*.<sup>4</sup> Given the legislative nature of the measures and the supremacy of federal statute over treaty obligations in US jurisprudence, the Court concluded that Iranian entities “did not have any reasonable possibility of successfully asserting their rights in US courts.<sup>5</sup> Consequently, the exhaustion of local remedies was not required for the relevant part of Iran’s claims.<sup>6</sup>

A salient aspect 30 March 2023 judgment is the Court’s implicit endorsement of a standard encompassing both access to a fair trial and a reasonable possibility of redress.<sup>7</sup> Accordingly, the accessibility to domestic remedies entails not only the procedural capacity to bring a claim, but also the existence of a reasonable prospect that the claim, once heard, could result in effective relief.<sup>8</sup>

## Conclusion

The exceptions to the *exhaustion of local remedies* rule highlight scenarios where local remedies are ineffective, unavailable, or unduly prolonged, allowing for more equity into its application. An examination of the ICJ jurisprudence concerning mixed claims, notably *Interhandel* and *ELSI*, elucidates the Court’s methodology in distinguishing between direct and indirect injuries. These cases demonstrate a consistent application of the exhaustion rule while also acknowledging circumstances where exceptions may apply, thereby refining our contours of this complex legal doctrine. The ICJ’s approach in *Certain Iranian Assets* illustrates that while the rule serves to respect State sovereignty, its exceptions - specifically futility - are vital safeguards to ensure that individuals are not left without recourse in the face of systemic failure or injustice within domestic legal systems.

The application of the exhaustion of local remedies rule to mixed claims, particularly through the lens of the *Certain Iranian Assets* case, reveals that the ICJ employs a nuanced methodology. In that case, the Court emphasized the threshold question of the availability of effective redress within domestic legal framework. This analysis contributes to a deeper

1 *Case of Certain Norwegian Loans*, Judgment of 6 July 1957, ICJ Rep 1957, Separate Opinion of Judge Sir Hersch Lauterpacht, 39.

2 *Certain Iranian Assets* (n 12) 69.

3 *Weinstein et al. v Islamic Republic of Iran et al.*, United States District Court, Eastern District of New York, Order of 5 June 2009, Federal Supplement, Second Series, vol. 624, 272, affirmed by United States Court of Appeals, Second Circuit, 15 June 2010, Federal Supplement, Third Series, vol. 609, 43.

4 *Bennett et al. v The Islamic Republic of Iran and others*, United States Court of Appeals, Ninth Circuit, 22 February 2016, Federal Supplement, Third Series, vol. 817, 1131, as amended on 14 June 2016, Federal Supplement, Third Series, vol. 825, 949.

5 *ibid*, 72.

6 *ibid*, 73.

7 Tohidi and Mirakhorli (n 73) 115.

8 *ibid*.



understanding of the legal landscape surrounding mixed claims and prompts critical reflection on how international law can adapt to ensure justice for individuals while respecting the sovereign rights of States. The case further demonstrates that the ICJ's approach to diplomatic protection, the exhaustion rule, and mixed claims proceeds from a holistic perspective. Rather than engaging in a threshold characterization of the claim as preponderantly direct or indirect, the Court opted to assess the overall structure of diplomatic protection to determine whether an exception to the exhaustion rule was manifestly applicable on the facts.



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## THE STANDARD OF STATE CONTROL IN ATTRIBUTING THE CONDUCT OF NON-STATE ACTORS IN INTERNATIONAL LAW: A REVIEW OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

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The attribution of conduct to a state in international law, particularly in international claims, is a fundamental and complex subject that determines how states are held accountable for the actions of non-state entities. While the general principle is to attribute the conduct of state organs to the state, under specific circumstances, the conduct of non-state actors may also be attributable to the state, contingent upon the state's control or direction over those entities. The standard of control, particularly in the practice of the Iran-United States Claims Tribunal (IUSCT/Tribunal), is a critical aspect in determining state responsibility. The IUSCT maintains that for a state to be held responsible for the actions of non-state entities, it must be proven that the state exercised effective control over those actions. This control requires an examination not only of the mandates and statutes of the non-state entities but also proof of the state's direct influence on their operations. In cases involving the Islamic Revolutionary Committees and private entities, the Tribunal has considered clear indications of state responsibility, especially when tangible state control and direction have been established. For instance, in conditions of chaos such as during a revolution, a state cannot evade its responsibility by citing the prevailing disorder; however, at the same time, for the acts of private entities to be attributable to the state, mere state ownership is insufficient. The Tribunal emphasizes that it must be proven that the actions of the non-state entities were carried out pursuant to the state's instructions or under its direction. In summary, the IUSCT strongly emphasizes the necessity of "effective control" and a causal link between this control and the violation of international law to prevent the undue imposition of responsibility on states.

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## **Introduction**

Revolutions, uprisings, and public protests that have proliferated over the past decade have once again created conditions in which issues such as the exercise of state authority in the absence of official authorities or the attribution of the conduct of successful revolutionary movements can once again be raised in practice. Furthermore, the attribution of the acts of terrorist groups has been one of the most challenging topics in international law for at least the past decade, a major part of which is based on the issue of attributability. Therefore, this article, as its title also suggests, intertwines two areas of international law, the importance of neither of which can be doubted. On one side lie the rules for attributing international responsibility to the state, over which, at least until now, the shadow of time's passage has not heavily loomed; and on the other side stands the most important and influential contemporary international arbitral tribunal, namely the Iran-United States Claims Tribunal (IUSCT/ Tribunal).

The central question of this article is, considering the purpose of establishment of the Iran-United States Claims Tribunal, namely, the legal settlement of disputes between the two governments and the nationals of Iran and the United States, how has the practice of this body been regarding the standard of control for attributing the conduct of non-state actors to the state? Given the complexities of conducting case studies, assessing the impact of judicial and arbitral practice in the field of international responsibility is a difficult task. This difficulty is compounded when the body in question is the IUSCT, where political considerations have sometimes overshadowed legal issues. The core of the attribution rules in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC ARSIWA, 2001) is focused on determining which actions and conducts should be considered as acts of the state. The aim of the subsequent discussion is also to examine the circumstances under which the IUSCT has considered certain conduct to be an act of the state.



## 1. The Standard of Control for Attributing the Conduct of Non-State Actors to the State in International Law: Examining Dimensions and Conditions

The attribution of responsibility to the state is one of the fundamental issues in international law, playing an essential role in determining the international responsibility of states for the breach of their obligations. According to the general principles of international law, whenever a state commits a breach of an international obligation, its international responsibility is engaged, and the responsible state is obliged to compensate for the damages resulting from its wrongful act. However, determining which acts are attributable to the state and thus engage its responsibility is a complex matter requiring careful examination. Establishing a causal link between the act or omission and the injury suffered is a necessary condition for attributing responsibility to the state, but it is not sufficient on its own. In other words, it must first be proven that the alleged injury resulted from a specific act or omission. Then, it must be examined whether this act or omission is attributable to the state or not.<sup>1</sup> According to Article 1 of the ARSIWA, a state is responsible only for the internationally wrongful acts (IWA) of “itself”.<sup>2</sup> Since the state is a juridical person and cannot act directly, the IWAs of the state are in fact the acts or omissions of persons who are in some way connected to the state. Article 4 of the ARSIWA states a general principle in this regard: The conduct of any state organ shall be considered an act of that state under international law, provided that organ was acting in that capacity.<sup>3</sup> This principle includes all state organs, whether legislative, executive, judicial, or otherwise, and at whatever level of government (central, local, etc.). Thus, the wrongful acts of a judge, a police officer, a soldier, or any other state official are attributable to the state and engage its responsibility.

The fundamental principle is that a state is responsible only for the conduct of its own organs. However, in certain exceptional cases, a state may also be held responsible for the acts of private persons. Articles 5 to 11 of the ARSIWA enumerate the exceptional cases in which the state is responsible for the acts of private persons. For example, if the state entrusts a specific function to a private person and that person commits a wrongful act in the course of performing that function, the state may be held responsible. Article 8 articulates one of the most important cases for attributing responsibility to the state for the acts of private persons: The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. In other words, if the state is in some way involved in the commission of the wrongful act by the private person, the responsibility for that act is attributable to the state. The direction and control by the state qualifies the general principle of the “personal nature of state responsibility” and expands its

<sup>1</sup> Seyyed Ghasem Zamani, ‘The Place of the Principles and Rules of International Responsibility of States in the Oil Platforms Case’ in *The Judgment of the International Court of Justice in the Oil Platforms Case* (Research Center of the Islamic Consultative Assembly, Tehran 2015) 100 [In Persian].

<sup>2</sup> Ian Brownlie, *System of the Law of Nations: State Responsibility (Part 1)* (Clarendon Press 1986) 37.

<sup>3</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text and Commentary* (tr A Ebrahim Gol, Shahr-e Danesh, Tehran 2023) 26 [In Persian].



scope of liability. The term “*de facto* organs” is used to explain Article 8.<sup>1</sup> This means that if a private person or group is in fact acting under the control and direction of the state, it is considered tantamount to a state organ and its acts are attributable to the state. However, the ILC did not use this term in the commentary to the ARSIWA and preferred to emphasize the concepts of “control” and “direction”.<sup>2</sup>

The perpetrator’s identity as a state entity is, in itself, sufficient for responsibility to be attributed to the state. However, concerning non-state entities, another link between the state and the perpetrator must be proven, such as the state’s direction and control over private persons. It is noteworthy that the ILC has not set any specific threshold for this direction and control. Therefore, determining the degree of control and direction necessary for attributing responsibility to the state is a matter that must be examined on a case-by-case basis, considering the specific circumstances of each case. Ultimately, attributing responsibility to the state is a complex and multifaceted issue that requires careful examination of the conditions and circumstances of each case. Nevertheless, by adhering to general principles and abiding by the ARSIWA, a better understanding of this subject can be achieved, and steps can be taken towards determining the international responsibility of states for the breach of their obligations.

International judicial bodies have addressed the attribution of state responsibility in various cases and have considered different criteria for determining the threshold of “control.” These criteria and differing approaches have been shaped by the specific circumstances of each case and show that the theories of “effective control” and “overall control” are among the most important concepts in this area. In the *Nicaragua* case (1986), the International Court of Justice (ICJ/ Court) considered the criterion of “effective control” as the basis for attributing responsibility to the United States government for its support of the operations of *contras* forces in Nicaragua. The Court emphasized that for the United States to be held responsible, it had to be proven that the country exercised effective control over those specific military or paramilitary operations during which the legal violations occurred. The Court stressed that mere financial and logistical support is insufficient for attribution and that practical and continuous control must be proven.<sup>3</sup> In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), unlike the ICJ, used the criterion of “overall control” and stated: “For the acts of private persons to be attributed to a state, it must be proven that these persons acted under the control of that state. The standard for this control may vary depending on the circumstances of each case. In international law, a high threshold for the control test is not required in all circumstances.”<sup>4</sup> Here, the Tribunal deemed the overall control standard sufficient and stated that the intensity and degree of control could be lesser or greater in different cases. This approach provided a broader concept of attribution compared to the effective control theory.

<sup>1</sup> Jörn Griebel and Milan Plücken, ‘New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v. Serbia*’ (2008) 21 Leiden Journal of International Law 601.

<sup>2</sup> Marko Milanovic, ‘State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken’ (2009) 22 Leiden Journal of International Law 307, 314.

<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 109.

<sup>4</sup> *Prosecutor v Tadić* (Judgment) ICTY-94-1-A (15 July 1999), para. 117.

In the *Bosnia and Herzegovina v. Serbia and Montenegro* case (2007), the ICJ once again examined the “effective control” criterion as the threshold for attribution. The objective was to determine whether the acts of the Serb paramilitaries during the genocide could be attributed to the state of Serbia. Arguing that the Serbian government did not exercise effective control over the actions of the paramilitaries, the Court absolved Serbia of responsibility for the genocide.<sup>1</sup> This case reaffirmed the stringent effective control criterion. The European Court of Human Rights, in a case,<sup>2</sup> addressed the issue of the expulsion of applicants by British Railways, which was carried out under domestic laws and an agreement with trade unions. The Court declared that the United Kingdom was responsible not because it was the employer of the railways, but because it had legislated and legitimized this practice. This decision demonstrated that even actions stemming from a country’s domestic laws can engage the international responsibility of the state.

In general, international judicial bodies consider different thresholds for attributing responsibility to the state, depending on the circumstances and requirements of each case. While the ICJ usually adopts a stricter approach with the “effective control” criterion, the ICTY facilitated the process of attribution with its “overall control” approach. These differences indicate the adaptation of legal rules to the practical and political realities of each case. However, in all instances, the strength of the link between the state and the private person or group continues to play a fundamental role in determining responsibility.

## 2. The Impact of Establishing the Control Threshold in the Practice of the Iran-United States Claims Tribunal

In the cases before the IUSCT, the concept of state “control” has extended beyond mere share ownership or the appointment of managers to examine the degree and manner of the state’s influence over the conduct of non-state legal entities. Adopting a realistic approach, the Tribunal has sought to determine whether the acts and conduct of these entities, by virtue of their close connection to the state, are attributable to it.

In the case of *Starrett Housing Corporation v. Iran*, the Tribunal, through a broad interpretation of the concept of “expropriation,” considered the appointment of a temporary manager for the “Shah Goli” company by the Ministry of Housing as an instance of indirect taking (creeping nationalization), despite the absence of an explicit nationalization order.<sup>3</sup> The Tribunal argued that this action had deprived the claimant of the right to use, effectively control, and enjoy the benefits of its property. This case demonstrates that the Tribunal considers not only direct expropriation but also any unreasonable measure that prevents the use, enjoyment, or disposal of property as tantamount to expropriation.

The lawyers for the Government of Iran in this case attempted to argue, by citing the relevant law concerning the appointment of temporary managers, that the purpose of this action was to prevent the closure of economic units and preserve employment, and that there

<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, paras. 220-230.

<sup>2</sup> *Young, James and Webster v United Kingdom* App no 7601/76; 7806/77 (ECtHR, 13 August 1981).

<sup>3</sup> *Starrett Housing Corp v Government of Islamic Republic of Iran* (1983) 4 Iran-US CTR 122.



was no intent to expropriate. They also argued that the temporary manager had duties similar to an agent towards a principal and was considered a trustee.<sup>1</sup> However, the Tribunal did not accept these arguments and, emphasizing the practical impact of the appointment of the temporary manager on the claimant's property rights, ruled in favor of state responsibility.

In similar cases, including *Phelps Dodge*, while understanding the government's reasons for adopting measures to protect its interests, the Tribunal held the government responsible for paying compensation for the losses incurred.<sup>2</sup> This approach indicates that the Tribunal holds the state responsible for compensating damages resulting from the deprivation of property rights, even if there are justifiable reasons for a governmental decision.

In general, the IUSCT utilizes criteria such as *the degree of dependence, the manner of direct or indirect control, and the practical effects of the state on the decision-making of private entities* to determine the extent and manner of state control over private persons. The purpose of this examination is to determine whether the acts and conduct of these persons were so closely supervised and controlled by the state that this behavior can be linked to the state and its responsibility engaged.

The Tribunal's approach in this regard has established a significant precedent in which the surrounding circumstances of state control over private institutions and their degree of connection to state interests are carefully examined. This practice shows that the acts of private persons are attributed to the state only if significant control by the state over them can be established. The Tribunal has issued similar awards in some cases, including *TAMS* and *Clem M. Food Corp.*, providing a specific framework for the legal attribution of the acts of private persons to the state. In some Cases,<sup>3</sup> the Tribunal meticulously applied these criteria and sought to establish the government's connection to the companies based on the facts of the case.

Furthermore, the Tribunal in some instances has referred to the prior positions of the parties, including the Government of Iran in US domestic courts, and has attempted to use the inconsistency of these positions to advance claims.<sup>4</sup> Prior to signing the Algiers Accords, Iran had taken positions in US courts that were inconsistent with the arguments it presented before the Tribunal. Specifically, in defending against claims filed by Americans in US domestic courts against entities controlled by the Iranian government for loss of their interests, Iran claimed that these entities were in fact owned by the Government of Iran and asserted immunity from legal proceedings based on the principle of sovereign immunity. The claimants before the Tribunal succeeded in highlighting this position taken by Iran in US domestic courts and used it as one of the grounds for holding the Government of Iran liable.

Such examinations demonstrate the importance of precise criteria and the establishment of clear rules for distinguishing the acts of private persons from state conduct, which has played a key role, particularly in claims concerning the taking or expropriation of property. For this reason, in some of its awards, while understanding the special circumstances that

1 *Starrett Housing Corp v Government of Islamic Republic of Iran* (n 10) 136.

2 *Phelps Dodge Corporation v Iran* (1986) 10 Iran-US CTR 121, 126.

3 *Starrett Housing Corp v Government of Islamic Republic of Iran* (n 10) 180.

4 Khalil Khalilian, *Legal Claims of Iran and the United States before the Hague Tribunal* (Sherkat-e Sahami-ye Enteshar, Tehran 2003)



might compel a state to take specific measures, the Tribunal has still adhered to the principles of compensation under international law as the benchmark. For example, in the *Phelps Dodge* case,<sup>1</sup> the Tribunal stated that these special circumstances could not release the respondent from its obligation to pay compensation to the claimant.

### 3. The Threshold of Control: An Indicator for Attributing the Conduct of Non-State Entities to the State

The initial version of the attribution rule now reflected in Article 8 of the ARSIWA was presented by the Special Rapporteur, Roberto Ago, in the 1970s. This Article stipulates that the conduct of a person or group of persons who are “in fact... acting on behalf of the State” shall be considered an act of the State under international law.<sup>2</sup> The aim was to encompass “groups which, while not belonging to the regular armed forces of the State, were nonetheless carrying out military activities in time of war”.<sup>3</sup> Ago gave the examples of “private individuals who exceptionally performed duties of regular armed auxiliary forces, such as the Parisian taxi drivers in the First World War at the Battle of the Marne” and also “volunteers whom certain Powers sent, or allowed to go, to countries where a civil war was in progress”.<sup>4</sup> Furthermore, the ILC in this context referred to “kidnappings carried out on foreign soil by private individuals acting in fact on behalf of the State”<sup>5</sup> and noted that “if it were established that the persons concerned had acted in concert and at the instigation of the organs of a State, the act of kidnapping should be regarded as an act of that State”.<sup>6</sup>

The Commission conceived this rule for situations where the state established a relationship of a representative nature with a non-state actor, during which the state instructed the non-state actor to perform a specific act on its behalf.<sup>7</sup> Consequently, the commentary to the initial Draft ARSIWA specified: “It must be proved in fact that the person or group of persons was in fact appointed by organs of the State to perform a specific task or to carry out a particular duty, that they performed that definite task at the instigation of those organs”.<sup>8</sup>

However, other statements by the ILC in the 1970s indicate a potentially broader conception of this rule. These statements refer to states being responsible for the conduct of groups that were formed with state encouragement and received financial support, training, and weapons, and with which the state coordinated its own forces’ operations. The ILC claimed that these groups:

*“from the standpoint of international law, could no longer be considered individuals. They became formations which acted in coordination with and at the instigation of the State and carried out missions authorized or even entrusted to them by*

<sup>1</sup> *Phelps Dodge Corporation v Iran* (n 12) 126.

<sup>2</sup> Roberto Ago, ‘Third Report on State Responsibility’ (1971) UN Doc A/CN.4/246 and Add. 1-3, 283.

<sup>3</sup> ILC, ‘Summary Records of the Meetings of the Twenty-Sixth Session’ (1974) UN Doc A/CN.4/SER.A/1974, para. 5.

<sup>4</sup> ILC (n 17) paras. 5, 7.

<sup>5</sup> ILC (n 17) para. 7.

<sup>6</sup> ILC vol II (n 17) 284.

<sup>7</sup> James Crawford, ‘First Report on State Responsibility’ (1998) UN Doc A/CN.4/490 and Add.1-7, para 158. See also Mačák (n 29) 414-15.

<sup>8</sup> ILC vol II (n 17) 284-5 (commentary to draft art. 8 para. 8).



*that State. They then fell into the category of persons or groups which were in fact, if not formally, associated with the State apparatus... .”<sup>1</sup>*

Special Rapporteur James Crawford addressed the inherent ambiguity in the standard attribution language when the ILC revisited the formulation of this rule in 1998. Crawford noted that “as a matter of ordinary language, one can speak of a person acting ‘on behalf of’ another person without any actual instructions or authorization from that other person”.<sup>2</sup> Considering the ICJ’s judgment in the *Nicaragua* case, where the Court considered attribution based on the state’s exercise of “effective control” over the contra forces,<sup>3</sup> Crawford examined to what extent the language of Article 8 should encompass situations of *de facto* state control over a person or group, in addition to cases of “express agency” involving “actual instructions or authorization” from the state.<sup>4</sup> Crawford proposed a revised formulation whereby the conduct of persons or groups who were “in fact acting on the instructions of, or under the direction or control of...” the State would be considered an act of the State under international law.<sup>5</sup>

While this change could be seen merely as clarifying the ambiguous concept of an entity acting “on behalf of” a State,<sup>6</sup> it also somewhat expands the scope of the rule and allows for greater flexibility in determining whether the conduct in question was carried out on the part of a State.<sup>7</sup> The final development in the evolution of Article 8 was a minor change to Crawford’s proposed wording, introduced by the Drafting Committee of the ILC. This committee modified Crawford’s reference to “direction and control,” replacing the conjunction “and” with the disjunctive “or.”<sup>8</sup> Thus, the Drafting Committee emphasized that the requirements for direction *or* control are alternatives, not cumulative.<sup>9</sup> This drafting history may explain the inconsistency in interpreting Article 8, which on one hand refers to direction and control jointly as a single attribution standard, but on the other hand indicates that proving either criterion is sufficient.

In the claims brought before the IUSCT, the criterion of state “control” over non-state entities plays a pivotal role in attributing responsibility to the state. This criterion, however, has not always been defined explicitly and uniformly, and its application in various cases indicates a dynamic and variable approach.

In the case of *Clem M. Food Corp. v. Iran and the Simorg Company*, the Tribunal, relying on evidence such as the use of government letterhead on documents and the appointment of government officials to the board of directors, found that the government exercised control over the “Cycl” company. This ruling shows that “the appointment of government officials,” “control of the board of directors,” and “the percentage of state ownership” are effective criteria for determining state control.<sup>10</sup>

<sup>1</sup> ILC vol II (n 17) 80 (commentary to draft art. 11 para. 32).

<sup>2</sup> Crawford (n 21) para. 197.

<sup>3</sup> *Nicaragua v United States of America* (n 6) 115.

<sup>4</sup> Crawford (n 21) para. 197.

<sup>5</sup> Crawford (n 21) 43, 56.

<sup>6</sup> ILC, ‘Summary Records of the Meetings of the Fiftieth Session’ (1998) UN Doc A/CN.4/SER.A/1998, para 8.

<sup>7</sup> Kubo Mačák, ‘Decoding Article 8 of the International Law Commission’s Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors’ (2016) 21 Journal of Conflict and Security Law 405, 414.

<sup>8</sup> ILC, ‘Report of the International Law Commission on the Work of its Fifty-Second Session’ (2000) UN Doc A/55/10, 65.

<sup>9</sup> ILC (n 28) 289, para 79.

<sup>10</sup> See *Phelps Dodge Corporation v Iran* (n 10); *Starrett Housing Corp v Government of Islamic Republic of Iran* (n 10); *Foremost Tehran*

In contrast to this approach, in the case of *Flexi-Van Leasing Inc. v. Iran*, the Tribunal, while acknowledging state control over the “Starline” and “Iran Express” companies, deemed state control alone insufficient for attributing responsibility. The Tribunal emphasized that specific and direct interference by the state in the claimant’s contractual rights must be proven for state responsibility to be established.<sup>1</sup> In this case, the Tribunal could not prove a direct link between state control and the companies’ failure to perform their contractual obligations; consequently, it did not hold the state responsible. This ruling demonstrates that the threshold for proving effective control for attribution of responsibility at the Tribunal is higher than the threshold for establishing jurisdiction.

In the *Pak Dairy* case, the Tribunal considered both majority share ownership and control of the board of directors sufficient to determine that the company was “under state control” and affirmed its jurisdiction. However, in the merits phase, the Tribunal only accepted the “prevention of dividend payments” as direct state interference, which alone was insufficient to prove expropriation.<sup>2</sup>

The *PepsiCo v. Iran* case also emphasizes the criteria of majority share ownership and control of the board of directors for determining state control over the Zamzam companies.<sup>3</sup> However, in this case too, despite confirming state control, the Tribunal only accepted the prevention of dividend payments as state interference and deemed this interference insufficient to prove all of the claimant’s allegations. In a recent case related to the *Bonyad-e Mostazafan* (Foundation of the Oppressed), the Tribunal refrained from making a decision on the responsibility of the state and the Bonyad due to the payment of obligations from an security account. This indicates the Tribunal’s flexibility in applying the state control criterion and its potential to deviate from previous practices in specific cases.<sup>4</sup>

Finally, the *Kodak* case emphasizes the flexibility of the “control” concept in different legal contexts and its dependence on the specific context and available evidence.<sup>5</sup> In this case and similar ones like *Eghra*, the Tribunal showed that even without direct instructions, the actions of entities that are structurally involved in performing governmental functions can be attributable to the state. In general, the IUSCT uses the indications and documents available in the cases to determine the threshold of control for attributing the conduct of non-state entities to the state and adopts a flexible and dynamic approach that consistently emphasizes the direct and specific effect of state actions on the claimant’s rights.

An analysis of the Tribunal’s practice shows that this legal entity has, in specific instances, distinguished between the phase of establishing jurisdiction and the merits. The Tribunal has applied a lower threshold for the control criterion at the jurisdiction phase and more stringent criteria at the merits phase. Furthermore, from the Tribunal’s perspective, the exercise of governmental authority by entities such as the Bonyad-e Mostazafan has been the basis for

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*Inc v Islamic Republic of Iran* (n 45).

<sup>1</sup> *Flexi Van Leasing Inc v Iran* (1986) 12 Iran-US CTR 335.

<sup>2</sup> Ahmad Mozaffari and Mehdi Nikfar, *Selected Awards of the Iran-United States Claims Tribunal (Volume 2)* (Qoqnoos, Tehran 2020) 181 [In Persian].

<sup>3</sup> *PepsiCo Inc v Islamic Republic of Iran* (1986) 13 Iran-US CTR 3.

<sup>4</sup> *PepsiCo Inc v Islamic Republic of Iran* (n 36) 6.

<sup>5</sup> *Eastman Kodak Co v Iran* (1987) 17 Iran-US CTR 153, 166.



attributing these acts to the Government of Iran, and not merely the Bonyad being under state control.<sup>1</sup> This approach demonstrates the Tribunal's flexibility in assessing the concept of control and the attribution of conduct, offering varying interpretations of the relationships between private entities and the state depending on the circumstances of each case. This approach is particularly important in claims related to the functioning of state-controlled entities like the Bonyad-e Mostazafan for determining state responsibility.

#### 4. The Standard of Control in State Ownership of Non-State Actors

One of the key axes in analyzing cases where the Tribunal has addressed the role of control as the basis for attributing the conduct of non-state entities to the state has been the issue of ownership and control. To clarify this standard, the case of *Flexi-Van Leasing Inc. v. The Government of the Islamic Republic of Iran*<sup>2</sup> is presented. In this case, the claimant was a company engaged in leasing transportation equipment, such as cargo containers, chassis, and trailers, worldwide. Prior to 1979, the company had leased some of its equipment to companies operating in Iran, including Starline and Iran Express. Flexi-Van claimed that the Government of Iran had gained control of these two Iranian companies before February 29, 1980, and, consequently, using its control, had violated the contractual rights of the claimant company under the lease agreements (including receiving future rental payments and the return of equipment) and had expropriated them. According to the claims, Iran Express had stopped paying rent since March 1979, and Starline since mid-1978. The claimant argued that in February 1980, three managers appointed by the Iranian government, along with Revolutionary Guards, had occupied the headquarters of Iran Express and dismissed its managers and officials. Later, the Government of Iran also appointed individuals as new managers of this company through the Ministry of Roads and Transportation. Regarding Starline, the claimant provided documents indicating that the Bonyad-e Mostazafan had expropriated and taken complete control of this company at least from early 1980.<sup>3</sup>

The defenses of the Iranian government consisted of two parts. First, the government denied exercising any control over these two companies, and second, even if expropriation were proven, the changes made had only affected the position of the shareholders and not the legal personality of the companies themselves, which remained obligated to their debts and commitments. Therefore, in the government's view, the Government of Iran was not responsible for fulfilling the contractual obligations of these companies.<sup>4</sup> However, in its award, the Tribunal declared that "Starline was under the control of the Bonyad-e Mostazafan, and thus, under the control of the Government of Iran." Nevertheless, the Tribunal pointed out the important fact that the documents in the case did not show the form and details of this control or whether this control had led to interference in the management or day-to-day decision-making of Starline.<sup>5</sup> The Tribunal explicitly stated that "mere proof of the

1 *Hyatt International Corp v Government of Islamic Republic of Iran* (1985) 9 Iran-US CTR 72, 87.

2 *Flexi Van Leasing Inc v Iran* (n 33).

3 *Flexi Van Leasing Inc v Iran* (n 33) para. 349.

4 *Flexi Van Leasing Inc v Iran* (n 33).

5 Mozaffari and Nikfar (n 34) 128.

Government's control over Starline is not sufficient for the claim of expropriation of the claimant's contractual rights." Expropriation of contractual rights can only be argued if there has been specific and attributable interference in the claimant's contractual rights themselves. The Tribunal further argued: For the claimant to prove its claim of expropriation, it must show that Starline or Iran Express, when failing to pay rent or return the equipment, did so based on instructions, recommendations, or orders from the Bonyad or the Government of Iran.<sup>1</sup>

What becomes clear from the *Flexi-Van Leasing* case is that although the Tribunal confirmed the government's control over Starline through the Bonyad-e Mostazafan, it emphasized that Starline had already been defaulting on rent payments and returning containers before its takeover by the Bonyad and continued this performance afterward. Therefore, based on the available evidence, it cannot be proven that this refusal was carried out under government orders, and consequently, the Government of Iran cannot be held responsible in this matter. Regarding Iran Express, despite the Tribunal's acknowledgment that this company had come under government control from early 1980, the Tribunal, citing similar reasons, did not consider the type and extent of control exercised by the government sufficient to conclude that government interference in the contracts between Iran Express and the claimant was significant enough to be considered expropriation.

A noteworthy point is that the Iranian Arbitrator, in his Concurring Opinion in the *Flexi-Van* case, explicitly stated: "No government is *ipso facto* responsible for the acts and obligations of private companies or even public institutions by virtue of the fact that such companies can be considered under the 'control' of the government, unless those acts or obligations are specifically and legally attributable to the government itself."<sup>2</sup> Accordingly, from the review of the Tribunal's view in the *Flexi-Van* case, it appears that the threshold of control considered by the Tribunal for establishing its jurisdiction (according to Paragraph 3 of Article VII of the Claims Settlement Declaration) is not entirely identical to the threshold of control considered by the Tribunal for the attributability of wrongful conduct of private persons and entities to the state. In the latter case, the Tribunal has deemed a higher threshold of control necessary, which aligns more closely with the effective control theory.

The Tribunal's practice in the case of *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran*<sup>3</sup> is also based on this same approach. In this case, the Foremost group of companies, which had a share in establishing Pak Dairy in Iran, claimed that since late 1978, Iranian governmental entities that were shareholders in Pak Dairy had taken actions that effectively deprived Foremost of exploiting and using its 31% share in the company. In response, the Respondents claimed that Pak Dairy was not under government control and that the units related to the case which were shareholders (including the Organization for Investment and Economic and Technical Assistance of Iran, the National Iranian Investment Company, the Bank of Industry and Mines, and the Bonyad-e Mostazafan) had merely exercised their rights as shareholders and had not implemented government policy. The Respondents also emphasized the difference

1 Mozaffari and Nikfar (n 34) 129.

2 Mozaffari and Nikfar (n 34) 131.

3 *Foremost Tehran Inc v Islamic Republic of Iran* (1986) 10 Iran-US CTR 228.



between expropriation and majority share ownership by government entities, stating that this does not change the private nature of the company.<sup>1</sup> Adopting this approach, when examining whether Pak Dairy was a “entity controlled by the Government of Iran” under Paragraph 3 of Article VII of the Claims Settlement Declaration for establishing jurisdiction, the Tribunal simultaneously considered two criteria: the identity of the shareholders and the composition and conduct of the board of directors. In the Tribunal’s opinion, majority share ownership and control of the board of directors together proved that Pak Dairy was an entity “controlled by the Government of Iran,” and thus the Tribunal affirmed its jurisdiction over this case.

## 5. The Standard of Control in the Management of Non-State Actors

The Tribunal’s practice indicates that the mere existence of state control (through share ownership or the presence of government representatives on the board of directors) is insufficient for attributing responsibility. The Tribunal emphasizes the necessity of a direct causal link between the company management’s actions (which are influenced by or result from government orders) and the violation of the claimant’s rights. In other words, it must be proven that the company management acted on behalf of the state and in execution of its policies.

In the *Foremost* case, the Tribunal emphasized that Foremost, as a minority shareholder, should not have expected to be able to successfully oppose the policies of the majority (governmental) shareholders, who were advancing their actions in coordination with the policies of the revolutionary government. In the Tribunal’s view, the only action by the majority that was explicitly against Foremost’s interests and for which the state was held responsible was the prevention of dividend payments. However, this specific interference was not in itself considered expropriation. The American Arbitrator also noted that the Government of Iran was held responsible for the actions of a private company because the managers who represented state entities and state banks, and who held the majority of shares, dominated the company.<sup>2</sup> However, the Tribunal only found the requisite degree of control concerning the prevention of cash dividend payments to the claimants, and only this action was attributed to the Government of Iran. This case shows that for holding the state responsible, the Tribunal seeks to prove direct and effective government interference through the company’s management in violating the claimant’s rights.

In the *PepsiCo* case, PepsiCo sought payment for Pepsi-Cola syrup delivered to the various Zamzam companies. The claimant alleged that the Bonyad-e Mostazafan was an entity controlled by the Government of Iran and, by executing government orders, had taken over the shares of the Zamzam companies and placed them under government control. In response, the Respondents denied this, stating that the Bonyad-e Mostazafan was a private charitable organization with an independent legal personality and that the Zamzam companies were not, within the meaning of Paragraph 3 of Article VII of the Claims Settlement Declaration, under the control of the Bonyad-e Mostazafan. In this case, the Tribunal deemed the Bonyad-e

<sup>1</sup> *Foremost Tehran Inc v Islamic Republic of Iran* (n 45) para.188. See also Seyed Ghasem Zamani and Parastu Vosoughi, ‘The Role of the Iran-United State’ (2024) 2 Iranian Journal of International and Comparative Law 42.

<sup>2</sup> Mozaffari and Nikfar (n 34) 198.



Mostazafan an entity controlled by the Government of Iran and, relying on the two criteria of majority share ownership and control of the board of directors, stated that the Bonyad had also placed the Zamzam companies under government control.<sup>1</sup> However, in its merits review, the Tribunal merely noted that the Government of Iran and the Bonyad-e Mostazafan denied any responsibility for the claimant's claim and disregarded the Bonyad's response, which claimed it had acted merely as a shareholder in the Zamzam company.<sup>2</sup> It seems the Tribunal in this case did not provide sufficient reasoning for the attributability of the Zamzam companies' actions to the Government of Iran and the Bonyad. Nevertheless, the Tribunal ordered payment from the security account, effectively holding the Government of Iran responsible for the conduct of the Zamzam companies. This approach by the Tribunal differs from the *Flexi-Van* and *Foremost* cases and applied a lower threshold for attribution.

In the *Economy Forms* case, the claimant alleged that the Sabir and Mana companies, which were under the control of the Government of Iran, had refused to perform their contractual obligations and attributed the responsibility for this breach to the Government of Iran. Accepting this claim, the Tribunal declared that the Respondents themselves had admitted that 100% of Mana company's shares belonged to the Industrial Development and Renovation Organization (IDRO), and that this organization was wholly owned by the Government of Iran and some state entities. Furthermore, part of Sabir company's shares were owned by the Ministry of Energy.<sup>3</sup> In contrast, the Iranian Arbitrator, in a Dissenting Opinion, criticized the Tribunal's award. He argued that the mere establishment of public institutions by the government or state supervision over their performance is not, by itself, sufficient reason to equate the legal status of these institutions with the state, either in domestic or international law. In his view, the connection or link of a public institution to the state can only be accepted within the framework of international law if that institution in fact acts as one of the state's organs or an executive arm. He emphasized that the mere existence of a control relationship between the state and an institution is insufficient for attributing its responsibility to the state, and it must be proven that the state exercised intense and pervasive control over the institution. However, in the Iranian Arbitrator's opinion, the Tribunal in this case had not established such severe control yet still considered the mentioned companies to be under the control of the Government of Iran.<sup>4</sup>

In the *Schering Corporation* case, the claimant alleged that the Workers' Council, formed after the revolution in the offices and factory of Iran-Schering, had taken financial control of the company and prevented it from paying its debts to the claimant for the purchase of pharmaceutical products. In this case, the Tribunal faced the issue of whether the Government of Iran was responsible for the actions of workers' councils. Referring to Article 104 of the Constitution of the Islamic Republic of Iran, the Tribunal noted that this article provides for the formation of workers' councils. However, the Tribunal emphasized that the mere provision for the formation of these councils in the constitution does not imply that the councils acted

1 *PepsiCo Inc v Islamic Republic of Iran* (n 36).

2 *PepsiCo Inc v Islamic Republic of Iran* (n 36) 6.

3 *Economy Forms Corp v Islamic Republic of Iran* (1982) 3 Iran-US CTR 42.

4 Mozaffari and Nikfar (n 34) 211.



as part of the state structure. Ultimately, the Tribunal concluded that in the present case, there was no reason to indicate that the Workers' Council had acted on behalf of the Government of Iran or state organs. According to the Tribunal, the Council members were not selected by the government, no instructions or recommendations were communicated to the Council by the government, and the Council did not carry out its actions on the orders of any state institution.<sup>1</sup>

In the *Otis Elevator* case, the claimant alleged that the conduct of a group of Iranian workers who had formed a trade union to protect the rights and interests of their members was attributable to the Government of Iran. He claimed that the Ministries of Labour and Commerce had actively supported the trade union's actions. However, the Tribunal clarified that to prove this claim, the claimant must specifically prove two things: first, that the mentioned ministries had interfered in the trade union's affairs, and second, that these ministries had encouraged or participated in the union's actions. Ultimately, due to the claimant's inability to provide sufficient evidence to prove these points, the Tribunal rejected his claim.<sup>2</sup>

The Tribunal's practice shows that for attributing responsibility to the state, there must be a direct and effective link between the state's policies and actions (through the management of companies) and the violation of the claimant's rights. Mere share ownership or the membership of government representatives on the board of directors is insufficient for attribution. The Tribunal usually seeks to prove that the company management, acting on the orders or encouragement of the state, took actions that led to the violation of the claimant's rights. The *PepsiCo* case is an example where the Tribunal deviated from this practice and attributed responsibility to the state using a lower threshold.

## Conclusion

The attribution of conduct to the state is a cornerstone issue in international law, determining how the conduct of non-state actors is attributed to states for the breach of their obligations. While the general principle is to attribute the conduct of state organs to the state itself, in exceptional cases, the conduct of non-state actors may also be attributable to the state, provided that the state exercises control, direction, or instruction over those actors. This standard of control, particularly in light of the practice of international judicial bodies such as the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY), has been subject to differing interpretations; the ICJ, with its "effective control" approach, and the ICTY, with its "overall control" approach, have delineated different scopes for attributing the conduct of non-state actors to states. The importance of the criterion of direction and control for the Iran-United States Claims Tribunal (IUSCT/ Tribunal) is also rooted in this Tribunal's jurisdiction to hear claims between states and their nationals. Establishing state control over private entities justifies the Tribunal's jurisdiction to hear these claims and is also effective in determining compensation from the security account and in examining cases of expropriation and taking. Ultimately, although company ownership

<sup>1</sup> *Schering Corporation v Islamic Republic of Iran* (1984) 5 Iran-US CTR 361.

<sup>2</sup> *Otis Elevator Co v Islamic Republic of Iran* (1987) 14 Iran-US CTR 283.



also plays a role in determining state control, the Tribunal's practice shows that for attributing the conduct of non-state actors, an effective causal link between state control and the harmful act must be proven.

In cases where entities or institutions are considered non-governmental under domestic law but perform governmental or quasi-governmental duties and functions, the Tribunal examines the entity's statute, delegated authority, and the degree of government involvement in that entity to determine whether its actions can be attributed to the state. Even if an entity possesses public assets, this alone is insufficient to attribute its actions to the state; rather, it must be seen whether the state exercises control over the activities of that entity. In conditions of chaos, such as during a revolution, proving a link between the individuals or groups that committed acts and the state is difficult. However, the state cannot evade responsibility by invoking these conditions. If the state allows groups such as the Islamic Revolutionary Committees to act as local security forces and delegates governmental authority to them, the state will be responsible for the actions of these groups. On the other hand, mere state ownership of a company or entity is insufficient to attribute its actions to the state. It must be proven that the state exercised effective control over the company's activities and that the company's wrongful acts stemmed from state instructions or policies. Even if a company is under the control of the Bonyad-e Mostazafan (which is under state control), the state cannot be held responsible for that company's actions based solely on this argument. It must be proven that the state directly interfered in the violation of the claimant's rights. Furthermore, the mere existence of state control (through share ownership or the membership of government representatives on the board of directors) is insufficient for attributing responsibility. There must be a direct causal link between the actions of the company's management (which are influenced by or result from state orders) and the violation of the claimant's rights. In other words, it must be proven that the company management acted on behalf of the state and in line with its policies. In summary, the IUSCT, for attributing the acts of non-state entities to the state, seeks to prove the state's effective control over that entity and a causal link between this control and the violation of the claimant's rights. Mere ownership or the membership of government representatives on the board of directors is insufficient for attributing responsibility.



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## A COMPARATIVE ANALYSIS OF STATE CRIMINAL LIABILITY FOR ENVIRONMENTAL CRIMES: CHALLENGES AND APPROACHES IN THE CRIMINAL LAW OF IRAN AND FRANCE

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Environmental crimes have emerged among the foremost international challenges, with states assuming a decisive role in their emergence, perpetuation, and deterrence. While governments bear a statutory duty to protect the environment, developmental policies and regulatory decisions may, directly or indirectly, facilitate the proliferation of such crimes. This study conducts a comparative analysis of the criminal liability of state for environmental crimes within the legal systems of Iran and France. The central research question is: To what extent can states be held criminally liable for environmental crimes, and what principal distinctions characterize the approaches of these two legal systems? The operative hypothesis posits that in Iran, state liability remains predominantly confined to administrative and civil spheres due to insufficient criminalization, whereas France has developed a more coherent juridical framework acknowledging the potential criminal liability of public legal persons. Methodologically, the study adopts a descriptive-analytical approach, utilizing library and documentary resources, within a comparative criminal law framework informed by theories of corporate criminal liability. The findings indicate that reforms within French criminal law, particularly within specialized environmental statutes and the Penal Code, enable the prosecution of public institutions and, under certain circumstances, state entities for environmental violations. French jurisprudence has further elaborated the doctrine of corporate criminal liability to enhance environmental protection. Conversely, the Iranian system remains principally oriented toward civil and administrative remedies, hampered by deficient enforcement regimes and substantial legal ambiguities regarding the recognition of the state as a subject of criminal liability. This study concludes that Iran necessitates a revision of its legislative framework, incorporating insights from the French experiences, to reinforce its criminal policy for effective environmental protection.

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## Introduction

In recent decades, environmental crises have transcended limited and local challenges to emerge as among the most serious global threats. Extensive deforestation, air and water pollution, the destruction of plant and animal species, the rise of airborne particulates, and climate change constitute merely a partial catalogue of the dangers currently threatening human health, ecological security, and sustainable development. Within this context, governments - the primary institutions responsible for environmental policymaking and regulation - assume a dual role. On the one hand, they bear an obligation to establish the requisite legal, supervisory, and criminal mechanisms to address environmental threats. On the other hand, their own development-oriented and economic policies can intensify environmental degradation.

Despite the expansion of domestic and international regulations promoting environmental protection, the legal status of states as juridical persons with potential criminal liability for environmental offenses remains ambiguous and inconsistent. International instruments such as the Stockholm Declaration, the Rio Conference outcomes, and the Paris Agreement, emphasize state responsibility in protecting the environment. However, these commitments are predominantly ethical and political in nature and typically lack effective mechanisms for criminal enforcement.

At the domestic level, many jurisdictions continue to perceive the state primarily as a “regulator” rather than a potential “perpetrator,” thereby subjecting it less frequently to criminal scrutiny. Nevertheless, certain legal systems - most notably that of France - have introduced significant reforms in criminal and environmental law in recent years, enabling the imposition of criminal liability on public bodies and state-affiliated institutions. Within these systems, the state and its subsidiaries may be subject to prosecution and sanction where they commit or facilitate environmental offenses. This development represents a crucial shift from a regime of merely administrative or civil liability toward one of genuine criminal responsibility.

In contrast, Iran’s legal system relies predominantly on civil and administrative frameworks, with the criminal liability of state entities remaining extremely limited. Deficiencies in criminalization, the absence of effective sanctioning regimes, and normative

gaps have engendered a *de facto* immunity for the state, disrupting the necessary balance between state authority and environmental protection.

The importance of this issue can be articulated from several perspectives. First, from the standpoint of environmental criminal law, it is evident that comprehensive enforcement of environmental regulations cannot be achieved without recognizing the criminal responsibility of state institutions. How can citizens or private actors be expected to comply with the law if the government itself is not held accountable? Second, from a comparative criminal policy perspective, examining the French experience - which has developed a relatively coherent framework for the criminal liability of public legal persons - can offer valuable guidance for the reform of Iranian legislation. Third, from a social and practical standpoint, the consequences of environmental offenses are often irreversible and pose serious risks to public health and natural resources. Therefore, clarifying the scope of state criminal liability is not merely a theoretical debate but a necessity for safeguarding the rights of present and future generations. In light of the foregoing, the aim of this research is to conduct a comparative analysis of the criminal liability of states for environmental offenses and to identify the respective strengths and weaknesses of the legal systems of Iran and France. The study seeks to illustrate how legal reforms in France have facilitated the effective enforcement of criminal sanctions against public institutions, whereas in Iran, limited criminalization, insufficient implementation of laws, and structural gaps have hindered the establishment of a clear and functional framework for such liability.

The central research question is: "To what extent can states bear criminal responsibility for environmental offenses, and what principal distinctions exist between the legal systems of Iran and France in this regard?" Based on a preliminary analysis, it appears that in Iranian law, the criminal liability of the state is significantly restricted and largely confined to civil and administrative responsibility, whereas French law provides a more coherent and enforceable framework for recognizing the criminal responsibility of public legal entities.

This research employs a descriptive-analytical methodology, utilizing library resources, legal documents, judicial precedents, and a comparative approach to furnish a reasoned and substantiated response to the main research question.

## 1. Review of Literature

This study adopts two primary theoretical pillars to examine the criminal liability of states in the context of environmental crimes within the legal systems of Iran and France. In this vein, theories of corporate criminal liability are introduced to offer the conceptual foundation for extending criminal responsibility to states and public institutions. The introduction of these perspectives facilitates both a rigorous conceptual analysis and a structured comparative assessment across distinct legal systems.

### 1.1. Comparative Criminal Policy

a) Historical development: Traditional criminal law limited liability exclusively to natural persons, thereby granting states and public institutions a *de facto* immunity from criminal



prosecution. However, with the expansion of state and corporate activities throughout the twentieth century, new theoretical frameworks emerged that recognized legal entities as independent actors capable of bearing criminal responsibility (Elezi, 2024: 79). This shift reflected the growing inadequacy of relying solely on individual accountability in the context of industrial development and state-sponsored environmental harm.

b) Agency/representation theory: This theory maintains that the actions of managers, officials, or agents may be attributed directly to the organization they represent. Accordingly, when a state official or public agent commits an environmental offense within the scope of their official duties, the act can be imputed to the state or public institution itself (Westbrook, 2023: 141–142). This approach functions as a safeguard against governmental evasion of liability by establishing a clear link between individual misconduct and the organization's overarching legal responsibility.

c) Collective identity theory: According to this theory, legal entities possess a coherent "collective will," enabling them to commit offenses independently of the individuals who compose them. As such, states and public institutions may themselves be regarded as direct perpetrators. This theoretical perspective has formed the foundation of several significant reforms in European legal systems, including France, and it supports the imposition of sanctions such as substantial fines or operational restrictions on public bodies (Sarch, 2024: 927–928).

d) Risk–benefit theory: Under this theory, liability is imposed when a legal entity either derives benefit from, or creates risk through, an unlawful act. In the realm of environmental law, this approach is especially relevant where state-led development projects generate pollution or cause ecological degradation. Here, the decisive criterion for establishing liability is either the hazardous consequence produced or the direct benefit obtained from the activity, even in the absence of demonstrable criminal intent (Van Rijssel et al., 2025: 69).

## 1.2. Theories of Corporate Criminal Liability

a) Historical development: In traditional criminal law, the principle of personal culpability prevented the attribution of liability to legal persons. States and public institutions were therefore regarded as immune from criminal prosecution. However, from the twentieth century onward, with the expansion of collective activities and the increasing complexity of social and economic relations, new theories emerged that allowed for the prosecution of legal persons. The rise of large corporations, international organizations, and the expanding role of the state in the economy and industry demonstrated that focusing solely on individual responsibility was no longer sufficient. Consequently, legislators and courts gradually began to recognize legal entities as independent social actors capable of bearing criminal responsibility (Elezi, 2024: 79).

b) The agency or representation theory: This theory posits that the actions of managers and representatives of a legal entity can be attributed to the entity itself. Thus, if a governmental official or agent, acting within the scope of their duties, commits an environmental crime, such conduct may be ascribed to the state or a public body. This perspective is grounded in the principle of vicarious liability and has been widely employed in environmental cases as

the basis for holding public institutions accountable. The significance of this theory lies in its capacity to connect the conduct of individual officials to the organizational will of the state, thereby preventing governmental evasion of responsibility (Westbrook, 2023: 141–142).

c) The collective identity theory: According to this theory, legal entities possess a “collective will” and can independently commit crimes. Within this framework, the state or its affiliated organizations may themselves be regarded as perpetrators. This theory has formed the basis of numerous legal reforms in European jurisdictions, including France. It emphasizes that states and public institutions are not merely aggregations of individuals, but independent legal persons capable of decision-making and lawbreaking. This perspective supports the imposition of sanctions such as heavy fines or legal restrictions on public institutions, representing a significant step toward ensuring governmental accountability for environmental crimes (Sarch, 2024: 927–928).

d) The risk–benefit theory: Some scholars argue that a legal person should bear responsibility when it has either benefited from, or created risk through, a criminal act. In the field of environmental law, this theory is particularly relevant in situations where state development projects lead to widespread environmental degradation or pollution. Here, the primary criterion for liability is the “hazardous consequence” or the “direct benefit” derived from the unlawful activity. For example, if a state-sponsored industrial project is implemented without adherence to environmental safeguards and results in massive pollution, the state should be held liable—even in the absence of proven criminal intent. This theory is closely aligned with the principles of precaution and prevention in environmental law (Van Rijssel et al., 2025: 69)

### **1.3. Comparative Criminal Policy & Theories of Corporate Criminal Liability**

**a) Historical Development:** Traditional criminal law was confined to natural persons based on the principle of personal culpability, which afforded states and public institutions a *de facto* immunity from criminal prosecution. However, following the expansion of corporate and state activities throughout the twentieth century, particularly with the rise of large corporations and the increasing role of the state in industry, this individual-focused approach proved inadequate. New theoretical frameworks consequently emerged, recognizing legal entities as independent social actors capable of bearing criminal responsibility. This doctrinal shift responded to the growing complexity of social and economic relations and the need to address harms, such as state-sponsored environmental damage, that could not be sufficiently remedied through individual accountability alone.

**b) Agency/Representation Theory:** This theory maintains that the actions of managers, officials, or agents can be directly attributed to the organization they represent. Consequently, when a state official or public agent commits an environmental offense within the scope of their official duties, the act may be imputed to the state or public institution itself. Grounded in the principle of vicarious liability, this approach functions as a juridical safeguard against state evasion of responsibility by establishing a clear nexus between individual misconduct and the organization’s overarching legal will. It has been widely employed as a basis for holding public institutions accountable in environmental cases.



**c) Collective Identity Theory:** According to this theory, legal entities possess a coherent “collective will,” enabling them to commit offenses independently of their constituent individuals. Within this framework, states and public institutions are not mere aggregations of individuals but are regarded as direct perpetrators capable of independent decision-making and lawbreaking. This theoretical perspective has informed significant reforms in European legal systems, including that of France. It supports the imposition of sanctions - such as substantial fines or operational restrictions - on public bodies, representing a major step toward ensuring state accountability for environmental crimes.

**d) Risk-Benefit Theory:** Under this theory, liability is imposed when a legal entity either derives a direct benefit from, or creates a foreseeable risk through, an unlawful act. In environmental law, this approach holds particular relevance where state-led development projects generate pollution or cause ecological degradation. The decisive criterion for establishing liability is either the hazardous consequence produced or the benefit obtained, even in the absence of demonstrable criminal intent. For instance, if a state-sponsored industrial project, implemented without proper safeguards, causes massive pollution, the state can be held liable. This theory aligns closely with the principles of precaution and prevention in environmental law.

## 1.4. Conceptual Framework of the Study: Relationship of Theories with the Criminal Liability of States

While these theories were originally developed in the context of private legal entities, their application to states and public institutions remains contested. Proponents argue that when the state contributes to environmental harm, it should incur liability in the same manner as any other legal person. Critics, however, emphasize concerns related to sovereignty, immunity doctrines, and the unique constitutional status of the state. Notwithstanding this debate, the French legal experience demonstrates that distinguishing between sovereign acts (*actes de gouvernement*) and administrative or commercial acts enables the recognition of state criminal liability in specific domains, including environmental protection.

### 1.4.1. Analytical Contribution of the Framework

The synthesis yields a multidimensional analytical framework:

- **Theoretical Perspective:** It provides a justification for recognizing criminal liability of states for environmental offenses.
- **Practical Perspective:** It employs the French model to propose feasible and effective reforms for the Iranian legal system.
- **Comparative Policy Perspective:** It offers a structured methodology for adapting successful foreign legal mechanisms to the Iranian context, thereby enhancing enforcement and strengthening institutional accountability.

Together, these dimensions illustrate that holding states criminally liable for environmental crimes is not only conceptually defensible but also imperative for promoting environmental justice and improving the effectiveness of criminal sanctions.

### 1.4.2. Implications for Iranian Legal Reform

Applying these combined theories highlights several critical areas for reform within Iran's legal system:

- Strengthening the legal recognition of state liability for environmental harm;
- Integrating preventive and corrective criminal policies into environmental governance structures;
- Developing specialized judicial mechanisms and tribunals to ensure effective and consistent enforcement;
- Incorporating insights from international experiences - particularly those of France - to implement proportionate sanctions and remedial measures.

Such reforms would help ensure that both state and private actors are held accountable, thereby narrowing the extant gap between normative principles and practical implementation in environmental criminal law.

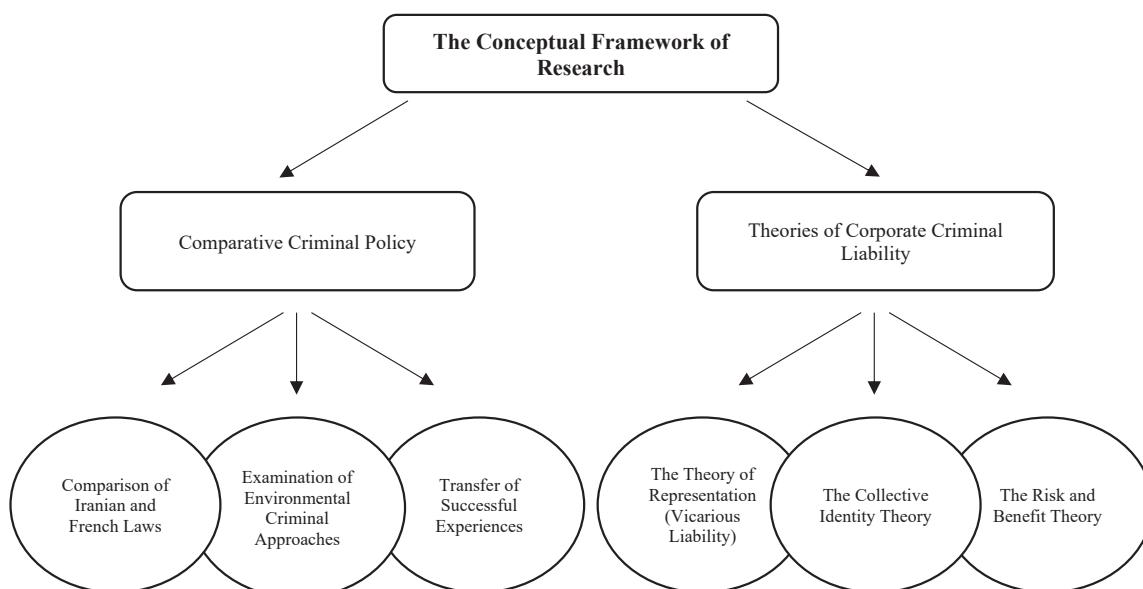


Figure 1 - Conceptual Framework of the Research (Designed by the Authors)

## 2. Research Findings

### 2.1. The Legal Status of Iran Regarding the Criminal Liability of the State for Environmental Crimes

#### 2.1.1. Legal and Constitutional Foundations

In the Iranian legal system, the foundations of state responsibility for environmental protection are primarily articulated in the Constitution, ordinary legislation, and specific regulatory frameworks. Article 50 of the Constitution stipulates that: "In the Islamic Republic, the protection of the environment upon which present and future generations must rely for a progressive social life is regarded as a public duty. Therefore, economic and other activities that result in pollution or irreversible environmental destruction are prohibited."<sup>1</sup> Although

<sup>1</sup> Farhad Mohseni, *The Supreme Court and environmental law in Iran* (University of Tehran Press 2022), 24.



this Article imposes a general and binding obligation on both the state and citizens, it lacks explicit criminal enforcement mechanisms. Ordinary legislation, such as the Environmental Protection and Enhancement Act (1974) and the Law on the Prevention of Air Pollution (1995), identifies certain environmental offenses; however, these statutes predominantly assume that perpetrators are natural persons or private corporations. The state, as a public legal entity, is rarely subjected to criminal liability within this legislative scheme.<sup>1</sup>

### 2.1.2. The Position of the State in Iran's Criminal System

In Iranian criminal law, the principle of individual criminal responsibility constitutes the primary obstacle to recognizing criminal liability of the state. This principle dictates that only a natural person who commits a criminal act with requisite intent (*mens rea*) may be punished, and liability cannot be imputed to another entity, including the state. Given that the state, as a juridical person, lacks direct criminal intent, the attribution of *mens rea* becomes problematic. Traditionally, this conceptual gap has confined state responsibility to civil compensation or administrative sanction, rather than criminal punishment.<sup>2</sup>

Islamic jurisprudence further reinforces this limitation. Criminal doctrines such as *qisas* (talio), *hudud* (fixed punishments), and *diyya* (blood money) are inherently directed at natural persons and cannot be applied practically to abstract entities such as the state. As a result, state institutions enjoy a form of relative immunity from direct criminal accountability. In practice, when state bodies cause environmental harm - for instance, pollution from a state-owned factory - penalties tend to be limited to civil compensation, administrative measures, or sanctions levied against individual employees. This approach significantly diminishes the deterrent effect of environmental legislation.<sup>3</sup>

By contrast, several other jurisdictions, including France and the United States, recognize that juridical persons including corporations and, in some cases, public institutions can be held criminally liable, particularly for environmental and economic crimes. This approach ensures that institutional actors cannot evade accountability solely based on their legal status or sovereign character. While Iran's reliance on civil and administrative liability stems from legal tradition and concerns regarding state authority, it diminishes the effectiveness of the criminal justice system in key areas such as environmental protection. Increasingly, scholars argue for acknowledging at least limited criminal liability for state juridical persons, allowing sanctions for harmful acts while preserving exemptions for acts of pure sovereignty. Such recognition would align Iran with international practice, enhance deterrence, and strengthen institutional accountability.

### 2.1.3. Legal and Institutional Barriers

Several significant doctrinal and institutional obstacles preclude the recognition of state criminal liability for environmental offenses in Iran. First, ambiguity exists as to whether the state, as a juridical person, may be held accountable, since the Islamic Penal Code of 2013, while recognizing the liability of legal persons, does not explicitly include public institutions.

<sup>1</sup> Mohammad Taghizadeh Ansari, *Environmental law in Iran* (SAMT 2020), 6668-.

<sup>2</sup> Ali Karkhaneh, *Analysis of international environmental instruments* (Majd 2022), 53.

<sup>3</sup> Seyed Hassan Tayebi, *Environmental law* (Majd 2023), 171172-.



Second, most environmental statutes emphasize administrative measures and financial penalties, offering few genuinely punitive criminal sanctions. Third, judicial practice remains underdeveloped, with courts rarely prosecuting state bodies and instead directing legal action toward lower-level officials. Fourth, a pattern of selective enforcement allows agencies vested with environmental responsibilities - such as the Ministry of Energy or the Department of Environment - to operate with considerable impunity despite their potential contribution to environmental degradation.<sup>1</sup>

Collectively, these barriers render the criminal liability of the state a largely theoretical construct, seldom enforced in practice. This results in inadequate deterrence, persistent state violations, and recurrent infringements upon both citizens' rights and environmental protection. To remedy these deficiencies, clear legislative recognition, enforceable criminal sanctions, and robust judicial oversight are imperative.

#### 2.1.4. Case Examples and Judicial Practice

In Iran, numerous legal proceedings have addressed issues such as deforestation, water contamination, and air pollution. However, most prosecutions target individuals or private companies, while state-owned industrial enterprises - such as refineries and power plants - typically face civil remedies rather than criminal sanctions. Courts frequently mandate pollution abatement, environmental restoration, or financial compensation, yet criminal liability rarely extends to the state institutions themselves. In some cases, managers or employees have been subject to prosecution, but the overarching organizations, including ministries and state-owned enterprises, remain largely shielded from direct accountability.<sup>2</sup>

This jurisprudential pattern highlights three key tendencies within the Iranian judiciary's approach to environmental offenses:

- A predominant focus on individual or corporate liability, consistent with the entrenched principle of personal criminal responsibility;
- The primacy of civil liability, emphasizing compensatory and remedial over punitive measures;
- A *de facto* immunity for state-owned institutions, which seldom face direct criminal sanctions even when they are the principal source of pollution.

These tendencies carry significant implications. The practical immunity afforded to state entities attenuates the deterrent function of the law, while civil or administrative sanctions alone provide only partial prevention. This dynamic also undermines environmental justice and erodes public trust, as citizens and environmental advocates increasingly perceive a lack of accountability for the state's role in environmental degradation.

Overall, the Iranian legal regime governing environmental protection is characterized by normative ambiguity and practical weakness regarding state responsibility. While statutory provisions endorse environmental preservation, they fail to impose meaningful criminal sanctions on public institutions. Consequently, many environmental harms directly

1 Ali Mashhadi, *Compilation of basic laws and regulations of environmental law* (Khorsandi 2025), 201204-.

2 Mohammad Aghaseyed Jafar-Kashfi, *Environmental law and sustainable development of the oil and gas industry* (Majd 2022), 142144-.



attributable to state activities fall beyond the purview of criminal prosecution, resulting in a significant enforcement gap.

### **2.1.5. Case Study: Iran's Approach to Environmental Crimes - *The Iralco Case (2025): Criminal Conviction of an Industrial Company for Environmental Pollution***

This case exemplifies judicial action in Iran addressing environmental crimes committed by a large industrial entity. By adjudicating against the Iran Aluminum Company (Iralco), the court demonstrated that criminal liability for legal persons can be applied in practice, although the central state itself remains largely exempt.

- **Case Summary:** Following reports from the Environmental Protection Organization of Arak County regarding the continuous emission of hazardous pollutants from the Iran Aluminum Company (Iralco), which posed a persistent threat to public health, the Public and Revolutionary Prosecutor's Office of Arak initiated a criminal investigation. Technical and expert assessments were conducted under judicial supervision, a formal indictment was issued, and the court subsequently heard the case. On the stipulated date, the court rendered a final ruling against the company.
- **Summary of the Verdict:** The court held Iralco, as a legal entity, criminally liable under statutory provisions relating to “threats to public health through air pollution.” The imposed sanctions included a monetary fine equivalent to five times the assessed damages, payable to a designated government fund; the implementation of public service measures (including, according to reports, an obligation to plant 100,000 saplings); and ongoing judicial supervision of mandated corrective actions. The full text of the ruling has not been publicly disseminated, but its key provisions were reflected in official statements released by the Judiciary.
- **Legal Analysis:**
  - **Criminal Liability for Legal Entities:** The ruling illustrates that Iranian courts can, in practice, apply principles of criminal liability to corporate entities within the industrial sector, confirming the operational recognition of “punishable legal persons.”
  - **Nature of Sanctions:** The amalgamation of substantial fines, environmental remediation obligations, and judicial oversight reflects an emerging trend toward integrating pecuniary and corrective sanctions. However, purely carceral penalties (such as custodial sentences for senior managers) were not emphasized in the official pronouncements.
  - **Scope and Limitations:** The prosecution was directed principally at the corporate entity and its executive managers rather than the central state or its ministries. Consequently, the “*de facto* immunity” of high-level state institutions remains substantially intact. Furthermore, the limited public access to the complete judicial ruling precludes a more granular and precise legal analysis.<sup>1</sup>

<sup>1</sup> Environmental Protection Organization of Iran, ‘Criminal Conviction of Iralco for Environmental Pollution’ (Press Release, EPO Press Release 2025) 27.



- **Conclusion:** The Iralco ruling represents a notable jurisprudential development in the enforcement of environmental criminal law against industrial actors in Iran and may serve as a practical model for strengthening punitive and corrective measures. Nonetheless, the lack of transparency surrounding the publication of judicial decisions and the continued *de facto* immunity of central stateal institutions underscore the pressing need for substantive legal and procedural reform.

## 2.2. France's Legal Framework on the Criminal Liability of Public Juridical Persons for Environmental Crimes

### 2.2.1. Historical Foundations and Legal Evolution

France was among the first European jurisdictions to fundamentally reconfigure its criminal policy by formally recognizing the criminal liability of legal persons in the 1990s. Prior to this doctrinal shift, classical French criminal law - like many civil law systems - adhered strictly to the principle of personal criminal responsibility, under which only natural persons could be prosecuted. This model proved inadequate, particularly in the environmental sphere, where a substantial proportion of polluting activities was attributable not to individuals but to corporations, public institutions, and local authorities. Holding only employees or managers accountable could not fully capture the institutional nature of environmental harm.<sup>1</sup>

A major turning point occurred with the adoption of the new French Penal Code in 1994. Article 121-2 explicitly stipulates that “legal persons, with the exception of the State, may incur criminal liability for offenses committed on their behalf.”<sup>2</sup> This provision marked the formal recognition of criminal liability for both private and public legal persons, while maintaining the immunity of the central state. Subsequent reforms, particularly in 2004 and 2010, expanded the scope of environmental offenses and augmented the available sanctions. These developments not only consolidated the legal foundation but also established France as a leader in criminal environmental protection among European states.<sup>3</sup>

### 2.2.2. The Position of the State and Public Institutions

Although the French central state remains exempt from criminal liability, this immunity is narrowly construed and does not extend to all public bodies. In practice, municipalities (*communes*), regional and departmental councils (*conseils régionaux et départementaux*), and a broad spectrum of public institutions (*établissements publics*) may be held criminally liable. This distinction is highly significant because much of France's environmental governance - including waste management, water treatment, urban planning, noise regulation, and the preservation of natural resources - is decentralized and administered by these public entities.

By subjecting these bodies to potential criminal liability, the French legislature has sought to promote administrative accountability while maintaining the constitutional authority of the

1 Eleni Gkegka, ‘Le contentieux environnemental devant le juge administratif de l'excès de pouvoir: À propos des affaires Les Amis de la Terre and Commune de Grande-Synthe’ (2024) 14 *Revue du Droit Public* 80, 88.

2 (*Nouveau Code Pénal*) “Les personnes morales, à l'exception de l'État, sont responsables pénalement des infractions commises pour leur compte”

3 Sofia Canali, ‘La responsabilité climatique devant le juge administratif, une instrumentalisation de la réparation à des fins de cessation de l'illicite?’ (2024) 49 *Revue Juridique de l'Environnement* 604, 613.



state. Although the continuing immunity of the central state remains a subject of scholarly and political critique, the inclusion of local and administrative entities represents a core strength of the French model.<sup>1</sup>

### 2.2.3. Environmental Legislation and Criminal Reforms

Complementing the Penal Code, France has developed a comprehensive Environmental Code (*Code de l'environnement*), progressively codified since 2000. This Code constitutes the principal legislative framework governing environmental offenses and their attendant sanctions.

Key areas covered include:

- **Water Pollution:** Article L.216-6 criminalizes unlawful discharges into surface or groundwater by any natural or legal person.
- **Air Pollution:** Strict emission limitations apply to industrial installations and transportation sources.
- **Waste Management:** Detailed regulations govern hazardous and non-hazardous waste; violations often implicate public authorities.
- **Biodiversity Protection:** Offenses include illegal hunting, habitat destruction, and harm to protected species.
- **Soil and Forest Protection:** Unregulated forest exploitation and soil degradation carry significant penalties.<sup>2</sup>

Most of these provisions apply equally to public legal persons, meaning France recognizes one of the broadest scopes of environmental criminal liability among civil law jurisdictions.

### 2.2.4. Judicial Practice

French judicial authorities have actively applied principles of criminal liability to public entities in environmental litigation. Illustrative examples include:

1. **The Erika Case (1999-2012):** Although not involving a state entity, this litigation was pivotal in establishing the concept of “environmental damage” (*préjudice écologique*) and imposing substantial fines on corporate polluters.
2. **Municipal Waste Disposal Case (2007):** A municipality was convicted for unauthorized disposal of urban waste, with the court affirming the municipality’s liability as a legal person, irrespective of individual employee negligence.
3. **Water Pollution Case (2013):** A local public institution incurred sanctions for unlawful wastewater discharge, with mandatory ecological restoration imposed.
4. **Hazardous Waste Management Case (2018):** A state-affiliated company was convicted for mismanaging toxic waste, reinforcing that even government-linked entities may be held criminally accountable.<sup>3</sup>

<sup>1</sup> Luigi Mingozi, ‘A réparation des dommages climatiques dans la demande d’avis consultatif soumise au Tribunal international du droit de la mer: une occasion manquée?’ (2024) 42 *Revue Juridique de l’Environnement* 561, 577.

<sup>2</sup> Anna Christodoulou, *L’Union européenne au secours de l’environnement au moyen du droit penal* (est l’archive institutionnelle de l’Université Toulouse 2024), 16-17.

<sup>3</sup> Amadou Diallo, ‘La responsabilité de l’État dans les affections respiratoires liées à la pollution de l’air: analyse de deux jugements du 16 juin 2023 du tribunal administratif de Paris’ (2023) 26 *Revue de Droit de la Santé* 455, 461-465.



These cases demonstrate that criminal liability of public legal persons is not merely a theoretical construct but is actively implemented within the French judicial system.

### 2.2.5. Types of Sanctions

French law provides for a diverse array of sanctions applicable to public legal persons, many of which carry high deterrent value:

- Heavy fines, sometimes amounting to several million euros;
- Suspension or revocation of operating permits, preventing a public entity from pursuing projects with polluting potential;
- Temporary or permanent closure of offending facilities, such as factories or waste disposal sites;
- Publication of conviction rulings in the media, ensuring transparency and reinforcing deterrence;
- Court-ordered remedial measures, such as environmental cleanup and ecosystem restoration.<sup>1</sup>

These sanctions regime highlight that the French approach to environmental criminal justice is not purely punitive but also restorative and corrective.

### 2.2.6. Strengths, Challenges, and Opportunities in the French System

The French model exhibits several notable strengths:

- Recognition of the criminal liability for public legal persons, moving beyond the classical principle of purely personal responsibility;
- A comprehensive legal framework (the Environmental Code) covering nearly all aspects of environmental protection;
- An active judiciary that enforces laws and issues deterrent rulings;
- A diverse set of sanctions that integrates punitive, restorative, and corrective elements;
- Harmonization with European Union environmental policies and directives, enhancing transnational enforcement coherence.

Nevertheless, certain limitations persist:

- Exemption of the central state, which continues to draw criticism, given its involvement in major national projects with significant environmental impacts;
- Complexity of attributing fault to public entities, especially where decision-makings are collective or hierarchical;
- Heavy financial burden on municipalities and local institutions, which may encounter difficulties in complying with onerous judicial orders;
- Tension between economic development policies and environmental protection

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<sup>1</sup> Marco Zani, 'Pour une justice pénale internationale en matière environnementale: à propos de la répression des atteintes à l'environnement par une juridiction internationale spécialisée' (2024) 18 *Annuaire de la Commission du droit international* 123, 125127-.



mandates, with state and local bodies occasionally disregarding environmental rules under economic pressure.

Overall, France represents an advanced and relatively successful international model for public-sector criminal liability in environmental matters. By recognizing the responsibility of public legal persons, codifying a comprehensive Environmental Code, and ensuring active judicial enforcement, France has established a high level of accountability. Yet, the continued immunity of the central government remains a significant weakness, potentially undermining the balance between sovereign power and environmental protection.

In general, the French experience demonstrates that criminal liability for public institutions is not only feasible but also a powerful tool for raising environmental standards. This model offers valuable lessons for Iran, where the legal system has so far relied primarily on civil and administrative responsibility of the state.

### **2.2.7. Case Study: France's Approach to Environmental Crimes - *The Charente River Pollution and the Saint-Marie Municipality***

**5. 1. Background and Factual Synopsis:** In 2019, residents of the western district of Saint-Marie, located in Nouvelle-Aquitaine region, reported discoloration and foul odors emanating from the Charente River. Preliminary investigations by the Regional Environmental Authority traced the pollution to the municipal wastewater treatment facilities operating under the direct supervision of the Saint-Marie municipality. Expert analyses concluded that the treatment system was outdated and, notably, the municipality had received formal administrative warnings in 2017 regarding the urgent necessity for renovation, yet had failed to implement effective corrective measures.

**6. 2. Applicable Legal Framework:** The identified violations fell within the ambit of the following provisions of the French Environmental Code:

- Article L.216-6, which prohibits the unauthorized discharge of wastewater into surface waters;
- Articles L.173-1 and L.173-2, pertaining to the criminal liability of legal persons (including public bodies) for environmental offenses;
- Reference was also made to Article 121-2 of the French Penal Code, concerning the criminal liability of legal entities, with the explicit exception of the central state.

Based on this legal architecture, the Regional Public Prosecutor filed criminal charges against the Saint-Marie municipality in January 2020.

## **3. Judicial Procedure**

**a) Investigation Phase (January-June 2020):** Environmental inspectors conducted systematic sampling and analysis over a four-month period. It was conclusively established that the treatment plant had discharged wastewater exceeding permissible legal limits on twenty-three separate occasions during 2019. In subsequent testimony, the municipal mayor



acknowledged that necessary repairs had been deferred due to the prioritization of other municipal construction projects.

**b) Final Indictment:** In June 2020, the investigating judge confirmed the following charges against the municipality:

- Illegal discharge of wastewater into surface waters;
- Violation of operational standards for a public environmental facility;
- Negligence in the maintenance and renovation of public infrastructure, notwithstanding prior formal warnings.

**c) Court Hearing (November 2020):** The criminal court convened on 15 November 2020. The municipality's defense argued that:

- The failures resulted from "budgetary constraints," absent any intentional wrongdoing;
- An economic crisis in the previous year had precluded the execution of the renovation project;
- Preliminary corrective measures had been initiated in the summer of 2020.

The prosecutor and environmental experts countered that:

- Under Article 121-2 of the Penal Code, the municipality, as a public legal entity, is criminally liable even where misconduct stems from managerial or budgetary decisions;
- The formal reports from 2017 and 2018 had imposed a clear duty on the municipality to undertake timely remedial action.

**4. Court Ruling (10 December 2020):** Upon review of the evidence and arguments, the Criminal Court of Bordeaux convicted the Saint-Marie municipality.

**a) Penalties Imposed:**

- A financial penalty of €450,000, calibrated according to the scale of the damage and the repetitive nature of the violations;
- Mandatory corrective measures, including:
  - Complete renovation of the treatment facilities within a nine-month period;
  - Installation of an automated monitoring system for wastewater quality;
  - Public disclosure of the conviction, requiring publication in local newspapers and posting on the municipality's official notice boards;
  - A twenty-four month period of judicial supervision, during which an independent technical supervisor was appointed to submit biannual compliance reports.

**b) Judicial Reasoning:** The court held that:

- The municipality had demonstrated "serious negligence" (*faute caractérisée*) despite multiple formal warnings;



- Under Article L.216-6, water pollution constitutes an offense of strict liability, rendering proof of criminal intent unnecessary;
- The criminal liability of a public entity is fully applicable pursuant to Article 121-2;
- The environmental damage constituted harm to a protected public good, specifically the environment.

## 4. Consequences and Implications: Subsequent to the ruling:

- The municipality inaugurated a new wastewater treatment plant in 2021;
- Official monitoring reports in 2022 indicated a marked improvement in the water quality of the Charente River;
- This case has been cited in academic discourse as a salient example of the rigorous enforcement of criminal liability against public bodies.<sup>1</sup>

This adjudication directly illustrates the operative principles of French environmental criminal law. It demonstrates the prosecutorial capacity against local public bodies, underscores the active role of the judiciary in enforcing composite sanctions, highlights the extensive reach of the Environmental Code, and simultaneously illuminates the persistent doctrinal gap between the liability of decentralized public entities and the continued criminal immunity of the central state.

### 4.1. Comparative Analysis of State Criminal Liability for Environmental Crimes: Iran and France

#### 4.1.1. Theoretical Foundations and Legal Philosophy

In Iranian criminal law, the dominant theoretical foundation remains anchored in the principle of personal criminal responsibility and a general rejection of the state's capacity for criminal liability. This approach is deeply rooted in Islamic jurisprudence and constitutional principles. Article 167 of the Constitution, together with multiple provisions of the Islamic Penal Code, emphasizes natural-person responsibility. Although Article 143 of the 2013 Islamic Penal Code tentatively introduced the concept of criminal liability for legal persons, it expressly excludes most state entities, thereby perpetuating the state's juridical immunity.

France, by contrast, has embraced a distinct criminal-policy philosophy since the 1990s, formally recognizing the criminal liability of legal persons and applying it extensively to environmental offenses. This paradigm shift stems from the recognition that institutional actors - both public and private - are often the primary agents behind environmental degradation, and limiting liability to managers or employees fails to reflect socio-legal reality. Thus, while in Iran the criminal liability of the state remains theoretically contested and substantially negated, in France it is firmly embedded within modern criminal policy.

#### 4.1.2. Legal Framework

Iran's environmental criminal norms are scattered across several instruments, such as the Islamic Penal Code, the Environmental Protection and Enhancement Act, the Clean Air Act,

<sup>1</sup> Éric Naim-Gesbert, *Droit général de l'environnement* (4th edn, LexisNexis 2024).



and various administrative regulations. These provisions overwhelmingly target natural persons. Even Article 143 of the Penal Code - which acknowledges corporate liability - creates significant exceptions for state entities, thereby maintaining a structural barrier to holding the state criminally accountable.

In France, environmental criminal law is codified within a comprehensive and unified Environmental Code, which systematically regulates nearly all environmental sectors. Crucially, this Code subjects legal persons, including local public institutions, to criminal liability. Thus, the French legal framework is coherent, structured, and transparent, whereas the Iranian framework appears fragmented, incomplete, and normatively ambiguous.

#### **4.1.3. Scope and Extent of Liability**

Iran maintains a highly restricted scope of state criminal liability. State entities generally benefit from *de facto* immunity and are subjected primarily to civil or administrative responsibility. For example, environmental damage caused by state-owned industrial or energy projects typically results in compensation orders rather than criminal prosecution of the state institution.

In France, the scope of liability is significantly broader. Municipalities, regional councils, and various public institutions may be prosecuted for environmental offenses and subjected to sanctions including substantial fines, operational suspension, or mandatory ecological restoration. Although the French central state remains exempt from prosecution, the accountability of local public bodies represents a substantial expansion of public-sector criminal liability.

#### **4.1.4. Judicial Practice and Enforcement**

Judicial practice constitutes a major point of divergence between the two jurisdictions. In Iran, there is virtually no judicial precedent establishing criminal liability for state institutions. Courts predominantly prosecute natural persons or issue civil compensation orders, leaving institutional actors largely exempt.

France, conversely, has developed a robust and active jurisprudence. Its courts have consistently held public institutions liable in cases involving illegal waste disposal, water pollution, and hazardous-waste mismanagement. These judicial decisions demonstrate that France not only formally recognizes but also actively enforces the criminal liability of public legal persons. This dimension of enforcement is a major strength of the French model and a notable weakness within Iran's environmental criminal justice framework.

#### **4.1.5. Sanctions and Penalties**

In Iran, criminal sanctions applicable to state entities are virtually nonexistent. Environmental enforcement is mainly limited to modest monetary fines, temporary closure of private polluting facilities, or the imposition of civil liability. Many of Iran's most significant environmental problems arise from state-led industrial, energy, or infrastructure projects, yet the legal system provides no meaningful criminal mechanisms to hold the state accountable.

France applies a broad spectrum of sanctions, including substantial fines, suspension or



revocation of environmental permits, closure of polluting facilities, mandatory remediation, and the public dissemination of judicial rulings. These sanctions create potent incentives for compliance and significantly enhance the accountability of public institutions.

#### **4.1.6. The Role of Comparative Criminal Policy**

French criminal policy reflects the influence of European Union directives and international environmental commitments, encouraging the recognition of public legal persons' criminal liability as part of broader environmental governance standards.

In Iran, criminal policy is shaped predominantly by Islamic jurisprudence, constitutional principles, and sovereign considerations. Consequently, reliance on civil and administrative responsibility is more pronounced, and the role of substantive criminal law in environmental protection remains markedly limited.

#### **4.1.7. Crime Prevention Policies in Iran and France**

Iran's environmental crime-prevention policies are largely administrative in nature, focusing on regulatory control, licensing regimes, and environmental inspections. Due to the absence of criminal liability for state institutions, criminal deterrence remains underdeveloped, and state compliance often relies on discretionary administrative enforcement rather than deterrent criminal sanctions.

France, conversely, combines legal, administrative, and criminal prevention strategies. Preventive measures include stringent regulatory frameworks, public awareness initiatives, proactive judicial oversight, and the application of sanctions against both private and public entities. This mixture of primary prevention (through legal rules and oversight) and secondary prevention (through punishment and corrective measures) increases the overall effectiveness of environmental protection.

#### **4.1.8. Punishments and Criminal Policies in Iran and France**

Iran's punishment policy toward environmental offenses remains notably limited, especially regarding state institutions. Criminal tools such as heavy sanctions, facility shutdowns, or mandatory corrective programs are rarely applied to state entities, leaving a substantial accountability gap.

In France, both natural and legal persons may face a diverse array of sanctions. Public institutions particularly at the local level are subject to fines, operational restrictions, remedial measures, and public disclosure requirements. These sanctions collectively strengthen deterrence and institutional compliance.

#### **4.1.9. Approaches and Policies for Rehabilitation and Offender Correction**

Iran's rehabilitative policies for environmental offenses are minimal and primarily directed at natural persons. There is no structured framework for correcting the conduct of state institutions or legal entities.

France, however, incorporates corrective and rehabilitative measures into its criminal policy through mandatory environmental restoration, court-supervised compliance programs,

and specialized training for public officials. These measures aim to modify organizational culture and reduce the likelihood of recidivism.

#### 4.1.10. Human Rights Considerations

In Iran, limitations on access to environmental information, non-transparent judicial proceedings, and the absence of mechanisms for holding state bodies criminally accountable may result in violations of public rights and the rights of future generations.

In France, greater transparency, public disclosure of judicial decisions, and the criminal accountability of local public institutions strengthen environmental rights and public participation. Nonetheless, the exemption of the central state remains a point of tension from the perspective of environmental justice and equality before the law.

#### 4.1.11. Existing Challenges in Criminal Policies

Iran faces several structural and institutional challenges: an incomplete legal framework, non-recognition of criminal liability for state institutions, a dearth of relevant judicial precedent, cultural and bureaucratic resistance, and resource constraints.

France, despite its more advanced system, also confronts challenges such as the exemption of the central state, the complexity of aligning domestic law with international and EU obligations, and the policy tension arising from competing economic and environmental priorities.

**Table - 1 Comparative Analysis of State Criminal Liability in Environmental Crimes :Challenges and Criminal Law Approaches in Iran and France**

| Dimension / Aspect                         | Iran  | France   |
|--|---|--|
| Theoretical Foundations & Legal Philosophy | Criminal liability primarily applies to natural persons; state criminal liability is largely denied, rooted in Islamic jurisprudence and constitutional principles; Article 143 allows limited liability for legal persons but excludes state entities. | Criminal liability of legal persons formally recognized since 1990s; applied to environmental crimes; public and private institutions are held accountable, not just managers or employees; firmly established in criminal policy. |
| Legal Framework                            | Scattered and uncoordinated; provisions in Penal Code (2013), Environmental Protection Act (1974), Clean Air Act (1995), etc.; mainly target natural persons; significant exemptions for state entities.  | Comprehensive Environmental Code covering nearly all environmental domains; explicitly includes legal persons, including local public institutions; coherent, detailed, and transparent.   |
| Scope and Extent of Liability              | Very limited; state institutions enjoy <i>de facto</i> immunity; mainly civil or administrative responsibility; environmental damages from state projects rarely lead to criminal prosecution.  | Broader scope; municipalities, regional councils, and public institutions can be prosecuted; sanctions include fines, suspension, or mandatory remedial measures; central state exempt, but local entities accountable.            |
| Judicial Practice & Enforcement            | Virtually no precedents of convicting state entities; courts focus on natural persons and compensation orders.  | Dynamic and active jurisprudence; public entities prosecuted for illegal waste disposal or water pollution; active enforcement strengthens compliance.   |



| Dimension / Aspect                              | Iran   | France  |
|---|--|---|
| <b>Sanctions and Penalties</b>                  | Almost absent for state entities; primarily monetary fines, temporary closure of private facilities, or civil liability.   | Wide spectrum: heavy fines, suspension/revocation of operation permits, facility closure, remedial actions, public disclosure of judicial rulings; strong deterrence for public institutions.           |
| <b>Comparative Criminal Policy Role</b>         | Influenced by Islamic jurisprudence and state sovereignty; limited criminal obligations for the state; reliance on administrative and civil measures.                  | Aligned with EU regulations and international environmental commitments; recognition of public legal persons' liability part of international obligations.  |
| <b>Crime Prevention Policies</b>                | Administrative and supervisory; focus on directives, permits, and inspections; limited criminal prevention; absence of state liability reduces enforcement incentives. | Legal and criminal framework; education, public awareness, judicial oversight, deterrent sanctions; combines primary (laws) and secondary (sanctions/ conduct correction) prevention; highly effective. |
| <b>Punishments &amp; Criminal Policies</b>      | Limited to modest fines, temporary closure of private polluting facilities, or civil liability; state enjoys <i>de facto</i> immunity.                                 | Comprehensive sanctions for individuals and legal persons; fines, suspension/revocation, remedial actions, mandatory environmental restoration, public disclosure; ensures accountability.              |
| <b>Rehabilitation &amp; Offender Correction</b> | Very limited; mostly training/retraining natural persons; no comprehensive program for legal entities or state institutions.   | Includes mandatory remedial measures, environmental restoration, and training for public officials; aims to modify organizational conduct and prevent recidivism.                                       |
| <b>Human Rights Considerations</b>              | Limited access to information, low transparency, ineffective mechanisms for state accountability; risks to public and future generations' rights.                      | Transparent judicial process, public disclosure, criminal liability for local public institutions; central state exemption still poses social justice concerns.   |
| <b>Existing Challenges</b>                      | Limited legal framework, absence of state criminal liability, weak judicial practice, institutional/cultural resistance, financial and human resource constraints.     | Central state exemption, complexity in aligning with international standards, economic and political pressures related to development projects.   |

## Conclusion and Recommendations

The criminal responsibility of the state for environmental offenses resides at the intersection of public law, criminal jurisprudence, and urgent global environmental concerns. Historically, criminal law doctrines accorded states immunity from prosecution by virtue of their sovereign authority. However, the escalating severity of environmental degradation throughout the twentieth century has fundamentally challenged this paradigm. The critical question confronting contemporary legal systems is whether a state, as the principal agent of development and steward of natural resources, can and should be subject to criminal liability when its policies or actions cause environmental harm.



## Summary of Findings: Iran and France

In Iran, the recognition of criminal liability for the state remains highly problematic. Classical legal principles - including the personal nature of criminal responsibility and doctrinal shields protecting the sovereign authority - have historically insulated the state from prosecution. Although Article 143 of the 2013 Islamic Penal Code appears to acknowledge the criminal liability of legal persons, the broad exemption afforded to state and public institutions effectively nullify its practical application. Judicial practice reinforces this limitation: no significant precedent exists wherein a state institution has been criminally convicted for environmental offenses. Even in instances where government agencies cause severe pollution of air, soil, or water, the institutional response is confined to civil or administrative measures, such as temporary operational suspensions, warnings, or minor fines. Consequently, Iran's legal framework privileges civil liability over criminal deterrence, engendering a form of *de facto* immunity for the state actors.

France presents a contrasting model. Reforms embodied in the 1994 Penal Code, complemented by the comprehensive *Code de l'environnement*, established clear rules for the criminal liability of legal entities, including local public bodies such as municipalities and regional councils. French judicial authorities actively enforce these provisions, issuing multiple convictions against public institutions for offenses such as unlawful waste disposal and water pollution. Sanctions ranging from heavy fines to suspension of activities, mandatory remediation, and public disclosure of judgments strengthen deterrence and compliance. Notwithstanding these advances, the central state remains largely exempt, a limitation that continues to attract scholarly critique.

Three major distinctions emerge from the comparative analysis of the Iranian and French systems:

- 1. Theoretical Foundations:** Iranian law adheres to traditional doctrines limiting criminal liability to individuals, impeding extension to the state. French law, conversely, employs modern theories of collective responsibility and organizational attribution to justify holding public institutions criminally accountable.
- 2. Legislative Structure:** Iran's environmental laws are fragmented and lack a cohesive criminal policy. In contrast, France integrates most environmental crimes and sanctions into a unified Environmental Code, providing clarity, predictability, and robust enforcement mechanisms.
- 3. Judicial Practice:** Iranian courts are reluctant to prosecute state institutions; criminal actions against public bodies are virtually nonexistent. French courts, however, actively impose criminal sanctions on local public entities, enhancing environmental protection.

These differences indicate that Iran currently lacks the legal and institutional instruments necessary to ensure meaningful criminal-law protection of the environment.

The criminal responsibility of states for environmental offenses is not merely a political choice; it



is a legal, ethical, and practical necessity. The environment is a shared heritage and a right belonging to future generations, and states cannot remain exempt from accountability for destructive actions. The French experience demonstrates that public institutions can be effectively held responsible, providing a model for deterrence, remediation, and environmental justice. For Iran, achieving sustainable development and environmental protection requires a similar paradigm shift recognizing the state's criminal liability, strengthening judicial practice, and integrating preventive, punitive, and corrective measures. While France has made substantial progress, Iran still requires comprehensive legal and institutional reform to ensure effective environmental governance.

To address these deficiencies, several key reforms are recommended:

- 1. Recognize State Criminal Liability:** Amend Article 143 of the Islamic Penal Code to remove exemptions for state entities and explicitly recognize the state and public institutions as legal persons subject to criminal prosecution. While politically and institutionally challenging, this reform is essential to ensure that no state entity is automatically shielded from accountability.
- 2. Draft a Comprehensive Environmental Code:** Develop a unified statute encompassing environmental offenses, sanctions, and enforcement mechanisms, similar to France's Environmental Code. This code should consolidate existing provisions, clearly define criminal and civil liabilities, and provide procedural guarantees. Implementation challenges may include legislative complexity, coordination among ministries, resistance from vested interests, and resource constraints.
- 3. Establish Specialized Environmental Courts and Judicial Training:** Create dedicated judicial fora for environmental offenses and provide specialized training for judges and prosecutors in environmental law, science, and comparative jurisprudence. Challenges will include securing specialized staffing, sustainable funding, overcoming institutional resistance, and facilitating a cultural shift from traditional judicial practices.
- 4. Strengthen Criminal Sanctions:** Introduce higher fines, suspension or cancellation of harmful projects, mandatory remediation, and public disclosure of judgments. These sanctions should combine deterrent and corrective elements. Challenges include potential resistance from state-owned enterprises and line ministries, enforcement oversight, economic constraints, and potential procedural delays.
- 5. Align Domestic Policies with International Standards:** Integrate international environmental norms and learn from successful comparative models, particularly that of France. Challenges include structural, legal, and cultural differences, political and economic resistance, resource limitations, and the need to shift institutional and societal attitudes.

#### AI Disclosure Statement

In the preparation of this article, AI was used for technical assistance with writing in academic English and formatting citations. The authors reviewed, verified, and are solely responsible for all content, citations, legal analysis, interpretations, and conclusions presented herein.



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## MODERN INTERNATIONAL APPROACHES TO VICTIMS' RIGHT TO INFORMATION: UNDERSTANDING MAJOR LEGAL REQUIREMENTS

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| Article Info   | ABSTRACT   |
|--|--|
| <b>Article type:</b><br>Research Article   | The protection of victims' rights has long attracted significant academic and legal interest, finding expression in both international instruments and national legislation. Among these rights, the right to information occupies a central position, serving as a prerequisite for the meaningful exercise of all other entitlements within any justice system. Modern instruments such as the European Union Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support, and Protection of Victims of Crime 2012 ('Victims' Rights Directive'), and the Canadian Victims Bill of Rights 2015, explicitly enshrine this right as foundational to effective victim participation and access to justice. Within this context, this article employs a qualitative methodology to examine how contemporary international instruments conceptualise and operationalise the victims' right to information, and to identify the core legal and institutional requirements for its effective implementation across jurisdictions. Following an introduction, literature review, and theoretical framework, the study traces the historical evolution of this right, analyses mainstream international approaches, and outlines the key elements necessary for its adequate realisation in national legal systems. The analysis concludes that while international norms increasingly promote a more expansive and structured approach to victims' right to information, several domestic frameworks - particularly in developing jurisdictions - frequently remain underdeveloped or inconsistent in their application. The article consequently argues that aligning national legislation, judicial procedures, and institutional support mechanisms with emergent international standards is essential to ensuring the full and effective enjoyment of this right by all victims of crime. |
| <br><a href="https://ijicl.qom.ac.ir/article_4013.html">https://ijicl.qom.ac.ir/article_4013.html</a> |  |
| <b>Keywords:</b><br>European Union, Victim, Victim's Right to Information, Victims' Rights Directive, Code of Criminal Procedure (CCP), Iran.  |  |

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## **Introduction**

Victims of criminal conduct often find themselves in neglected and disadvantaged positions, suffering physically, financially and psychologically as a result of the offences committed against them. Therefore, the protection of victims' rights has drawn the attention of jurists and scholars from multiple perspectives, including the imperative of ensuring justice and fair treatment, providing compensation, offering appropriate assistance, and safeguarding their security. Among these, the right to information assumes critical importance. This right is a key element in enhancing the position of victims and improving the effectiveness of criminal justice systems, as the pursuit of justice with dignity in criminal proceedings, protection against secondary victimisation, ensuring the safety of victims, facilitating legal assistance, and guaranteeing appropriate compensation all depend upon its full and effective implementation. Absent timely and comprehensive awareness of their rights, how can victims be expected to meaningfully exercise them? It is in this context that the evolving international approach has sought to define and strengthen the right to information for victims.

Examining the modern scope and requirements of the victims' right to information is particularly urgent, given the rising crime rates in several jurisdiction. This urgency is compounded by the fact that, in many cases, victims are not even aware that a criminal act has been committed against them, while others, though aware of the crime and the identity of the perpetrator(s), refrain from reporting it due to fear, concerns about reputation, or a lack of knowledge regarding legal procedures and available services and protections. These circumstances contribute to the perpetuation of criminal behaviour and the further victimisation of individuals across countries. Raising victims' awareness may also promote public awareness, encourage the reporting of crimes, and ultimately contribute to crime prevention. However, not all national laws and regulations fully recognise the victims' right to information, nor do they support it with sufficient enforcement mechanisms.

In light of the foregoing, this article seeks to analyse the normative approach adopted by modern international instruments towards the full implementation of the victims' right to information. Employing a qualitative methodology, it addresses the central question: 'How do modern international instruments approach the victim's right to information, and what are the main legal requirements for better ensuring and implementing this right?' To



answer this question, the article begins with a literature review. The second section outlines the theoretical and conceptual frameworks underpinning the study. This is followed by an overview of the historical development of the victims' right to information. Section four examines contemporary international approaches to this right, establishing a foundation for assessing how it is recognised and applied in practice. Building on these findings, section five explores the major legal requirements for enhancing the victims' right to information across jurisdictions. These requirements - derived from international standards and comparative analyses - are broadly categorised under three headings: the reform and enactment of relevant legislation; the streamlining of judicial procedures; and the strengthening of institutional frameworks. The article concludes with a synthesis of the findings and affirms the research hypothesis, highlighting the need for comprehensive and coherent strategies to align domestic legal systems with evolving international standards.

## 1. Review of Literature

A review of relevant research, both within Iran and internationally, reveals that the dimensions and requirements of the victims' right to information have received scant scholarly attention. While some studies have addressed adjacent areas, they often do so without a particular focus on this specific right. For instance, some scholars have examined victims' rights within Islamic jurisprudence and Iran's Code of Criminal Procedure (CCP). However, their works primarily focus on domestic legal texts and jurisprudential foundations, avoiding engagement with the evolving global approaches to victims' rights.<sup>1</sup> Similarly, the article entitled 'Participation of the Victim in the Judicial Process: Basics, Challenges and Solutions', despite addressing several aspects of victims' rights, fails to focus on the right to information, nor does it substantively engage with the international perspectives on the development and protection of victims' right to information.<sup>2</sup>

Among the few relevant international studies, reference may be made to the article by *Rakipova* and others titled 'Communication of the Victim in the Criminal Proceedings of Ukraine in the Conditions of Martial Law'. This study is limited to the issue of communication with the victim, merely one facet of the right to information. Furthermore, the study is confined to Ukrainian laws and practice.<sup>3</sup> Another example is the article 'Transforming Crime Victims' Rights: From Myth to Reality', which, while offering insights into the nature and evolution of victims' rights from a human rights perspective, does not comprehensively address the modern requirements attending the victims' right to information.<sup>4</sup>

The distinctive contribution of the present article resides in its dual emphasis. It focuses specifically on the victims' right to information - a relatively emergent and often neglected area

1 E.g., Ahmad Ahmadi, 'Victims' Rights in Jurisprudence and Criminal Procedure Law' (2021) 1(3) Comparative Criminal Jurisprudence 41.

2 Sajad Shahsavari, Hassanali Mozenzadegan, and Mehrdad Rayejiyanasli, 'Participation of the Victim in the Judicial Process: Basics, Challenges and Solutions' (2023) 28 The Quarterly Journal of Judicial Law Views 127.

3 Inna Rakipova and others, 'Communication of the Victim in the Criminal Proceedings of Ukraine in the Conditions of Martial Law' (2023) 25 DIXI 1.

4 Robyn Holder, Tyrone Kirchengast, and Paul Cassell, 'Transforming Crime Victims' Rights: From Myth to Reality' (2021) 45 International Journal of Comparative and Applied Criminal Justice 1.



of study - and pays particular attention to the international approach to this right. Concurrently, it elucidates the legal requirements and best practices for implementing different aspects of this right.

## 2. Theoretical and Conceptual Framework

The theoretical foundation of this study is anchored in the concept of the victim and his/her right to information, as articulated in international instruments. Identifying an individual as a victim entitles them to specific rights and access to state support and services. Among the most fundamental of these rights is the right to information. Modern instruments, such as the Canadian Victims Bill of Rights of 2015, define this as the right to receive general information about the criminal justice system, the victim's rights, available services and support programmes, as well as timely and specific updates on the progress of the relevant case, including the stages of investigation, prosecution, and the conviction of the offender.<sup>1</sup>

Overall, international instruments and domestic laws generally manifest two overarching approaches to the victims' right to information. The first is a narrow perspective, which conceives of the right to information as applicable principally during the trial phase - emphasising communication between the victim and judicial authorities, including the exchange of information and legal documents until the proceedings conclude. The second, broader approach sees the right to information as extending beyond the judicial process. Under this view, the victim's right to information as accrues from the discovery of the crime or the likelihood of victimisation and may persist until a final verdict is rendered - and even subsequent to the completion of the offender's sentence.<sup>2</sup>

## 3. Historical Background

The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 marked one of the earliest global milestones in articulating and safeguarding the dignity and rights of all human beings, irrespective of race, religion, ethnicity, or gender. Articles 8 and 10 of the UDHR affirm the right of every individual to seek legal redress before competent tribunals and to a fair and public hearing. Notwithstanding these provisions, the Declaration contains no explicit reference to the term 'victim'. Therefore, subsequent international instruments - such as the Convention Against Torture (CAT) of 1985, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005 - have sought to address this gap. These instruments collectively aim to strengthen the international legal framework for the protection of victims, ensuring the provision of medical, psychological, social, and welfare services, as well as access to justice and reparations.<sup>3</sup>

It was particularly from the 1970s onwards that legal systems and societies began to adopt a more coherent and structured approach to the protection of victims' rights. During this period, the necessity of ensuring victims' access to relevant information was broadly acknowledged within policy and legislative frameworks. Over time, this requirement evolved

1 Canadian Victims Bill of Rights (2015), §§ 6-8.

2 Rakipova and others (no 3), 5-6.

3 Holder, Kirchengast and Cassell (no 4), 5-7.



from a general principle into a clearly defined legal right, with international instruments and domestic legislation increasingly articulating and enshrining its various dimensions.<sup>1</sup>

## 4. Assessing the Contemporary International Approach to Victims' Right to Information

A review of international legal instruments reveals a pronounced trend towards the adoption of an expansive interpretation of the right to information for victims. These instruments address the right either in general terms or within specific legal contexts. A notable example is the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which recognises the right of victims to be informed of their legal rights, the proceedings relevant to their case, and the services available to them, including legal, social, and health-related support.<sup>2</sup>

Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance seeks to ensure the right to information for both the disappeared person and those directly affected by the crime of enforced disappearance. This includes the right to be informed of the criminal nature of the act, the status and results of any investigation, and the fate of the disappeared individual.<sup>3</sup> It is evident, however, that the majority of international instruments that purport to guarantee victims' right to information are non-binding soft law instruments or offer less than comprehensive protection to all categories of victims. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law - sometimes referred to as the International Bill of Victims' Rights - is no exception.<sup>4</sup>

However, the Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive), has arguably had the most significant impact on recognising and enforcing the right to information so far. Owing to its binding legal nature and relatively comprehensive scope, the Directive represents a turning point in international practice. It safeguards various dimensions of this right regardless of the nature of the offence, including: the right to understand and to be understood, the right to receive information from the first contact with a competent authority, the victim's right when making a complaint, the right to receive information about the case, and the right to interpretation and translation.<sup>5</sup> Furthermore, it requires Member States to implement the necessary laws, procedures, and administrative measures to comply with its provisions by 2015.<sup>6</sup>

1 Bonnie S Fisher, and Steven P Lab, *Encyclopedia of Victimology and Crime Prevention*, Volume 1 (Sage Publications 2010) 1014-1020.

2 UN General Assembly Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc No. 40/34, 1985, paras. 5, 6 and 15.

3 International Convention for the Protection of All Persons from Enforced Disappearance (2006), preamble and art. 24.1-2.

4 Michael Humphrey, 'The Individualising and Universalising Discourse of Law', in Thorsten Bonacker and Christoph Saferling (eds), *Victims of International Crimes* (Asser Press 2013) 85.

5 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (2012) ('Victims' Rights Directive'), arts. 3-7.

6 Ibid., art. 27.



Naturally, the realisation of victims' right to information is predicated on the establishment of effective communication. Such communication is intrinsically linked to human rights norms, as it serves to uphold the rights and legitimate interests of victims. Therefore, establishing meaningful communication with victims is contingent upon providing equal access to rights, fostering balanced relationships with victims, and exercising empathy and patience throughout administrative procedures, with the overarching objective of safeguarding their rights.<sup>1</sup> Accordingly, the Directive emphasises the importance of communication quality. One nuanced feature of this approach is the requirement for member states to ensure 'simple and accessible language' when communicating with victims - a result-oriented obligation. Article 3(2) of the Directive underscores the necessity of tailoring communication to the personal characteristics of each victim, including any disabilities that may impair their ability to understand or to be understood. Furthermore, Article 3(3) entitles victims to be accompanied by a person of their choice from the very first contact with the competent authority, particularly when the traumatic impact of the crime hinders effective communication.

A necessary corollary of victims' right to information is the obligation to provide translation and interpretation services to those who do not speak or understand the official language of the country. This obligation, which must be fulfilled free of charge, is essential to ensuring meaningful access to justice for all victims, including nationals who experience difficulties with the official language and foreign victims.<sup>2</sup> Its importance has grown significantly in the light of the global rise in migration. In 2020, an estimated 281 million people were living outside their country of birth - 128 million more than in 1990 and more than three times the number recorded in 1970.<sup>3</sup> In addition to language barriers, which commonly impede communication with migrants and refugees, a substantial proportion of this population is either entirely or functionally illiterate. This reality often leaves them unfamiliar with the legal frameworks, regulatory systems, and social expectations of their host states.<sup>4</sup> The challenge is further compounded by the fact that the overwhelming majority of migrants have no formal legal education or professional experience in legal systems.<sup>5</sup> It is therefore encouraging that the provision of information and advice is recognised as a core component of the right to information under the Victims' Rights Directive. Pursuant to this framework, victims must be provided with timely and accessible guidance - beginning from their initial contact with the competent authorities - regarding the judicial process, the support services available, the means of accessing such services, potential avenues for compensation, and other restorative justice mechanisms.<sup>6</sup>

The provision of medical services and psychological counselling may, at first glance, appear to fall within the broader category of victims' rights. However, in the case of vulnerable

1 Rakipova and others (no 3), 4.

2 Victims' Rights Directive (no 12), preamble and arts. 5,7; Mariana Vilas Boas, 'Crime Victims' Right to Information: Plain Language and its Implementation' [2024] Special Issue, Polissema 316, 329-331.

3 Marie McAuliffe and Linda Adhiambo Oucho, World Migration Report 2024 (International Organisation for Migration (IOM) 2024) 21.

4 Hervé Adami, 'The Role of Literacy in the Acculturation Process of Migrants' (Council of Europe, 2025) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802fc1b7>> accessed 30 May 2025.

5 Evie Browne, Evidence on Education as a Driver for Migration (Institute of Development Studies 2017) 12-15.

6 Victims' Rights Directive (no 12), preamble and art. 4.



victims - such as those subjected to rape, sexual assault, attempted murder, grievous bodily harm, or comparable serious offences - the full realisation of the right to information may, in practice, be contingent upon the availability of preliminary psychological or medical assistance. Such support enables victims to begin recovering from trauma and, within an environment characterized by dignity, respect, and security, to make informed decisions regarding the exercise or waiver of their legal rights.<sup>1</sup> This is particularly important, as victims retain the right not to be informed, to forget the crime, and to be forgotten. Many - whether to avoid further exposure, or due to fear, dissatisfaction, or a loss of confidence - may choose to disengage from the criminal justice process altogether, or expressly decline to receive information concerning criminal proceedings, complaints mechanisms, compensation procedures, and related matters.<sup>2</sup> Therefore, any decision by a victim to pursue or forgo his/her rights must be made in a protective environment, free from intimidation, coercion, or undue influence by the offender(s) or third parties, to ensure that it reflects his/her free and informed will. Failure to observe this condition risks the concealment of crucial facts in criminal proceedings and may allow perpetrators to evade prosecution by exploiting the fear and silence they instil in their victims.

It is important to note that the significance of providing a supportive environment for victims has also been acknowledged by international courts either. A salient example is the International Criminal Court (ICC). According to the Rome Statute, the Court is mandated to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims, taking into account all relevant factors, including age, gender, health, and the nature of the crime - particularly, though not exclusively, where the crime involves sexual or gender-based violence or violence against children. In this respect, the Prosecutor bears primary responsibility for ensuring the adoption of such measures during the investigation and prosecution of crimes. To more effectively fulfil this mandate, a Victims and Witnesses Unit (VWU) has been established within the Registry. This Unit, staffed with experts in trauma, including trauma associated with sexual violence, provides - in consultation with the Office of the Prosecutor - protective measures, security arrangements, counselling, and other appropriate forms of assistance. Such assistance ranges from basic medical care and clothing to long-term counselling and advanced medical procedures for victims who appear before the Court.<sup>3</sup> The Registry has also sought to operationalise Rule 88 of the ICC Rules of Procedure and Evidence through the establishment of a Vulnerability Protocol. This Protocol facilitates the recommendation and implementation of a broad range of measures in favour of victims, based on reports prepared by VWU psychologists. The development of these mechanisms constitutes a milestone in integrating psychosocial expertise into the judicial process at the international level, attributable to the central role accorded to psychologists in the proceedings and the consequent emphasis on addressing the individual needs of victims and witnesses.<sup>4</sup> Moreover, beyond its strictly judicial and procedural functions, the ICC -

<sup>1</sup> Boas (no 15), 320.

<sup>2</sup> Stefano Ruggeri, Audi Alteram Partem in Criminal Proceedings: Towards a Participatory Understanding of Criminal Justice in Europe and Latin America (Springer 2017) 390.

<sup>3</sup> Rome Statute of the International Criminal Court (1998), arts. 43.6 and 68.1-4.

<sup>4</sup> Rules of Procedure and Evidence for the International Criminal Court (ICC) 2002, rule 88; An Michels, 'The Psychologist-



through the VWU - has undertaken initiatives to enhance victims' right to information even in the territories of non-Member States. For instance, although Ukraine's accession to the Court formally took effect only on 1 January 2025, the VWU organised a training workshop in Kyiv from 13 to 16 March 2023. This programme, which involved prosecutors, judicial officials, and representatives of Non-Governmental Organisations (NGOs), addressed a range of issues, including multidisciplinary approaches to victim support and protection, relevant institutional frameworks, the implementation of survivor-centred and trauma-informed methodologies, and the safeguarding of consent and confidentiality for victims of conflict-related sexual violence.<sup>1</sup>

It is crystal clear that providing support services for victims of genocide, crimes against humanity, war crimes, and aggression, and addressing the harm they have suffered, necessarily requires well-structured programmes and adequate financial resources. Such resources must be commensurate with both the scale of the atrocities committed and the crimes falling within the jurisdiction of the ICC, thereby ensuring the Court's capacity to meet these pressing needs. To this end, Article 79 of the Rome Statute has envisaged the establishment of a Trust Fund, which was created in 2004 by the Assembly of States Parties. The Trust Fund is a unique mechanism designed for the benefit of victims of crimes within the Court's jurisdiction, and their families, and is mandated to deliver general assistance to victims of conflict without prejudice to ongoing proceedings before the ICC. In other words, it may be activated prior to the issuance of a ruling, and it possesses the capacity to extend assistance to victims who have not instituted proceedings before the Court at all.<sup>2</sup> Under its assistance mandate, the Fund implements physical and psychological rehabilitation, as well as material support initiatives, for victims, their families, and their wider communities. These programmes include medical care and treatment, surgical interventions, individual and group trauma counselling, information sessions, community therapy, psychological education through community dialogue and reconciliation, educational and vocational training, and access to referral services and capacity-building opportunities aimed at fostering the long-term empowerment of victims and their communities. To date, the Trust Fund has implemented its victim support activities in Uganda, the Central African Republic, the Democratic Republic of Congo, Côte d'Ivoire, Mali, Georgia, and Kenya.<sup>3</sup>

In parallel with these international developments, an increasing number of national and subnational governments have adopted independent legislation to safeguard victims' rights.

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Client Relationship at the ICC: A Road Map for the Development of the Counsel-Victim Relationship', in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (Oxford: Oxford University and International Criminal Court Bar Association 2020) 115-116.

1 ICC, 'Ukraine', (ICC, 2025) <<https://www.icc-cpi.int/situations/ukraine>> accessed 3 September 2025; ICC, 'ICC Victims and Witnesses Section Training for Public Prosecutors and police officials from Ukraine "Applying an integrated, witness and victim-centred model for protection and support for victims of conflict-related Sexual Violence in Ukraine"', (ICC, 20 March 2023) <<https://www.icc-cpi.int/about/cooperation/icc-victims-and-witnesses-section-training-public-prosecutors-and-police>> accessed 3 September 2025.

2 Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate Trust Fund for Victims Under Its Assistance Mandate' (2019) 19 Chicago Journal of International Law 490, 494.

3 The Trust Fund for Victims, 'Assistance programmes', (The Trust Fund for Victims, 2025) <<https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>> accessed 3 September 2025.



The most notable examples are the Canadian Victims Bill of Rights 2015, the Code of Practice for Victims of Crime in England and Wales (Victims' Code) 2015, and the Victims' Rights and Support Act 2013 of New South Wales. These laws affirm and guarantee victims' right to information to varying degrees. Nevertheless, they still fall short of the standards established by the Victims' Rights Directive and the comprehensive approaches adopted by the ICC in several respects. For example, the Canadian Victims Bill of Rights dedicates three substantive provisions to the right to information and its implications. It expressly guarantees victims the right - upon request - to be informed about the functioning of the criminal justice system, their role within it, available services and programmes, the right to file complaints concerning the infringement or denial of their rights, the status and outcome of criminal investigations, and details of conditional release decisions, including their timing and conditions.<sup>1</sup> Moreover, the Bill establishes a complaints mechanism under which any relevant federal department, agency, or body involved in the criminal justice system must review alleged violations of victims' rights under the Bill, make recommendations to address such infringements, and notify victims of the outcome of their complaints and the measures recommended.<sup>2</sup> It is also noteworthy that the Bill of Rights was enacted through the Victims Bill of Rights Act 2015, which introduced reforms across various provisions of Canadian criminal law.<sup>3</sup> However, the Act fails to confer party or intervener status on victims - or on those acting on their behalf - in criminal proceedings, nor does it provide an independent ground for initiating judicial proceedings in the event of an alleged infringement or denial of the rights it guarantees.<sup>4</sup>

## 5. Legal Requirements for Enhancing Victims' Right to Information

Understanding the evolving international approaches to victims' right to information, along with the challenges surrounding its implementation, highlights the major legal requirements needed to enhance this right in each country.

### 5.1. Legislative Reform and Enactment of Relevant Laws

The most fundamental benchmark for strengthening victims' right to information lies in the substantive legal provisions governing the judiciary and law enforcement organs. However, a comparative analysis of domestic legislation and international standards reveals divergence regarding the definition of 'victim' and the scope of his/her rights. For instance, international instruments, such as the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, explicitly recognise psychological and emotional harm as legitimate grounds for victimhood - allowing the recognition of family members and close relatives of direct victims as 'victims' in their own right, rather than limiting them to the role of legal heirs, agents, or representatives.<sup>5</sup> By contrast, some domestic frameworks adopt narrower definitions. Article (10) of the Iranian Code of Criminal Procedure (CCP) 2013, for example, defines a victim as 'a person who suffers harm or damage as a result

1 Canadian Victims' Bill of Rights (2015), §§ 6-8.

2 Ibid., § 25.

3 Tyrone Kirchengast, *Victimology and Victim Rights: International Comparative Perspectives* (Routledge 2017) 181-182.

4 Canadian Victims' Bill of Rights (2015), §§ 27-28.

5 UN General Assembly Resolution (no 9), arts. 1-2.

of the commission of a crime'. This formulation is both limited in scope and insufficiently precise. Crucially, it makes no express provision for emotional or psychological harm, nor does it acknowledge those who suffer such harm - such as close relatives - as victims. Although interpretative practices and advisory opinions may, in some cases, permit family members or legal representatives to initiate criminal complaints, these individuals are not legally recognised as victims. This ambiguity may carry significant implications in practice, particularly with respect to the claims for compensation for emotional damages suffered by the relatives of direct victims.

As the ability of vulnerable victims to exercise and enjoy the right to information may, in many instances - particularly in cases involving serious crimes, grievous bodily harm, or sexual assault - depend on access to medical services and other essential forms of support such as psychological care and counselling, national legal systems must adopt clear and consistent approaches concerning the obligations of relevant authorities and service providers in this regard. It is therefore promising that some national legal frameworks expressly mandate the provision of medical treatment to victims of serious crimes by all hospitals, free of charge, and impose a corresponding duty to notify the police immediately upon admission.<sup>1</sup>

In addition to refining the legal definition of the victim and identifying the necessary health sector responses to ensure victims' meaningful enjoyment of their rights, modern justice systems must also give due regard to the legal status and protection of individuals who report wrongdoing. This is particularly critical in contexts where such disclosures are essential to the detection and prevention of serious criminal activity. As many societies continue to grapple with rising levels of crime and corruption, the capacity to report offences swiftly and securely assumes a central role - not only in facilitating the detection and prosecution of unlawful conduct but also in preventing such acts, and associated victimisation *ab initio*.<sup>2</sup> For instance, the enactment of whistleblower protection laws can encourage individuals who, despite being aware of criminal conduct, abstain from reporting it due to fear or other concerns, to report illegal or unethical activity to competent authorities. This is particularly vital in relation to the growing incidence of economic crimes, which frequently involve the misappropriation of public or governmental resources, a reduction in the quality of goods and services, environmental degradation, and reputational harm to public or private institutions - thus harming society at large, and indeed the interests of members within the affected entities.<sup>3</sup> In other words, those who report such crimes may themselves, in certain circumstances, be regarded as victims, and as such, their rights also require legal protection. Despite the longstanding implementation of whistleblower protection laws in many developed countries,

1 E.g., Indian Code of Criminal Procedure (CrPC) as amended in 2018, s. 357c; Cf., e.g., Iranian Code of Criminal Procedure (CCP) 2013.

2 World Population Review, 'Crime Rate by Country 2025', (World Population Review, 2025) <<https://worldpopulationreview.com/country-rankings/crime-rate-by-country>> accessed 22 May 2025. Seokhee Yoon, 'Why Do Victims Not Report? The Influence of Police and Criminal Justice Cynicism on the Dark Figure of Crime' (Ph.D. Dissertation, The City University of New York (CUNY) 2015) 5-9. Derek Pyne, 'Crime, (Incentive to)', in Alain Marciano and Giovanni Battista Ramello (eds), Encyclopedia of Law and Economics (New York: Springer 2019) 467-468.

3 Leah Ambler, Calaire Leger, 'Whistleblower Protection: The Next Frontier in the Transnationalization of Anti-Corruption Law', in Régis Bismuth, Jan Dunin-Wasowicz, and Philip M Nichols (eds), The Transnationalization of Anti-Corruption Law (Routledge 2021) 316-323. Shahram Ebrahimi and Majid Sadegh Nejad Naeini, 'Criminological Analysis of Economic Crimes' (2014) 2 Journal of Criminal Law Research 147, 160-161.



the legal frameworks of numerous developing jurisdictions remain deficient, particularly where adequate safeguards and incentives are lacking.<sup>1</sup> On the other hand, raising public and victim awareness of the protections enshrined in such laws, alongside the implementation of educational and cultural initiatives aimed at promoting the reporting of corruption and misconduct, are essential policy objectives that must be meaningfully addressed within domestic legal systems.<sup>2</sup>

A further prerequisite for realising victims' right to information is the simplification and intelligibility of the legal language, forms, and procedures required to initiate complaints and pursue their rights. This is particularly necessary given the general public's unfamiliarity with legal terminology - language which is, at times, difficult even for lawyers to grasp. In this regard, some jurisdictions have enacted legislation specifically aimed at simplifying legal language. Although such an approach carries the risk of reducing legal precision, a cost-benefit analysis generally favours this shift, and many legal scholars have endorsed it.<sup>3</sup> Given the growing migrant population in the world - many of whom lack formal education or knowledge of domestic laws - there is a clear need for host states to designate individuals and institutions to assume roles that facilitate communication and legal awareness among victim communities.<sup>4</sup>

Last but by no means least, the enactment of special legislation for the protection of victims' rights - such as the EU Victims' Rights Directive or the Canadian Victims Bill of Rights - can play a pivotal role in clarifying and reinforcing the legal foundations of the victim's right to information. Beyond strengthening this right in substantive terms, such measures are also likely to yield broader benefits, including the promotion of the rule of law and the enhancement of both the consistency and perceived legitimacy of judicial decisions.<sup>5</sup>

## 5.2. Streamlining Judicial Procedures

The implementation of victims' rights requires objective standards, one of which is the public's perception of how a particular right is realised in their everyday lives. Hence, judicial procedures and approaches that fail to generate a shared understanding among the public or remain abstract in nature hold limited practical value.<sup>6</sup>

Therefore, the discretions afforded to the police officers, prosecutors, and other criminal justice officials need to be clarified to limit the margin of interpretation and delay while bringing consistency and determination to the judicial administration of justice. This is a prerequisite to the realisation of victims' right to information and to securing their consent for criminal prosecution under improved conditions.<sup>7</sup> Similarly, a necessary component for the

1 NWC, 'Whistleblower Laws Around the World', (National Whistleblower Center, 2025) <<https://www.whistleblowers.org/whistleblower-laws-around-the-world/>> accessed 24 May 2025.

2 DataGuard Insights, 'Implementing an Effective Whistleblower System: Key Benefits and Best Practices', (DataGuard, 23 January 2025) <<https://www.dataguard.com/blog/implementing-an-effective-whistleblower-system/>> accessed 24 May 2025.

3 Boas (no 15), 326.

4 Ibid., 329-331.

5 Manjiao Chi (2023), 'Regulatory Transparency in International Investment Law: From an Investment Protection Requirement to a Rule-of-Law Requirement', in August Reinisch and Stephan W Schill (eds), *Investment Protection Standards and the Rule of Law* (Oxford University Press 2023) 137-138.

6 Albin Dearing, *Justice for Victims of Crime: Human Dignity as the Foundation of Criminal Justice in Europe* (Springer 2017) 375.

7 UN General Assembly Resolution (no 9), annex, para. 16; Shahsavari, Mozenzadegan and Rayejiyanasli (no 2), 137-138;



effective implementation of this right is the specialisation of lawyers and the proper training of legal practitioners and advisors. Enhancing legal qualifications and expertise in pursuing victims' rights, provides societies with professionals who are uniquely positioned to give practical effect to such rights. Thus, providing specialised training to lawyers active in the field of victim support is imperative. Establishing institutions similar to the National Crime Victim Law Institute (NCVLI) in the United States - which delivers educational programmes for lawyers specialised in the field of victims' rights - is a notable strategy which can be modelled in other countries to facilitate this objective.<sup>1</sup>

### 5.3. Strengthening Institutional Frameworks

The fulfilment of victims' right to information, together with related services such as effective legal and psychological counselling and access to appropriate medical care, requires the establishment of competent institutions comparable to the ICC's victim support mechanisms, which operate at the international level. Accordingly, Iran's judiciary, for instance, has established certain mechanisms - most notably the Guidance and Legal Aid Units, as well as the Judiciary's Electronic Services Empowerment and Response Centre. However, the services offered by such bodies are often constrained by narrowly defined mandates and suffer from a shortage of specialised personnel and resources.<sup>2</sup> However, under the normative frameworks of contemporary international instruments, such institutions are expected to provide services far beyond providing basic legal information following the reporting of a crime or the identification of a suspect. That is why, for instance, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates the necessary material, medical, psychological and social assistance for victims through governmental, voluntary, community-based and indigenous means, and specifically calls upon states to establish, strengthen and expand national funds for compensation to victims, and, where appropriate, other types of funds, to support victims and compensate them where compensation is not fully available from the offender or other sources, and/or where the State is not in a position to compensate the victim for the harm.<sup>3</sup>

Today, many developed countries - including the United States, Germany, Australia, Austria, Canada, and Japan - have established compensation funds for victims of crime. These mechanisms are often based on specific legislation that, in many cases, also mandates free provision of various requirements of victims' right to information, including legal and psychological counselling.<sup>4</sup> Therefore, the establishment of victim compensation funds - designed to facilitate and expand service provision in support of victims' full enjoyment of their rights - appears both necessary and beneficial in other countries as well. Such funds

1 Moosa Akefi Ghaziani, 'Empowering Iranian Judges: A Venue for Reducing Capital Punishment', (*Georgetown Journal of International Affairs*, 13 February 2023) <<https://gjia.georgetown.edu/2023/02/13/empowering-iranian-judges-a-venue-for-reducing-capital-punishment/>> accessed 30 May 2025.

2 National Crime Victim Law Institute, 'Professional Resources' (NCVLI, 2025) <<https://www.ncvli.org/our-team/>> accessed 15 April 2025.

3 Tayebeh Bijani Mirza and Bagher Shamloo, 'Litigative Proceedings in Light of Primary Victimology in Iranian Law and International Documents' (2017) 10 *International Legal Research* 31, 39.

4 UN General Assembly Resolution (no 9), annex, paras. 12-15.

5 Rakipova and others (no 3), 10.



could be financed not only through state budgets but also via fines, penalties, or charitable contributions.

Finally, the enhancement of victims' right to information must be supported by continuous monitoring, periodic reviews, and strengthened cooperation between governmental victim support institutions and professionals working in the field of victims' rights, all within a coherent strategic policy framework.

An exemplary model is the European Union Agency for Fundamental Rights (FRA), established in 2007 as an independent EU body tasked with advising EU institutions and decision-makers. The FRA conducts continuous assessments of the implementation of victims' rights across Member States.<sup>1</sup> It benefits from a dedicated budget line for victims of crime, enabling it to collect and analyse data and carry out evaluations at the EU level. These evaluations are disseminated consistently, and the FRA may also share its views with the European Parliament.<sup>2</sup> Similarly, the European Network on Victims' Rights (ENVR), established in 2016 pursuant to the Council conclusions, aims to enhance cooperation among Member States, relevant organisations, and other stakeholders. Its objectives include facilitating the exchange and development of best practices in supporting victims' rights, identifying areas for potential improvement, and consistently providing professional information to professionals working with victims across the EU.<sup>3</sup>

Civil society organisations also play a vital role in this process, particularly by monitoring Member States' compliance with the European Union's obligations concerning victims' rights. They may report instances of non-compliance with EU laws and directives to the European Commission. The Commission, however, retains discretionary authority in determining whether to initiate proceedings against Member States on the basis of such reports.<sup>4</sup> A notable outcome of these collective efforts is the adoption of the EU's first Victims' Rights Strategy in 2020, which reaffirms the necessity of respecting the right to information for all victims in all Member States.<sup>5</sup>

## Conclusion

This article has been both a tribute to and a critique of the contemporary legal approaches to victims' rights. As demonstrated, enhancing victims' awareness is not only a necessary precondition for the meaningful exercise of their rights, but also a vital tool in preventing criminal behaviour and mitigating the recurrence of victimisation within society. Accordingly, jurisdictions such as the European Union, Canada, and Australia have adopted specific legislative and policy frameworks that explicitly recognise and substantively regulate victims' right to information. While divergence persists in the legal and institutional approaches to the

<sup>1</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on victims' rights (2020-2025), COM/2020/258 final (24 June 2020) 22-23.

<sup>2</sup> Amandine Scherrer and others, Victims' Rights Directive: Study (European Parliament Research Service 2017) 18.

<sup>3</sup> European Network on Victims' Rights, 'Role and objectives of ENVR', (ENVR, 2021) <<https://envr.eu/about-us/role-and-objectives-of-envr/>> accessed 5 June 2025.

<sup>4</sup> Chloe Briere, 'Transnational Responses to Trafficking in Human Beings in Europe', in Ricardo Pereira, Annegret Engel and Samuli Miettinen (eds), *The Governance of Criminal Justice in the European Union* (Edward Elgar 2020) 117-120.

<sup>5</sup> European Commission (no 46), 7-18.



scope and implementation of this right, it has, nonetheless, increasingly assumed the status of a global norm and continues to evolve.

Given that criminal justice systems constitute a cornerstone of good governance - and that the right to information plays a pivotal role in enabling the effective realisation of victims' rights and preserving social justice - concerted efforts must be undertaken to ensure its full protection. The normative obligations enshrined in foundational international instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the EU Victims' Rights Directive, together with state practice, indicate three principal requirements for the realisation of this right: legislative reform and clarity; the streamlining of judicial processes; and the strengthening of institutional frameworks.

Domestic legal systems require particular revision in their definition of 'victim' and in the legal treatment and substantive rights accorded to such persons. These reforms should ideally be accompanied by the enactment of dedicated victims' rights legislation. The EU Victims' Rights Directive 2012, which imposes binding obligations on Member States, provides a comprehensive and instructive model in this regard. Moreover, its normative content could serve as a valuable foundation for the development of an International Convention on Victims' Rights in the future. In this respect, all states - not only those in the Global North - have the opportunity to formulate coherent national strategies and contribute meaningfully to the elaboration of a global legal framework as well.

Finally, it is essential that the implementation of the right to information be underpinned by robust institutional mechanisms. While international bodies such as the ICC have taken considerable strides, *inter alia*, towards the global realisation and protection of this right, many domestic victim support institutions have, in practice, proved inadequate owing to shortcomings in expertise, resources, or coordination. To address these deficiencies, the engagement of both public and private mechanisms may serve to enhance institutional capacity and improve service delivery. The establishment of dedicated support funds - modelled on the ICC Trust Fund or those operating in a number of developed jurisdictions - would likewise be highly beneficial. It is, however, imperative that such institutions and funds, whether domestic or international, neither confine their activities to victims within a particular geographical region nor restrict assistance solely to those who have formally lodged complaints or who are aware of their victimisation. Moreover, the training of judicial officials and legal professionals, including lawyers and advisers, on the scope and practical imperatives of this right should draw upon the experience of institutions such as the National Center for Victims of Crime in the United States.



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## FASTING AS A DUTY: HOW RELIGIOUS FASTING CAN SUPPORT GLOBAL FOOD SECURITY

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Despite the universal recognition of the right to food, global hunger remains a persistent crisis. Paradoxically, many of the world's major religions incorporate fasting as a central practice, seemingly at odds with the fundamental need for sustenance. This essay explores this apparent contradiction, focusing on major religious traditions to examine the nuanced relationship between the right to food and the duty of fasting. It argues that religious fasting, far from undermining food security, can cultivate values such as self-abstinence, communal responsibility, and empathy for the hungry, indirectly supporting efforts to ensure more equitable access to food resources. Religious rules on fasting, in fact, can be instruments for managing the challenges of food insecurity. This paper analyses different meanings of fasting in religious laws, summarizing the altruistic view that underpins them. Moreover, this matter could be a point of the "strategy of dialogue" that is currently being developed in the EU under the umbrella of the Article 17 of the Treaty on the Functioning of the European Union. The ultimate goal is to demonstrate that religious duties can be considered as valuable legal resources in achieving global food security.



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## 1. The Right to Food in International Law: Foundations and Challenges

Having recognised the fundamental importance of food, international law enshrines the right to food as a basic human right. However, significant challenges remain in translating this right into reality. The core objective is to guarantee that every person, individually or as part of a community, has consistent and reliable access to sufficient, nutritious food produced sustainably and in accordance with their cultural norms.<sup>1</sup>

The right to food has been recognised in international law since 1948, when it was included as a component of an “adequate standard of living” in Article 25(1) of the Universal Declaration of Human Rights (UDHR). It was further enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), with specific components clarified by the Committee on Economic, Social and Cultural Rights in its General Comment No. 12. The right to life, as articulated in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and interpreted in General Comment No. 36 by the Human Rights Committee, also encompasses aspects of the right to food. Furthermore, the right to food is explicitly mentioned in the Convention on the Rights of the Child (Articles 24(2)(c) and 27(3)), the Convention on the Elimination of All Forms of Discrimination against Women (Article 12(2)), and the Convention on the Rights of Persons with Disabilities (Articles 25(f) and 28(1)). It is also reflected in regional human rights instruments and domestic constitutions. More recently, the Sustainable Development Goals (SDGs), particularly SDG 2 which focuses on food security, imply a commitment to the right to food.

As a result of international regulations, the right to food provides several guarantees and advantages. Recognised as an autonomous right in international law and many national constitutions, States have a legal obligation to respect, protect, and fulfil the right to adequate food. Aspects of this right that cannot be immediately and fully implemented are subject to progressive realization, requiring States to adopt national strategies towards full compliance.<sup>2</sup>

1 Bernd van der Meulen and Ioana Rătescu, ‘Food Prints on Human Rights Law Paradigms’ (European Institute for Food Law, Working Paper Series 2017/02, 21 October 2017) <https://ssrn.com/abstract=3056750> accessed 18 June 2025.; Also, see Office of the High Commissioner for Human Rights, Fact Sheet No. 34: The Right to Adequate Food <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-34-right-adequate-food> accessed 18 June 2025; Food and Agriculture Organization, Rome Declaration on World Food Security and World Food Summit Plan of Action (13 November 1996) <https://www.fao.org/4/w3613e/w3613e00.htm> accessed 18 June 2025.

2. Joanna Bourke-Martignoni, ‘The right to food’ in Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi



Moreover, the right to food promotes the transformation of social benefits that individuals or households receive under government food security programmes into legal entitlements. The objective of the right to food is to ensure that everyone, individually or as a member of a group, has permanent and secure access to nutritionally adequate food that is produced in a sustainable and culturally acceptable manner.<sup>1</sup> This access can be provided through three channels that often work in combination: (a) self-production, (b) access to income-generating activities, and (c) social protection, either informally through community support or through State-administered mechanisms.

Although the right to food is recognised in a number of international treaties and increasingly in domestic constitutions, a rising number of people around the world face extreme food insecurity. There is a considerable and growing gap between States' obligations and reality on the ground, for a number of reasons.<sup>2</sup> Legally speaking, one of the shortcomings of the current food and nutrition security systems, and in particular of the legal frameworks which underpin them, is that those legal frameworks seldom designate the judicial, quasi-judicial and administrative bodies to which complaints about violations of the right to food can be submitted.<sup>3</sup>

Moreover, the effectiveness of the right to food is currently menaced from the complexity of the global scenario and its current challenges.

First of all, civil conflicts routinely cause or exacerbate hunger, malnutrition and famine, as ongoing situations in Yemen, Somalia, Syria, and Gaza can attest.<sup>4</sup> In addition, the war in Ukraine has exacerbated the structural failure of dominant corporate-led capitalist economies and food systems. Independent research has highlighted that corporations are taking advantage of the crisis further to entrench their control over food systems.<sup>5</sup>

The climate crisis is also a significant (and worsening) factor in food insecurity. The capacity of communities to feed themselves and earn a living is severely compromised by their exposure to changing and severe climate conditions, natural disasters and environmental destruction, including soil degradation. As climate change advances, changes to rainfall patterns and seasonal average temperatures will affect the habitable range for crop species, and will deprive some farmers and communities of their traditional crops. The Intergovernmental Panel on Climate Change (IPCC) has warned that because of lack of availability of resources,

(eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020) 137.

1 See Olivier De Schutter, *Interim report of the Special Rapporteur on the right to food*, UN Doc A/68/28 (2013).

2 FIAN International, *Role of Local Governments in Food Systems Transformation* (2022) [https://www.fian.org/files/is/htdocs/wp1102127\\_GNIAANVR7U/www/files/Role%20of%20local%20governments%20food%20systems%20transformation\\_FINAL\\_EN\\_LAYOUT.pdf](https://www.fian.org/files/is/htdocs/wp1102127_GNIAANVR7U/www/files/Role%20of%20local%20governments%20food%20systems%20transformation_FINAL_EN_LAYOUT.pdf) accessed 18 July 2025.; see also in a global perspective, Cristian Timmermann, 'Food security as a global public good' in Jose Luis Vivero-Pol and others (eds), *Routledge Handbook of Food as a Commons* (Routledge 2018) <https://www.routledgehandbooks.com/doi/10.4324/9781315161495-6> accessed 18 July 2025.; For the origin of the 'respect, protect, fulfil' framework in the work of another Special Rapporteur on the right to food, see Asbjørn Eide, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23 (1987).

3 *Report on Food Insecurity and Starvation as a Human Rights Violation* (2023) <https://just-access.de/wp-content/uploads/2023/05/Just-Access-FISHR-report.pdf> accessed 18 July 2025.

4 FIAN International, 'International community must stop weaponization of food and starvation in Gaza' (Press Release, 26 October 2023) <https://www.fian.org/en/press-release/article/international-community-must-stop-weaponization-of-food-and-starvation-in-gaza-3599> accessed 18 July 2025.

5 FIAN International, *Report on the Impact of the War on the Right to Food in Ukraine* (2022) [https://www.fian.org/files/files/Ukraine\\_Report\\_fin\(1\).pdf](https://www.fian.org/files/files/Ukraine_Report_fin(1).pdf) accessed 18 July 2025.



numerous communities have already reached ‘soft’ limits to their ability to adapt to the agricultural impacts of climate change, and that ‘hard limits’ may also be reached in the future (beyond which it is impossible to adapt, even with adequate resources).<sup>1</sup> Climate change disproportionately affects the right to food of rural women, smallholder farmers, people living in poverty and indigenous communities, who have less ability to invest in climate adaptation.<sup>2</sup> At the same time, food systems – particularly in highly developed States – are a major contributor to climate breakdown, with industrial livestock farming being among the most damaging activities.<sup>3</sup> In arable farming, corporate agricultural practices involving heavy pesticide, herbicide, and fertilizer use are responsible for other forms of environmental degradation, including desertification, pollution of waterways, and ocean dead zones, in turn negatively affecting social and environmental determinants of health and accelerating negative environmental and climate feedback loops.<sup>4</sup>

Eventually, poverty and growing inequality, both within and between nations, are underlying structural factors that make some people more likely to experience food insecurity. It is now widely recognised that food security has little to do with insufficient levels of food production (globally), but is a problem of the unequal distribution of food: while some have access to ample food, many people do not have access to land or other natural resources to produce food for their own consumption, or to income from work or social security entitlements to be able to purchase food, or are unable to access food because of their race, class, caste, gender, disability or other bases of discrimination, and are at greater risk of food insecurity. It has therefore been suggested that food security should be classed as an “economic public good,” as a food-secure world produces numerous benefits - including moral benefits, public health gains, market opportunities, and higher social stability - that can be enjoyed simultaneously and from which no-one can be practically excluded.<sup>5</sup>

In this complex landscape, religious laws intersect with food security challenges in various ways, most notably through the widespread practice of *fasting*, which appears to contradict the right to food. Fasting is a virtually universal religious practice, often considered an obligation for adherents, even though it involves abstaining from food, a basic human need. Nonetheless, despite being central to many religious legal systems, the goals of fasting can align with those of a secular community.

For example, according to the great cultural anthropologist, Clifford Geertz, there are almost four reasons for fasting:

- the first is to show obedience to God;

1 IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability - Summary for Policymakers* (2022) <https://www.ipcc.ch/report/ar6/wg2/chapter/summary-for-policymakers/> accessed 18 July 2025.

2 Office of the High Commissioner for Human Rights, ‘The Impact of Climate Change on the Right to Food’ <https://www.ohchr.org/en/climate-change/impact-climate-change-right-food> accessed 18 July 2025.

3 Columbia Law School Human Rights Institute, *Scholarship Archive* [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1064&context=human\\_rights\\_institute](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1064&context=human_rights_institute) accessed 18 July 2025.

4 The Nature Conservancy, ‘Growing Threats: How Climate Change Will Exacerbate Environmental Impacts on Agriculture’ (9 March 2023) <https://www.nature.org/en-us/newsroom/growing-threats-how-climate-change-will-exacerbate-environmental-impacts-agriculture/> accessed 18 July 2025.

5 Cristian Timmermann, ‘Food security as a global public good’ in Jose Luis Vivero Pol, Tomaso Ferrando, Olivier De Schutter and Ugo Mattei (eds), *Routledge Handbook of Food as a Commons* (Routledge 2018) 85.



- the second is to learn self-control;
- the third is to learn what it is like to be poor;
- and the fourth is to gain control over spiritual power.<sup>1</sup>

In this list, the first reason might be considered as a religious reason, but others can be also appreciated by the secular members of the society.<sup>2</sup> Therefore, this paper will analyse the diverse understandings of fasting across religious laws, uncovering the distinct positions and underlying interests. By synthesizing these perspectives, it aims to show that religious duties associated with fasting can be valuable legal resources in the global effort to achieve food security. To support this argument, the essay will proceed in four key stages. First, it will establish the relevance of religious law in addressing global challenges. Second, it will explore the diverse cultural meanings of fasting within different religious traditions, demonstrating that the perceived opposition between nutrition and abstinence is, in fact, illusory. Third, the essay will offer an altruistic interpretation of religious fasting, revealing its potential as a means to advance the secular goals of contemporary food security initiatives. Finally, conclusions will summarize the findings and propose outlines for further research.

## 2. The Intersection of Religious Laws and Food Security: Values, Authority, and Influence

As stated elsewhere,<sup>3</sup> in such a global scenario, religious laws can intersect the food legal system in many ways, so that a religious legal inquiry on the topic of food security would be relevant in many respects. The connection between food and religion encompasses concepts and values such as celebration, sharing, community, solidarity, interconnectedness, dignity, self-restraint, appreciation, and a long-term vision of purpose and good deeds that extend beyond an individual's lifetime.<sup>4</sup> These concepts and values are also present in secular contexts to some extent. However, religious laws managed to provide a richer foundation for envisioning a better world where human flourishing can occur over generations. Religious rules are based in community life and offer a perspective that considers the various human and non-human needs organically. In times of insecurity and existential threat, these narratives can help bridge the gap between the familiar and the unknown, offering different interpretations to counteract dominant opposing narratives. Many religious rituals involve food, such as the blessing and sharing of specific food items. Religious communities often follow dietary rules, like kosher food and slaughter for Jewish communities, as a matter of religious freedom. In Islam during Ramadan and in other religions, food is associated with fasting as a way to practice patience, introspection, discipline, and compassion. Wasting food is considered wrong in many religious traditions due to the belief that food is a gift that

1 Clifford Geertz, *The Religion of Java* (Free Press 1964).

2 Joseph B Tamney, 'Fasting and Modernization' (1980) 19 *Journal for the Scientific Study of Religion* 129, 135.

3 Giancarlo Anello, 'Food Justice in Religious Laws: Hypotheses on Cultivated Meat' in Lucia Scaffardi, Maria Chiara Mancini and Giulia Formici (eds), *The Future of Food, the Food of the Future: Novel Food, Innovation, Sustainability, and Legal Issues* (Springer 2025) (forthcoming).

4 Nir Avieli and Fran Markowitz (eds), *Eating Religiously: Food and Faith in the 21st Century* (Routledge 2025).



deserves gratitude, often preceded by prayer before meals. Recent crises, like Covid-19, have showcased the active role of religious groups in addressing food security challenges.

In sum, given that a significant percentage of the global population identifies with a religious group,<sup>1</sup> religion is relevant in the global food system. Religious perspectives and laws are relevant to discussions on food security for a number of reasons. For example, in certain jurisdictions like Saudi Arabia or Iran, religious laws are recognized as part of the public legal system. This means that these laws, which define aspects of personal status, may also be applicable in public law and private international law.<sup>2</sup> Moreover, while legal and social norms ideally rely on voluntary acceptance, religious affiliation can create powerful bonds of adherence that may not always be based on critical evaluation. Religions often dictate strong principles that govern the behaviour of their followers, operating through the individual conscience. These internal rules are often expressed in the rhetoric of “duties” that many religious laws emphasize. These norms can be as binding as the laws of a state, shaping how individuals understand their rights and responsibilities. The need to respect religious rules for conscience can thus strongly influence interpretations of fundamental human rights.<sup>3</sup>

This influence can also affect food choices. To some extent, the concept of “asymmetric information” can be applied in the food sector,<sup>4</sup> as religious institutions often possess significant authority, leading individuals to accept information and directives from these sources unquestionably. This can result in choices that, from the outsider perspective, appear irrational, but are considered rational and valuable within the framework of religious beliefs. However, it’s important to critically examine how this dynamic can potentially limit individual autonomy and critical thinking.<sup>5</sup>

In light of the above, the religious duty of fasting, which is abstaining from food, can significantly affect how believers perceive their food choice and consequently their rights to health and adequate food. This intersection highlights the need to consider religious perspectives when addressing issues of food security.

### 3. Duties and Practices of Fasting in Different Religious Legal Traditions

Modern medical science acknowledges several benefits of fasting, both physically and psychologically.<sup>6</sup> Fasting can help the health of the body, reduce stress and improve mental well-being and self-esteem.<sup>7</sup> However, such scientific knowledge cannot explain the ancestral

<sup>1</sup> Pew Research Center, ‘The Global Religious Landscape’ (18 December 2012) <https://www.pewresearch.org/religion/2012/12/18/global-religious-landscape-exec/> accessed 18 July 2025; and Pew Research Center, ‘The Future of World Religions: Population Growth Projections, 2010-2050’ (2 April 2015) <https://www.pewresearch.org/religion/2015/04/02/religious-projections-2010-2050/> accessed 18 July 2025.

<sup>2</sup> See Canopy Forum, ‘Articles by Giancarlo Anello’ <https://canopyforum.org/tag/giancarlo-anello/> accessed 18 July 2025.

<sup>3</sup> Ibid.

<sup>4</sup> Aisha Ijaz, ‘The Role of Religiosity on Information Asymmetry Concerns and Search Behaviour in UK’s Convenience Food Market: A Focus on Muslim Minorities’ (2022) 28 *Journal of Food Products Marketing* 49.; more in general, Anthony Gill, ‘Religious Liberty and Economic Development’ (2013) 11 *Review of Faith and International Affairs* 5.

<sup>5</sup> Peter Van Der Veer, ‘Market and money: a critique of rational choice theory’ (2012) 59 *Social Compass* 185.

<sup>6</sup> National Institutes of Health, *To Fast or Not to Fast: Does When You Eat Matter?* (December 2019) <https://newsinhealth.nih.gov/sites/newsinhealth/files/2019/December/NIHNIHDec2019.pdf> accessed 18 July 2025.

<sup>7</sup> Krzysztof Stec, Karol Pilis, Wiesław Pilis, Paweł Dolibog, Sławomir Letkiewicz and Alicja Głęcka, ‘Effects of fasting on the physiological and psychological responses in middle-aged men’ (2023) 15 *Nutrients* 3444.



motivations for religious fasting. To understand the role of fasting in religious contexts, we must move beyond a purely scientific lens and consider the underlying theological and philosophical principles. Moreover, even though different forms of fasting are present in many religious traditions, their reasons cannot be traced back to one single rationale. Rather, it looks like that this practice sprang up independently among completely different peoples and faiths.<sup>1</sup>

In ancient times, fasting was part of a ritual suggesting symbolic rebirth, thus a king would fast before enthroning.<sup>2</sup> For example, fasting plays a significant role in the Buddhist path to enlightenment of the Prince Siddhartha. Siddhartha, before his transformation into the Buddha (this term literally translates to “enlightened one”), embarked on a quest for spiritual understanding, initially embracing extreme asceticism, including prolonged fasting. This rigorous practice, though intended to purify his mind, left him physically weakened. Recognising that the underlying cause of suffering (*samsara*) was attachment and desire, he shifted his approach, adopting a more balanced path. He sustained himself on a single grain of rice daily, enduring pain and weakness, until a Brahmin woman named Sujata offered him nourishing rice milk. This act of kindness allowed him to regain his strength and continue his meditation, ultimately leading to his enlightenment. This experience informed his concept of the “Middle Way,” a path that avoids the extremes of both sensual indulgence and excessive self-denial<sup>3</sup>.

In other religious traditions, fasting is strictly related to the cycles of agricultural activities, drawing an holistic conception of food centred on nourishing individuals and communities. The food from the new harvest, for instance, was believed to carry specific powers, which were transmitted through particular foods: a sacred meal might involve theophagy – the eating of a deity itself – or hierophagy, the consumption of something associated with the divine.<sup>4</sup> The eating of other food would have polluted the beneficial effect of sacred meals<sup>5</sup> and, conversely, fasting would have been purifying. Christian theology views the Eucharist as the spiritual representation of Christ’s body. Consequently, fasting in Christianity retains echoes of its earlier meanings, which are now understood and practiced within a legal framework. Christian scripture identifies three specific types of fasts.<sup>31</sup> An ordinary type of fast has been ascribed to Jesus in Matthew:

*Then Jesus was led up by the Spirit into the wilderness to be tempted by the devil, he fasted for forty days and forty nights, and afterwards he was famished (Matthew, 4:1-2).<sup>6</sup>*

<sup>1</sup> Michel Clasquin-Johnson, ‘Fasting/Asceticism/Feasting’ in Birgit Weyel, Wilhelm Gräß, Emmanuel Lartey and Cas Wepener (eds), *International Handbook of Practical Theology* (De Gruyter 2022) 341.; Rudolph Arbesmann, ‘Fasting and Prophecy in Pagan and Christian Antiquity’ (1949-51) 7 *Traditio* 1.

<sup>2</sup> Joseph B. Tamney, (n 14) 129.

<sup>3</sup> Sandip T Gaikwad, ‘Apprehending Concept, Canons and Types of Fasting in Buddhism’ [2017] 2 *International Journal of Innovative Research and Creative Technology* 164.

<sup>4</sup> An excellent book on this topic, from a phenomenological perspective, is [Kees Wagdtendonk, \*Fasting in the Koran\* \(Brill 1968\)](#) 21, especially in the section where A. discusses the meaning of fasting in a phenomenological perspective.

<sup>5</sup> ibid, 22.

<sup>6</sup> In the King James Version of Bible word “hungered” has been used instead of “famished.” From this Christians inferred that during these forty days Jesus was not eating food but continued to drink water. Thus, the normal Christian fast pertains to abstinence from eating food to the exclusion of abstinence from drinking water.



This fast means abstinence from eating only, while drinking water is allowed in it.

The second type is an absolute fast, which means abstinence from both eating and drinking. In the context of the “transforming experience” of Paul,<sup>1</sup> it is recorded in the New Testament:

*For three days he was without sight, and neither ate nor drank (Acts, 9:9).*

The third type is the partial fast, for which the Christian theologians take recourse to a vision of Daniel recorded in the Old Testament, before which he had observed self-restraint from certain types of foods and drinks.

*I had eaten no rich food, no meat or wine had entered my mouth, and I had not anointed myself at all, for the full three weeks (Daniel, 10:3).*

Today, the historical forms of fasting are not distinguished and the regulations of the Catholic church concerning fasting canon are described in the Canon Law Code, art. 1249,<sup>2</sup> as follows:

*The divine law binds all the Christian faithful to do penance each in his or her own way. In order for all to be united among themselves by some common observance of penance, however, penitential days are prescribed on which the Christian faithful devote themselves in a special way to prayer, perform works of piety and charity, and deny themselves by fulfilling their own obligations more faithfully and especially by observing fast and abstinence, according to the norm of the following canons.<sup>3</sup>*

Although this norm remains within Church law, the Church has gradually shifted its understanding of fasting. The original symbolic meaning – “cleaning” the body to prepare the faithful for receiving the body and blood of Christ – has been deemphasized. Instead, the Church now prioritizes the purification of the soul through confession.<sup>4</sup> This shift has resulted in a loss of some of the original meanings of fasting and has drawn criticism from historians and canon lawyers. They argue that, when interpreted historically and ethically, the duty of fasting not only shields the faithful from excessive attachment to worldly possessions but also fosters altruism and charity. It encourages them to share the resources saved through fasting and abstinence with community members in dire need.<sup>5</sup>

Fasting practices also characterize the lives of individuals and the cycles of the months and seasons in many religions. Periods of communal fasting are often observed at specific times, such as during a particular month of the calendar or in anticipation of or following important religious ceremonies. On this point, Mohammad Makram clearly writes:

<sup>1</sup> Instead of the old conception of “conversion.” For this interpretation, see Gabriele Boccaccini and Giulio Mariotti, *Paolo di Tarso, un ebreo del suo tempo* (Carocci 2025).

<sup>2</sup> See, for a critical comment, Geraldina Boni, ‘Il digiuno e l’astinenza nel diritto canonico’ in *Daimon, Annuario di diritto comparato delle religioni, numero speciale: Regolare il cibo, ordinare il mondo. Diritti religiosi e alimentazione* (il Mulino 2014) 217.

<sup>3</sup> *Code of Canon Law*, Book IV, Part III, Title II (1983) [https://www.vatican.va/archive/cod-iuris-canonicali/eng/documents/cic\\_lib4-cann1244-1253\\_en.html#TITLE\\_II](https://www.vatican.va/archive/cod-iuris-canonicali/eng/documents/cic_lib4-cann1244-1253_en.html#TITLE_II) accessed 18 July 2025.

<sup>4</sup> See. Geraldina Boni (n 31) 227.

<sup>5</sup> See *ibid*, 233.



*«a study of fasting in Judaism, Christianity, and Islam endorses the structural relationship between fasting, feasting, and festivals. Virtually all the important public fasting periods in the selected religious traditions are followed by feastings and festivals. For example, Esther fast in Judaism is followed by Purim feast, Lent fasting in Christianity is followed by Easter, and fasting of Ramadan is followed by 'Id al-Fitr in Islam».*<sup>1</sup>

The connection between fasting and religious time is central to many traditions. For example, Jewish law prescribes six annual periods of public fasting, some obligatory and others voluntary. Initially, the Mosaic Law recognized only one such obligatory fast, observed on the tenth day of Tishri, the seventh month. This day, known as Yom Kippur or the Day of Atonement, is the most solemn and significant religious event for Jews throughout the year. On this fast, the Torah reads:

*The Lord spoke to Moses, saying: Now, the tenth day of this seventh month is the day of atonement; it shall be a holy convocation for you: you shall deny yourselves and present the Lord's offering by fire (Leviticus, 23:26-27; See also, Leviticus, 16:29).*<sup>2</sup>

Later, additional fasts were added, commemorating significant historical events: the seventeenth day of the fourth month (Tammuz), the ninth day of the fifth month (Av), the third day of the seventh month (Tishri), and the tenth day of the tenth month (Tevet). These fasts are established together in the following verse of the Torah:

*Thus says the Lord of hosts: The fast of the fourth month, and the fast of the fifth, and the fast of the seventh, and the fast of the tenth, shall be seasons of joy and gladness, and cheerful festivals for the house of Judah: therefore love truth and peace (Zechariah, 8:19).*

Moreover, in the book of Esther another fast has been promulgated (Esther, 9:31-32) which is considered the sixth statutory communal fast. This fast is observed on the thirteenth of the last month (Adar) of Jewish calendar.<sup>3</sup>

In the same vein, the Islamic religion knows a strong relation between the calendar and public fasting. Two categories of fasting are mentioned in the Qur'an: the first is periodical and associated to the month of *Ramadan*, and it is obligatory for all adult Muslims with a few exceptions.<sup>4</sup> The second category of fasting is an expression of a penitent spirit for certain mistakes or sins committed. This type of fasting is present in many religions and serves as a means of seeking repentance for violations of God's will (duties). In the Quran, there are several references to this practice, for example, verse 89 of Chapter 5 and verse 196 of Chapter 2. Additionally, there is a verse that praises those who fast for the consent of Allah

1 Mohammad Akram, 'Meaning and Significance of Fasting in Comparative Perspective' (2016) 39 *Hamard Islamicus* 38, 53.

2 ibid, 39.

3 ibid.

4 Kees Wagdtendonk (n 27).



(al-Quran, verse 35 of Chapter 33), which can be interpreted as encompassing all kinds of fasting.

In the Muslim world, alongside repentance, fasting during Ramadan or beyond also carries a highly positive social impact. In 2023, nearly 2 billion people worldwide celebrated Ramadan, fasting approximately 13 hours and 26 minutes every day.<sup>1</sup> Over 80% of fasting Muslims increase their religious and social activities during the Holy month<sup>2</sup>. Generally, fasting practices promote altruism by fostering a willingness to sacrifice and donate to the poor. Recent surveys show that most Ramadan expenses are allocated to food and drinks, with the remaining percentage dedicated to charity or donations.<sup>3</sup> Additionally, as individuals experience hunger, they are more willing to reduce some antisocial behaviours that threaten food security, such as hoarding goods. Various statistics<sup>4</sup> and research indicate that heightened empathy during Ramadan often leads to a reduction in ordinary crimes in many Muslim countries.<sup>5</sup>

Moving to fasting in Hinduism, the spring and fall celebrations are among the more widely celebrated. Certain Hindu festivals and holy days require believers to observe fasting as part of their worship. For example, Navaratri, the nine-night celebration of the Feminine Divine occurs five times a year. Similarly, many Hindus consider Shravana to be the holiest month of the year. This month falls in July-August or August-September, depending on the regional calendar being followed and many Hindus observe a period of fasting during this month. Eventually, many Hindus believe that certain days of the week are dedicated to a particular deity and will observe fast to honour that particular deity. For example, believers of Lord Shiva tend to fast on Mondays, while believers of Lord Visnu tend to fast on Thursdays. Many Hindus fast on certain days of the month. For example, on the full moon period and the eleventh day after the full moon and the new moon. However, in Hinduism fasting is deferred to personal choice. More precisely, the method of fasting is not strictly codified, so that Hindus may fast at any time for a specific purpose, and also for the repentance of their sins. In so doing, Hindus observe fasts of varying strictness depending on individual beliefs or practices. Some Hindus will fast during inauspicious occasions to make them psychologically stronger and counter negative forces. Many Hindus are guided on the days to fast by their priest. Observance of certain samskāras or sacraments also require fasting for the whole duration or for a specific time. For example, couples who are getting married normally fast for the whole day.

In Judaism, individual fasting also exists and generally pertains to the private life of the

1 Very updated and interesting data are available at Amna Puri-Mirza, 'Ramadan - statistics & facts' (Statista, 14 February 2025) <https://www.statista.com/topics/6363/ramadan/#topicOverview> accessed 30 Novembre 2025.

2 Saifaddin Galal, 'Respondents from MENA that will increase religious activities during Ramadan 2024' (Statista, 28 November 2025) <https://www.statista.com/statistics/1451375/mena-share-of-respondents-increasing-religious-activities-during-ramadan/> accessed 30 novembre 2025.

3 TGM Research, *TGM Ramadan Insights 2024* (TGM Insight Pulse, 2024) <https://tgmrsearch.com/ramadan-insights-2024-global-study.html> accessed 30 Novembre 2025.

4 Amna Puri-Mirza (n 39).

5 [H Sanaei-Zadeh, K Aghakhan and J Gharehdaghi, 'Reduction in the Rate of Interpersonal Violence during the Holy Month of Ramadan' \(2015\) 29 \*Iranian Journal of Medical Sciences\* 50.](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4512/); in the same vein the research of the Uskudar University, available online at <https://uskudar.edu.tr/en/new/during-ramadan-crime-rates-decrease-between-15-and-20-percent/44512>, accesses 30 Novembre 2025.



faithful. Some private fasts are undertaken to atone for sins, while others are related to rites of passage, marriage, and other occasions. Jews sometimes fast on the anniversary of the death of a loved one. Similarly, if a Torah scroll is accidentally dropped, those present may fast for a day to observe the significance of the event.<sup>1</sup> Sometimes, in the Jews' communal history, fasting has functioned as the national response to catastrophes (Joel, 2:15). It should be noted that fasting itself is not the sole instrument for being forgiven. Rather, by means of fasting the soul and the body are prepared for the repentance that must be achieved by a sincere contrition.

Eventually, in several religions, the sensory deprivation provided by a fast has been considered itself as a means for straightening of one's own powers,<sup>2</sup> a medium for ascetism and mystical experiences. Christian sources emphasize the importance of moderation while fasting:

1. When you fast, do not look sombre as the hypocrites do, for they disfigure their faces to show men they are fasting. I tell you the truth, they have received their reward in full. But when you fast, put oil, on your head and wash your face, so that it will not be obvious to men that you are fasting, but only to your Father, who is unseen; and your Father, who sees what is done in secret, will reward you (Matthew, 6:16-18).

In Hinduism, generally speaking, fasting is considered a moral and spiritual act aimed at purifying the body and mind to attain divine grace. According to Hindu religion, fasting is believed to control over one's senses, squelches earthly desires and thus inculcates spiritual growth. Hindus also believe that when there is a spiritual goal behind fasting, it should not weaken the body.<sup>3</sup> It is viewed as essential for a person's well-being, nourishing both their physical and spiritual needs.

Similarly, in Confucianism, fasting is associated to ascetism and moral perfection. Fasting in Chinese is “*zhajie*”, which includes two meanings, that are fasting (*zhai*) and stop doing bad things (*jie*). The author Zhu Sheng (1299-1377), who lived in the early Ming Dynasty (1368-1644), composed, by imperial edict, “*Zhaijie Wen*” (Treatise on Fasting), in which he laid down the rules for the act of fasting, saying:

*«Zhai is for cleansing inner sins while jie is for giving up all bad habit. The person who fast must bathe and change clothes, stay in a separate room. He will not drink, not eat stench food, not visit the sick, not present condolences, not listen to music, and not answer to subpoena. Those are the things that must be given up (jie). And yet the person who fast must be sincere and cautious; if he thinks something must think the God whom he is worshipping; considering that God is above him, or at his left or right; focusing fully on this all time without a moment of laxity. This is the way of fasting».<sup>4</sup>*

1 Mohammad Akram (n 35) 39.

2 Kees Wagdendonk (n 27) 25.

3 Md Thowhidul Islam, 'Fasting in Hinduism, Buddhism and Islam: A Comparative Study' (2024) 2 *Magolat Journal of Islamic Studies* 160.

4 Min Ke Qin, 'Islam and Confucianism: Ritual, Prayer and Fasting' [2022] 15 *International Journal of the Asian Philosophical*



In Islam, fasting can also be associated with asceticism and mystical experience. Early Sufis embraced poverty to such an extent that “the poor man” (*faqir* in Arabic) became synonymous with the Sufi, a term that remains in use today. The renowned mystic and philosopher al-Ghazali (d. 1111), who advocated moderation and practicality in religious practices and helped integrate Sufism into mainstream Islamic spirituality, nonetheless emphasized that the path to God involves fasting, night vigils, sleeplessness, and renunciation of wealth.<sup>1</sup> Ghazali was used to mentioning together two *hadiths*, one that says fasting is half of patience, and the other that patience is half of faith, to conclude that one-quarter of faith in God is... fasting<sup>2</sup>.

#### **4. Functions of Fasting in a Globalised Scenario: How Duties and Rights Support Each Other**

As mentioned above, religious laws make fasting a duty for the faithful under certain circumstances. This duty appears to create an anthropological paradox: while food is a vital necessity, religions sacralise abstinence. This apparent contradiction may seem at odds with the ‘conservative’ function of religions, a view often emphasized by the gene-culture co-evolution approach.<sup>3</sup> This theory suggests that human beings evolve, by means of the interaction of genes and culture over long time periods. In the context of the sciences of religions, this idea explores how religious beliefs and behaviours may have shaped, and been shaped by, our genetic evolution.<sup>4</sup> For example, some researchers propose that the development of religious concepts - such as moral codes, ritual behaviours, or belief in an afterlife - could have provided evolutionary advantages by promoting cooperation, social cohesion, or group survival. Conversely, genetic predispositions (like certain cognitive tendencies) might influence how individuals interpret and adopt religious ideas.<sup>5</sup>

Furthermore, the primary opposition between the need for nutrition and its abstinence also encapsulates a secondary opposition regarding their respective legal positions – the right to food vs. the duty of fasting. This secondary opposition has significant implications for different approaches to human life, reflected in the contrast between the “secular” rhetoric of human rights and the religious rhetoric of duties;<sup>6</sup> the modern foundations of statehood and citizenship vs. the traditional lifestyles of religious authorities and groups; the values of individualism and liberalism vs. the collectivist, solidaristic ideals of community-based societies.

In order to unravel these points, it should be noted that the deprivation involved in fasting does not necessarily imply the negation of the society or the person. On the contrary,

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1 Valerie J Hoffman, ‘Eating and Fasting for God in Sufi Tradition’ (1995) 63 *Journal of the American Academy of Religion* 469. 2 *ibid*, 471.

3 *Evolutionary Processes in the Natural History of Religion* (Springer, 23 September 2021); for a comprehensive approach see James A Van Slyke, *The Cognitive Science of Religion* (Routledge 2016).

4 Charlotte Visagie, ‘Exploration of religion as phenomenon of gene-culture co-evolution’ (MA thesis, University of Johannesburg 2018).

5 Armin W Geertz and Leonardo Ambasciano (eds), *Studying the Religious Mind: Methodology in the Cognitive Science of Religion* (Equinox Publishing 2022).

6 Omar Farahat, ‘Reason-giving and the duty to obey: perspectives from classical Islamic jurisprudence’ (2021) 36 *Journal of Law and Religion* 5.



public fasting practices are primarily associated with events of religious significance for the respective communities. Feasts and festivals often occur before or after these fasting periods, serving as evidence of the solidaristic significance that fasting can have. Instead, by promoting self-control and social solidarity, individual fasting can also support personal well-being and foster greater integration into society.<sup>1</sup> Ultimately, some scholars argue that people reject fasting as an act of self-control not for its own sake, but because modernization imposes social controls that reduce the need for religiously motivated self-discipline<sup>2</sup>.

Thus, in a multifaceted and complex context, religious duties related to fasting can be integrated with the individual's right to food to address the challenges of food insecurity. This approach involves understanding the various functions that different modes of fasting may serve, notably their critical and solidaristic roles.

1) The critical function of the fasting deontology: first of all, the ascetic meaning of fasting can sometimes conceal a critical function: when an ascetic withdraws from society, they are, in fact, condemning it.<sup>3</sup> A striking example of such a function was expressed by the Mahatma Gandhi, who made the discipline of fasting a great example of leadership and an instrument of political activism.<sup>4</sup> Gandhi, building on Indian traditions, ideas, and institutions, extended this approach to the duty of fasting too.<sup>5</sup> Obviously, in Gandhi's teaching, duty is the expression "in detail" of the concept of Dharma, that is the cementing force of the universe. A quotation may be needed:

*«Duty is the expression in detail of the concept of cementing force of the universe, and Hindu thought has ultimate dimensions of duty and classified into five categories, namely, sacrifices to Brahman, Gods, ancestors, animal creation and to fellow beings. In the fulfilment of this five-fold duty man realises the unity of the visible and invisible universe».*<sup>6</sup>

As mentioned earlier, Gandhi employed the duty of fasting as a means to critique the dominance of British authority and as an instrument of political protest. Indirectly, his critique targeted Western ideology and the set of values that supported colonial power in India.

In his system of belief, duty acquires a priority over right. The former is a primal expression of dharma, the latter is an expression of individual self-interest sanctioned by social will.<sup>7</sup> Gandhi recognises the teaching of verses 40-48 of the chapter 18 of the Bhagavad Gita, on this point.<sup>8</sup>

1 Mohammad Akram (n 35) 37.

2 Joseph B. Tamney, (n 14) 131.

3 Mohammad Akram(n 35) 38.

4 Gandhi's insistence on self-discipline as a preparation and qualification for Satyagraha on the social and political level is an expression of his integral conception of duty, says G N Sarma, 'Gandhi's Concept of Duty' (1980) 41 *The Indian Journal of Political Science* 227.

5. Amar Farooqi, 'Gandhi's Spiritual Politics: Austerity, Fasting and Secularism' (2020) 36 *Studies in History* 178.

6 G N Sarma (n 57) 215-6.

7 *ibid*, 218.

8 <https://bhagavadgita.io/>. Verses of the Gita about food and cooking are in Chapter 3 (13). In the Vedic tradition, food is cooked with the consciousness that the meal is for the pleasure of God. A portion of the food items is then put in a plate and a verbal or mental prayer is made for the Lord to come and eat it. After the offering, the food in the plate is considered prasād (grace of God). All the food in the plate and the pots is then accepted as God's grace and eaten in that consciousness. Other religious traditions follow similar customs. Christianity has the sacrament of the Eucharist, where bread and wine are consecrated and then partaken. <https://www.holy-bhagavad-gita.org/chapter/3/verse/13>



More specifically, there are two levels of duty in Gandhi's thought: the first pertains to the individual's obligations to society, as defined by social traditions, institutions, and customs; the second relates to individual conscience (the Inner Voice). The appeal to the Inner Voice - the higher law - has always been invoked in situations of moral crisis involving conflicts of loyalty. Both the call of conscience and the obligation to follow the law of the community are valid, and a crisis of choice arises when one must be prioritized over the other. It is well known that one of the essential requisites of a *satyagrahi*<sup>1</sup> is respect for the law and the preparedness to accept the punishment of law.<sup>2</sup>

In Gandhi's perspective, there is a primacy of the duty over the right or, better said, the duty is the source of right. On this point Gandhi writes to Julian Huxley in these terms:

*«I learned from my illiterate but very wise mother that all rights worthy of being deserved and preserved are those resulting from a fulfilled duty. Thus the right to life itself only comes to us when we fulfil our duty as citizens of the world. According to this fundamental principle, it is probably quite easy to define the rights of Man and Woman and to link each right to a corresponding duty that is worth fulfilling. It could be shown that every other right is just a usurpation not worth fighting for».*<sup>3</sup>

Later, he emphasized that no legal tradition can be entirely oriented towards the exclusion of right, nor towards the community at the expense of the individual, nor towards tradition without regard for reason or intuition. Indian and Western traditions have often been regarded as mutually exclusive, each emphasizing one of these principles to the exclusion of the others. However, it would be more accurate to say that both elements are present in each tradition, though they are differently balanced.<sup>4</sup> More precisely, Gandhi viewed public and private morality as an integrated whole:

*«Clearly, therefore, in Gandhi's view the concept of duty was integral and he made no dichotomy in his ethical public and private duty or morality. Public duty was the extension of duty to oneself and the discipline required for the performance of both types of duty was identical. From Gandhian point of view one who had not undergone self-discipline can hardly claim to be a public servant».*<sup>5</sup>

Similar to Kant's view, in Gandhi's perception the knowledge of what the individual owes to himself must be derived from the intuitive perception of his relation to the universal.<sup>6</sup> The critical legacy of Gandhi, as well as that of the Hindu legal tradition, finds today a formal expression in the ideology of "Asian Values," a term that emerged in the late 20th century, particularly in the 1990s. It describes a set of cultural, social, and political principles that some Asian leaders and scholars argue are distinct from Western values. Key aspects of Asian Values are deeply rooted in the role that religious duties play in certain Asian legal

1 Alladi Veerabhadra Rao, 'Gandhi's Concept of Satyagraha' (2018) 9 *Research Journal of Humanities and Social Sciences* 24.  
2 G N Sarma (n 57) 228.

3 Mohandas K Gandhi, 'Letter to Julian Huxley' in *Human Rights: Comments and Interpretations* (UNESCO 1949). This text in Italian translation is also present in Ernesto Balducci, *Gandhi* (Edizioni Cultura della Pace 1988) 184.

4 G N Sarma (n 57) 226.

5 *ibid*, 225.

6 *ibid*, 225.



traditions, such as Hinduism, Buddhism, and Confucianism (the early Confucian model for the formation of political entities/civilisations differs from western political conceptions such as the nation-state that is a paradigm of the western and liberal society.<sup>1</sup> Many of these duties safeguard group relations, emphasizing the importance of family, community, and societal harmony over individual interests. In such a worldview, priority is given to collective welfare rather than personal freedoms. As a consequence, moral and religious duties are regarded as essential to respecting authority and maintaining hierarchical order, which are considered vital for societal stability. Practical manifestations of these principles often include a strong work ethic, discipline, and frugality. In this framework, duties, such as responsibilities to family, society, and the state, are often prioritized over individual rights and freedoms. More specifically, duties are central when societal cohesion and collective harmony are at stake; thus, individual interests should not disrupt social stability, and citizens are expected to trust and obey authority.

2) The solidaristic/altruistic function of the fasting deontology: The altruistic dimension encapsulated in legal and moral duties is not exclusive to Asian cultures. As mentioned, this element is present and widely shared among Muslim communities worldwide, where the spiritual benefits of fasting benefit society at large. Fasting, for instance, is also an act of self-control that embodies the value of self-restraint. In a global context where food security is at risk, promoting self-restraint and solidarity in consumption are important values that should be encouraged, even from a Western perspective and within a largely secular worldview. In an article of 1931, discussing the theories of remarkable western scholars like Duguit, Lundstedt, and Austin, Carleton Kemp Allen firstly states that legal duties are dependent on moral (and religious) duties.<sup>2</sup> The execution of sanctions that are connected with their violation cannot be the ground of their legal nature.<sup>3</sup> Secondly, emphasizing some aspects of the discussed theories, concludes that the nature of legal duties can be found in the interest of the community, rather than the individual:

*«Whether or not it be otherwise in morals, in law a duty owed to oneself is a flat contradiction. Whenever the law imposes a duty on the individual in respect of his own person, liberty or property, it does so not in the interest of the individual himself (except in so far as he shares in the general welfare of society), but in the interest of the community or of some section of the community».*<sup>4</sup>

Building on his reasoning, Allen argues that solidarity among members of society forms

1 Joseph Cho-wai Chan, *Confucian Perfectionism: A Political Philosophy for Modern Times* (Princeton University Press 2014).

2 Carleton Kemp Allen, 'Legal Duties' (1931) 40 *Yale Law Journal* 331.

3 ibid, 362: «Duty cannot be anything but subjective and moral. Nor can it be enforced by anything but individual conscience. When we speak of the legal enforcement of legal duties, we mean rather the operation of the prescribed legal penalty for non-compliance with certain express commands or prohibitions. This extrinsically-imposed penalty for disobedience is not the same thing as the enforcement of the duty, for to say that is to presuppose that the sovereign command is a duty to the individual. It is not necessarily so: that is a matter which can be determined only by moral judgment. King Herod commands the Massacre of the Innocents, and Mary evades the command. She might have been put to death for her disobedience, but it could hardly be said that her execution would have been the enforcement of her duty».

4 ibid, 358.



the fundamental basis of legal duties. He further contends that legal duties serve as the most effective instruments for fostering altruism within society:

*«There is no duty more essentially moral than the altruistic duty; indeed, to a great extent, morality is altruism. Every lawyer will know what I mean when I say that as a general principle our law has shown itself extremely chary of imposing altruistic duties. The conservative view has been that to demand of the average man that he should sacrifice his own clear interest to that of another is to expect of him a morality beyond his capacity and therefore to commit the injustice of addressing to him a command which he is unable to obey. But at the present time we may observe an increasing recognition of purely altruistic duties in law».*<sup>1</sup>

Altruistic duty is fundamentally moral, and morality itself is largely rooted in altruism.<sup>2</sup> Liberal modern law was somehow cautious about imposing duties, based on the belief that demanding self-sacrifice from the average person is unfair and beyond their capacity but the religious laws have been based on the dynamic of duties and societal relations for centuries and are relevant for masses of believers even today. Consequently, in the pursuit of solidaristic goals related to food security, religious groups observing fasting as part of their religious duties can be appreciated by secular members of society as well. Naturally, a key distinction remains between religious duties and moral duties, as religious duties are often seen as aligned with the will of God, whereas moral duties are grounded in human conscience and societal values:

*«In religious duties one has a distinction between the content of the duty and the authority of the duty which is absent in moral duties. The radical difference between doing one's duty in and outside religion, rests to a large extent, on the religious identification of duty with the will of God. This difference is illustrated in the following ways: First, moral duties are not always present; we do not spend even the greater part of our time thinking about duty. On the other hand, the more one meditates on the law of God and disciplines oneself to it, the nearer one is said to be to God: "But his delight is in the law of the Lord; and in his law doth he meditate day and night" (Psalm 1. 2). If anyone talked of meditating on his duty day and night he would be an unbearable person and morally reprehensible. The moral life is not ruled by duty in the way in which the religious life is ruled by the will of God. [...] Secondly, what is to be done in the performance of one's moral duty is usually quite specific [...] The two differences between moral and religious conceptions of duty which we have considered are based on a third, more fundamental difference, namely, that moral duties, unlike religious duties, are often thought of in relation to needs. I recognise*

<sup>1</sup> ibid, 367, and he continues: «There are, I conceive, four principal ways in which an altruistic act may give rise to legal rights or duties. (1) It may be commanded by the law as a positive duty. (2) Its altruistic motive may be set up as a defence to an act which would otherwise be illegal. (3) It may be the foundation of a claim for reimbursement. (4) It may be the foundation of a claim for compensation for injury sustained in saving one person from the consequences of the wrongful action of another».

<sup>2</sup> David Hume, *A Treatise of Human Nature* (Clarendon Press 1896), is a classical reading on this point.



*that it is my moral duty to do something in face of a need for that particular action to be done which makes up my duty. If a duty is done in relation to needs, it at least makes sense to suppose that the need can be met. In so far as the people who benefit from the performance of religious duties get what they needed, it makes sense to talk of answering needs in the performance of religious duties.»<sup>1</sup>*

It is quite interesting that, from a secular perspective, the duty of fasting might be related to fulfilling a human need - though this does not seem to be the case. Nevertheless, one might wonder whether there are hidden benefits associated with this duty, which is so prevalent in many religious ethics and laws. The answer is that, at times, religious duties can serve as the basis for legal duties; occasionally, they can also reinforce policies related to human rights, especially when aiming to achieve international or global goals. This point will be further explored in the concluding section.

## Conclusion

Global food security is a collective issue that extends well beyond the borders of any single country. In this context, a cosmopolitan duty approach is necessary, one that promotes an altruistic attitude and prompts tangible international action.<sup>2</sup> Despite appearing contradictory to the right to food, the dynamic of religious fasting plays a crucial role in safeguarding important values. These include moderation, sharing, and self-control in food consumption and waste, which are essential for achieving food security. These values are embedded in religious laws and they can effectively complement secular and globalized legal frameworks. By integrating these values, secular food policies can also be better guided towards social or public aims.

This paper ultimately calls for the integration of religious duties, such as fasting, with the individual right to food. This approach involves recognizing the various functions that different modes of fasting may serve, notably their critical and solidaristic roles. Such religious practices and duties should be considered and incorporated into food law policies, such as by promoting food sharing initiatives, supporting local food production, or advocating for more equitable access to food resources. In this direction, it will be helpful to explore the potential complementarity between the “grammar” of religious duties and the policies of States tackling the problem of food insecurity. This matter could be a point of the strategy of dialogue that is currently being developed in the EU under the umbrella of the Article 17 of the Treaty on the Functioning of the European Union.<sup>3</sup> This article recognises the specific contribution of churches and religious

1. D Z Phillips, ‘Moral and Religious Conceptions of Duty: An Analysis’ (1964) 73 *Mind* 406.

2 John MacCunn, ‘Cosmopolitan Duties’ (1899) 9 *International Journal of Ethics* 1., who was discussing about the global dimension of the British Empire, at his time, and was asking himself if was morally adequate to limit the ties of solidarity to the group of fellow citizens and the binding of nationality. After a long rationale, his response was negative and he wrote his conclusions in this way: ““a keen sense of cosmopolitan duty-grounded as this is in fundamental ethical fact-is at once one of the most elevating and the most justifiable attributes of a free citizen. And a great empire like ours, gathering into a political unity men of the most diverse races, creeds, ideas, characters, civilizations, savageries, is the greatest school of cosmopolitanism the world has ever seen. There has been nothing like it for educating those sympathies and obligations which, in Bentham’s words, have «limits none other than those of the habitable globe».

3 European Parliament, *Article 17 TFEU: Dialogue with Churches, and Religious and Philosophical Organisations – The EP Implementation* <https://www.europarl.europa.eu/at-your-service/files/be-heard/religious-and-non-confessional-dialogue/>

associations and declares that the Union shall maintain an open, transparent and regular dialogue with these churches and organisations. According to recent guidelines,<sup>1</sup> dialogue partners can be churches, religious associations or communities as well as philosophical and non-confessional organisations that are recognized or registered as such at national level and adhere to European values. All relevant topics related to the EU agenda can be addressed in this dialogue. Such topics can be raised both by the European Commission and its interlocutors provided both parties agree. In the light of its policy priorities, the Commission may choose to suggest priority topics for discussion over a certain period of time with different interlocutors. However, this should not prevent both sides from addressing topical issues at any given time. The topic and format for a specific initiative are chosen jointly by the Commission and the respective interlocutor in a spirit of constructive mutual understanding. Moreover, this dialogue must be transparent and regular. More specifically, interlocutors are invited to contribute to the European Union policy-making process through the various written consultation processes launched by the European Commission. This dialogue may be conducted through *inter alia* informal meetings hosted by the President of the European Commission, bilateral meetings with Commission representatives at all levels and, in particular, meetings with the responsible Adviser for the dialogue with churches, and religious associations or communities as well as philosophical and non-confessional organisations. Further instruments in this non-exhaustive list may include dialogue seminars and ad-hoc consultation procedures on specific and timely policy issues.<sup>2</sup> As a previous example of this kind of dialogue seminars, a mention should be made to some reports that address the problem of food security in the contemporary and globalized scenario. In the document “Collective Action for Ending a Collective Problem: A Multi-stakeholder Project on Global Food Security” (25 July 2023),<sup>3</sup> the right to food is interpreted in conjunction with its apparent opposite - the duty of fasting. This relationship is understood as a principle that helps safeguard values such as moderation, sharing, and self-control in food consumption and waste, which remain highly relevant even within the secular and globalized context of contemporary legal frameworks, such as the Sustainable Development Goals (SDGs). The values embedded in the deontological dimension of religious rights can effectively complement voluntarist models that guide food law policies toward social or public aims.

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2 ibid.

3 *Collective Action for Ending a Collective Problem: A Multi-stakeholder Project on Global Food Security* (Report, 25 July 2023) <https://www.dcu.ie/sites/default/files/inline-files/Report%20-%20final%20%283%29.pdf> accessed 30 Novembre 2025.



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## GOOD GOVERNANCE THROUGH PUBLIC POLICY EDUCATION: EXPERIENCES FROM US-MEXICO AND IRAN-AFGHANISTAN WATER TREATIES

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The inherent difficulties of designing and executing good public policy are not restricted to modernity or any specific political system. Many of these difficulties were pondered and discussed even in the ancient world. Today, Public Policy Education (PPE) has turned into a primary necessity, and more than any time in recent history needs to be promoted globally. PPE could empower citizens to assume a more effective role in good governance through understanding how governmental decisions directly impact their lives. The promotion of PPE can lead to the overall promotion of good governance, as it can progressively enhance civic agency, limit excessive state control, and reinforce democratic principles. This study examines the origins of public policy fundamentals and argues that they are not inherently tethered to the American context. It posits that public policy educators around the world can, and indeed should, develop their own curricula based on similar broad outlines and comparative studies. Establishing PPE worldwide is paramount, and one effective method is to immerse students in real-world policy challenges from diverse global settings. This paper – employing a descriptive-analytical method and illustrating its application through two bilateral treaties on water rights (US-Mexico and Iran-Afghanistan Water Treaties) – further highlights how other real-world case studies from international organizations, such as the International Telecommunication Union (ITU) and the Food and Agriculture Organization (FAO), can expose students to practical policy challenges. The paper seeks to address a central question: Can Public Policy Education effectively promote good governance? Findings suggest that PPE holds significant potential for cultivating a globally informed and engaged citizenry. This is particularly vital given the widespread perceptions of governance failures in numerous states; an educated populace familiar with universal principles of good governance can tackle complex policy issues more effectively than current state structures.

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## Introduction

The discipline of public policy, formally established in the United States post-World War II, is a relatively nascent academic field that functions as both a scholarly pursuit and a foundation for professional practice.<sup>1</sup> Historically, the School of Public Policy at the University of Maryland<sup>2</sup> concentrated its pedagogical efforts exclusively on graduate education. The establishment of its undergraduate program approximately seven years ago represents a significant, more recent institutional development, to which I (Dr. Ramsay) have contributed curriculum development for a considerable duration of its relatively short existence.

It is not readily apparent what foundational knowledge is indispensable for undergraduate public policy students, whether they intend to pursue graduate studies or enter professional policy roles. Empirical observation suggests the following competencies are crucial:

1. A recognition of recurrent patterns in social life and governance observable across diverse historical and geographical contexts;
2. An understanding that self-governance, irrespective of its manifestation, inherently poses challenges not present under oligarchic, autocratic, or imperial systems;
3. A comprehension of the logical underpinnings of popular governance within democratic or republican frameworks;
4. The acknowledgement that policymaking inherently involves confronting unforeseen issues; the unexpected is not an isolated category but an integral aspect of the domain;
5. The capacity to accept limitations on available tools and viable solutions;
6. Practical experience in collaborative decision-making within small groups, particularly when addressing unforeseen problems under constraints;
7. The ability to accurately recall and represent collective group decisions, rather than solely individual contributions or preferences.

It is of interest to briefly consider the relations between the qualities and skills just

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1 - Martin Potůček and Lance T LeLoup, 'Approaches to Public Policy in Central and Eastern Europe' in Martin Potůček and others, *Public Policy in Central and Eastern Europe: Theories, Methods, Practices* (Network of Institutes and Schools of Public Administration in Central and Eastern Europe 2003) 1, 12-, available at <https://www.martinpotucek.cz/wp-content/uploads/2019/10/approaches-pp.pdf> accessed 30 May 2025.

2 University of Maryland School of Public Policy, 'Research & Impact' <https://spp.umd.edu/research-impact> accessed 30 May 2025.

enumerated and the intellectual framework underpinning the creation of the United States Constitution. Items (1) through (4) were all part of the intellectual repertoire of the fifty-five founders who drafted the Constitution, and were fairly widespread in the revolutionary generation. These four qualities were stimulated by the types of effort involved in fighting for, and conceiving of, a republic that would cover an extensive territory – a novel undertaking at the time. Later, with greater historical distance from the founding era, these qualities may have been prone to decline.

On the other hand, items (5) through (7) are administrative qualities that, in its new structure of government, the revolutionary generation had to learn. In the American experience, these latter qualities may have reached their real fruition in the 1930s and 1940s, when state capacity for survival was tested by the Great Depression and World War II. The development of congressional legislation for reform and executive-branch agencies to deal with pressing crises created an institutional legacy that remains a subject of contemporary controversy and dispute.

Students new to the study of public policy are likely to assume that for a given problem, material resources, a knowledge base, and the rationality to use both well are already in place. In practice, however, it is more likely that at least one of these three is lacking. Also, the rule of law is not a constant in a given society; it is at best more fragile than it looks, and is a matter of degree, tending to widen and narrow depending on what social strains are impacting it. Thus, to effectively address these common preconceptions, it is crucial to present actual policy problems through exercises that require collaborative effort and tentative problem-solving.

The comprehensive scope of the above-mentioned foundational competencies might initially suggest an overambitious pedagogical undertaking; however, their integration into an academic curriculum is entirely feasible. This approach has been pursued within two mandatory courses, “Great Thinkers and Public Policy” and “Public Leaders and Active Citizens,” in the United States, also offered by other members of the faculty.

To foster a globally aware and engaged citizenry, this paper argues that comprehensive public policy education should emphasize universal principles, historical context, and practical, globally relevant case studies. Such an approach is essential for equipping students with the adaptive and collaborative skills required for effective governance in an increasingly interconnected world. Accordingly, the paper begins by examining various patterns of governance, followed by an analysis of two case studies - the US-Mexico and Iran-Afghanistan water treaties. It concludes by proposing a pedagogical framework for analyzing cross-border water rights.

## 1. Patterns of Governance

Recognizing patterns of governance is a vital analytical skill for participants in political systems, from scholars to active citizens. It entails understanding the recurring structural trends and systemic behaviors that characterize how power operates and decisions are made. This insight provides a deeper understanding of a system’s strengths, vulnerabilities, and



predictable reactions. Ultimately, this foresight allows for better policy predictions, smarter diplomatic strategies, and more effective interventions.

### 1.1. The Confucian Model

To introduce students to the concept of recurrent patterns in social life and governance across diverse societies, the curriculum incorporates the teachings of Confucius. It is often overlooked in Western academic discourse that Confucius is a primary source of civil service principles and ethical standards,<sup>1</sup> advocating for impartiality and integrity in public administration. This philosophical framework, which influenced 18th-century European thought through Jesuit missionary<sup>2</sup> accounts of Chinese culture, later became integrated into Western civil service examination systems in the 19th century, albeit with its Chinese origins largely obscured.

*In the sixteenth century, through the right of royal patronage (Padroado), the Portuguese Crown summoned the Society of Jesus to spread Christianity beyond Europe, in non-Christian lands, previously divided between the Spanish and Portuguese Crown by the papal authority. Thus, tightly anchored in European colonial expansionism, the Society of Jesus projected itself into new spatial layouts. The Jesuit mission was the first one to be established on a permanent basis on Chinese soil in the late Ming period, allowing a continuous exchange between the European missionaries and their many Chinese interlocutors. The mission became official when Michele Ruggieri (b. 1543–d. 1607) and Matteo Ricci (b. 1552–d. 1610) set up a first residence in Guangdong Province in September 1583. Following instructions of the Visitor to East Indies' missions, Alessandro Valignano (b. 1539–d. 1606), they took steps to accommodate to local culture, especially in its external aspects. Matteo Ricci went further, shaping an accommodation of Catholic Christianity to Confucianism, with the help of his Chinese interlocutors. This progressively entailed a harsh rejection of Buddhism and Daoism. In close collaboration with scholar-officials and literati (some also Christian converts), this accommodation accompanied knowledge production outside the religious and doctrinal spheres, like philosophy, cartography, mathematics, and astronomy, among others, which eventually materialized in a vast literature in Chinese. Consequently, Christianity as promoted by the Jesuit missionaries became a broader cultural phenomenon in China. This 'elite proselytism' was capped with certain Jesuits' official appointments to the Astronomical Bureau in early Qing China. However, scholarly studies in the twenty-first century have shown how Jesuit missionaries promoted other forms of Christian missionary work, especially in rural areas, far from Beijing. Italian historiography in the first half of the twentieth century presented Matteo Ricci as the main founder of the China mission, overshadowing Michele Ruggieri. This trend grew stronger during the Second Vatican Council (1962–1965), when the Jesuit China mission as shaped by Matteo Ricci was praised as a model of inculcation of the Christian*

<sup>1</sup> Michael Schuman, *Confucius: And the World He Created* (Basic Books 2015).

<sup>2</sup> Available at <https://www.europeanguanxi.com/post/jesuit-missionaries-in-china-during-the-early-modern-period> accessed 30 May 2025.



faith. Accommodation to Confucianism has been generally placed at the core of what became known as the Chinese Rites Controversy, by which the Jesuit missionaries were denounced by other religious orders in China for their tolerance toward Confucian rites.”<sup>1</sup>

*The Analects*, often referred to as the *Sayings of Confucius*, is a classical Chinese philosophical work that contains a collection of teachings and thoughts attributed to Confucius and his associates. It is traditionally thought to have been assembled by his disciples. In class, students engage with selected extracts from *The Analects*,<sup>2</sup> specifically curated for their relevance to modern concepts of public administration. These readings are categorized into practical applications, including: “On informing yourself,” “On the people,” “On getting employed,” “On ethical conduct,” “On dismissal from work,” “On resignation,” “On mentoring the young,” and “On the flourishing and decline of states.” Students then select a passage and compose a brief essay reflecting on its personal or policy significance. This exercise helps students recognize the enduring relevance of ancient ethical principles to contemporary policy challenges, fostering an appreciation for the historical continuity of governance ideas.

## 1.2. Self-Governance: Lessons from Aristotle

To impress upon students the reality that self-government is a continuous endeavor fraught with difficulties, the course introduces Aristotle’s *Politics*.<sup>3</sup> While Plato’s *Republic*,<sup>4</sup> a work of speculative political philosophy, often dominates undergraduate curricula in American universities, Aristotle’s *Politics* offers an empirically grounded analysis of real city-states, providing a taxonomy of self-governing constitutions and an examination of their stability and longevity. This disparity in pedagogical emphasis is notable, given Western democratic societies’ commitment to self-governance.

“Aristotle’s critical review of Plato’s *Republic* and *Laws in Politics*, as well as his criticism of other constitutions in the same book, has had a mixed reception. Franz Susemihl and Robert Hicks say that Aristotle’s ‘attack upon the polity of pure reason, as it claims to be, in Plato’s *Republic* ranks among the most successful parts of the whole work,’ while Julia Annas describes it as ‘surprisingly crass and literal-minded, much below Aristotle’s best.’ In the same vein, some scholars have accused Aristotle of failure to engage Plato in a fair way or even to understand Plato at all, while others have defended his criticisms as largely or completely justified.”<sup>5</sup>

Students engage with extracts from Books IV, V, and VI of *The Politics*, focusing on themes such as the diversity of constitutions, the interplay of social classes, definitions of democratic

1 Ana Carolina Hosne, ‘The Jesuit Missions in China, from Matteo Ricci to the Restoration (Sixteenth-Nineteenth Centuries)’ *Oxford Bibliographies Online: Chinese Studies* (last modified 23 May 2024) <https://www.oxfordbibliographies.com/abstract/document/obo-9780199920082/obo-9780199920082-0221.xml> intro section, accessed 30 May 2025.

2 Robert Eno, *The Analects of Confucius: An Online Teaching Translation* (2015) [https://www.transcend.org/tms/wp-content/uploads/2022/09/Analects-of-Confucius-Eno-2015-TMS\\_compressed.pdf](https://www.transcend.org/tms/wp-content/uploads/2022/09/Analects-of-Confucius-Eno-2015-TMS_compressed.pdf) accessed 30 May 2025.

3 Aristotle, *The Politics* (TJ Saunders ed, TA Sinclair tr, Penguin 1992).

4 Plato, *The Republic* (GMA Grube tr, CDC Reeve rev, Hackett Publishing 1992).

5 Jozef Müller, ‘The Politics of Aristotle’s Criticism of Plato’s *Republic*’ in S Weisser and N Thaler (eds), *Strategies of Polemics in Greek and Roman Philosophy* (Brill 2016) 93.



and oligarchic types, the concept of polity (*politeia*), and factors influencing constitutional stability or overthrow. A summarized chart of Aristotle's spectrum of government forms further aids comprehension. A key insight for students is Aristotle's argument that the most stable constitution integrates multiple principles, balancing the rule of wealth (oligarchy) and the rule of the majority (democracy) to prevent instability arising from unchecked power or hasty decisions. This segment of the course develops students' capacity for critical analysis of political structures and their inherent vulnerabilities, emphasizing the perpetual need for balance and deliberation in self-governing systems.

### 1.3. Popular Governance: Machiavelli's Republicanism

To lead students to ponder the logical premises for governance by the people in a democracy or republic, the curriculum turns to Niccolò Machiavelli. Unlike the more commonly taught *The Prince*, which focuses on sole rulership, *Discourses on Livy* offers a treatise on republicanism, making it particularly relevant for understanding popular governance. It is indeed curious that a large, established republic like the United States would not prioritize the teaching of the latter.

Machiavelli begins by pointing out that he is arguing for principles "where it is not sought to impose them by violence or authority [i.e., earlier writers]."<sup>1</sup> On these questions, reason can stand alone. He then states - not that the people are inherently better than a prince - but that they are no worse: "both equally err when they can do so without regard to consequences...were any to accuse both princes and peoples, the charge might be true, but... to make exception in favor of princes is a mistake." The human nature of each is the same, whether ordinary individuals, princes or a multitude. Therefore, only respect for the laws, especially a community's founding laws, makes the difference in governing wisely. It is only if a people respects its laws that it is "more prudent, more stable, and of better judgment than a prince."

Students analyze Machiavelli's *Discourses*, specifically Chapter 58, "That a People is Wiser and More Constant than a Prince." Machiavelli posits that, given adherence to foundational laws, a people can be more prudent, stable, and judicious than a prince. He supports this with empirical observations from Renaissance Italian city-states, noting the remarkable progress of those governed by the people. This challenges the notion of republics as mere mechanical systems of checks and balances, underscoring the vital role of civic virtues and ongoing deliberation. This study develops students' understanding of the philosophical underpinnings of popular sovereignty and the conditions necessary for its successful operation, moving beyond simplistic views of democratic functionality.

### 1.4. Good Governance: Transparency, Accountability, and Participation

Governance encompasses the full range of processes, institutions, and practices through which societies make decisions and manage shared concerns. It's about how rules are made, how power is exercised, and how responsibilities are carried out across all levels of public

<sup>1</sup> Niccolò Machiavelli, *Discourses on the First Decade of Titus Livius* (Ninian Hill Thomson tr, Kegan Paul, Trench, Trübner & Co 1883).



life. When we talk about good governance, we add a crucial value judgment - emphasizing transparency, accountability, participation, and fairness. From a human rights perspective, good governance means ensuring that public institutions act in ways that protect human dignity, manage resources responsibly, and promote the realization of rights and justice for all.<sup>1</sup>

While there is no internationally agreed definition of 'good governance', it typically spans the following attributes: full respect of human rights, the rule of law, effective public participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.<sup>2</sup>

The United Nations Human Rights Council has identified the key attributes of good governance: transparency, responsibility, accountability, participation and responsiveness (to the needs of the people).<sup>3</sup> All these key attributes can be achieved through the promotion of the Public Policy Education. In fact, every citizen has the right to the PPE education, for the right to education is recognized as a fundamental human right under Article 26 of the Universal Declaration of Human Rights (1948).

The idea that States in today's world are growing increasingly ineffective and unresponsive is a complex issue with deep roots, and it's certainly not confined to a single country or political system. In this respect, American professor James L. Perry says: "Americans variously perceive the state of governance in America as broken, frustrating and unresponsive. A common expression may summarize public sentiment: 'The wheels are coming off!' This sentiment is rooted in at least three simultaneous developments: government's failure to do basic work that once was taken for granted, an accelerating pace of change that quickly makes past standards of performance antiquated, and a dearth of the intellectual capital that generates the knowhow to fix the gulfs between expectations and performance."<sup>4</sup>

A central question arises: How should States respond to pervasive public dissatisfaction and distrust? Some answer that "Good Governance" can address these deficits. The Council of Europe describes good governance as "the responsible conduct of public affairs and management of public resources" which promote "accountability, transparency, the rule of law, and sound financial management. They serve as a foundation for delivering better services and fostering trust in public institutions."<sup>5</sup>

The authors of this paper contend that good governance needs to be materialized alongside the promotion of education of public policy. Accordingly, universities around the world should develop the necessary curricula and institutionalize this nascent field.

1 Ruhollah Akrami and Mehrad Momen, 'Combating Corruption in Public Administration, Policy and Governance: a Perspective on Iranian Law' (2023) 2 Iranian Journal of International and Comparative Law 231.

2 Office of the United Nations High Commissioner for Human Rights (OHCHR), *What is Good Governance?* (OHCHR, undated) <https://www.ohchr.org/en/good-governance/about-good-governance> accessed 6 June 2025.

3 *ibid*

4 James L Perry (ed), *Public Service and Good Governance for the Twenty-First Century* (University of Pennsylvania Press 2020)

5 Council of Europe, '12 Principles' (n.d.) <https://www.coe.int/en/web/centre-of-expertise-for-multilevel-governance/12-principles> accessed 3 June 2025



## 2. Real-World Simulations (FAO, ITU) in Classroom

To ensure students realize that policy responsibility entails dealing with unexpected problems, and that the unexpected is a constitutive element rather than a separate category, classroom simulations are employed. These simulations present real-world policy dilemmas that are well-documented and sufficiently circumscribed for student engagement.

An initial simulation engages students with a hypothetical scenario derived from the Virginia Board of Health, where a temporary acting commissioner was appointed in apparent contravention of state law mandating that the position be held by a medical doctor. Students, adopting the perspective of policymakers, are tasked with identifying the Board's available policy choices, avenues for appeal, and the appropriate public or private nature of such appeals. Weekly exercises then present students with a diverse array of challenges - ranging from local and national (e.g., specific United States governance issues) to complex international cases, including those involving bodies such as the Arctic Council, the International Telecommunication Union (ITU), and the Food and Agriculture Organization (FAO). A defining characteristic of all these problems is their inherent unpredictability and lack of readily apparent solutions. This pedagogical approach actively cultivates students' capacity to navigate ambiguity and complexity in policy situations, thereby preparing them for the intrinsic unpredictability of real-world governance. The inclusion of cases centered on the ITU, for instance, allows students to explore the intricate processes of international spectrum allocation and its implications for global communication, while FAO-related scenarios immerse them in the multifaceted challenges of global food security, sustainable agriculture, and humanitarian aid coordination.

The simulations are designed to build students' capacity to accept constraints on the tools or solutions available. Students are typically presented with a limited menu of permissible approaches, forcing them to operate within predefined boundaries. In the Virginia Board of Health example, students could choose between sending a private letter to the governor, discussing concerns with state senators (potentially leading to public disclosure), or issuing a public statement. This structured approach ensures students understand that policymakers rarely have the power to simply "fix" problems, but must work within existing limitations. This exercise hones students' resourcefulness and strategic thinking within constrained environments.

Cultivating the ability to make decisions collaboratively under constraints on unexpected problems, and accurately recall group decisions, is a critical objective. following a briefing on a problem, students form dynamic groups of four to six. Group formation is designed to foster diverse perspectives: students first answer three questions related to the broader policy problem, then divide provisionally based on their answers, and finally form mixed groups. Each group is assigned a leader via dice roll, ensuring equitable rotation of responsibility. Groups have 25 minutes to agree on a policy approach, with explicit instructions to take clear notes of the collective decision. This method, while seemingly intricate, quickly becomes routine. The emphasis on meticulous note-taking is crucial as students must learn to identify with and

articulate a group's rationale, rather than merely their individual preferences. This practice is essential for developing teamwork, consensus-building, and collective accountability.

Armed with their collective notes, students practice clearly communicating a policy decision to the general public, anticipating objections, and formulating fair responses. A few weeks after a simulation, each student selects one of their group's decisions and drafts a mock press release, accompanied by a "Frequently Asked Questions" (FAQ) page addressing potential public inquiries or criticisms. This assignment, though typically concise, offers significant scope for students to refine their ability to convey complex information clearly, concisely, and transparently, taking responsibility for the group's collective decision. This exercise directly enhances students' competencies in policy communication, anticipatory governance, and public accountability.

Together, these carefully designed pedagogical interventions, integrating historical analysis with practical simulations, collectively equip public policy undergraduates with a robust set of intellectual and practical skills. By engaging with foundational texts, navigating complex dilemmas, and communicating collective decisions, students develop the capacity to critically analyze policy issues, collaborate effectively, and contribute meaningfully to public service. This comprehensive approach ensures graduates possess the analytical depth and practical acumen necessary for successful careers in public policy, whether in graduate studies or professional roles.

### **3. Case Study: US-Mexico and Iran-Afghanistan Water Treaties**

Various types of policy problems, especially those concerning natural resources or the basics of human welfare, have similarities across cultures and are amenable to comparative analysis in classroom. Broad areas such as climate change adaptation, public health organisation, pandemic response, or energy efficiency provide ample material. A comparative analysis of bilateral treaties on transboundary water resources offers valuable insights into diverse approaches to policy challenges.

Subsequent sections will explore two case studies to support the main query of the paper which – as explained above – explores how public policy education can accentuate the role of people in governmental decision-making processes, limit States' dominance, and pave the way for good governance. This study also seeks to highlight that policy education should be started from classrooms and in classrooms, it should be grounded in concrete, real-world examples – such as international treaties – to help students better grasp complex concepts. For instance, in the case of the US-Mexico water treaty, below, state involvement was present from the outset, yet the rights of local communities were ultimately overlooked, leaving them with persistent grievances. By contrast, in the case of the Iran-Afghanistan Helmand River Water Treaty, Iranian and Afghan border communities had peacefully coexisted and interacted for years without a formal agreement. However, once state actors intervened and a treaty was formalized, local populations began facing additional challenges. In fact, these cases highlight contrasting methods for water allocation and dispute resolution, particularly in how they address upstream-downstream dynamics and institutional frameworks and underscore the importance of case-based learning in public policy education. They also point



to a broader conclusion: where citizen involvement is stronger and state control more limited, peaceful coexistence is more likely. The core message is a call for good governance via people-centered governance.

### 3.1. The North American Case: Depoliticized Problem-Solving

In North America, the seminal water rights treaty was negotiated during a time of positive US-Mexican relations. In 1944, both Mexico and the United States were allied against the Axis powers. Germany's sinking of Mexican cargo ships in 1942 had led Mexico to declare war against the Axis powers (Germany, Italy, and Japan).<sup>1</sup> Wartime cooperation on supply and matériel created a conducive diplomatic environment. Within this context, the *Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande* was concluded. It includes some features of interest worth considering for freshwater cross-border treaties in general.<sup>2</sup>

The 1944 Treaty established parallel US and Mexican Sections, each headed by an “Engineer Commissioner” supported by assistant engineers, a legal advisor, and a secretary. These personnel are granted diplomatic rank, ensuring clear status during cross-border interactions and direct reporting lines to their respective foreign ministries. This structure facilitates the resolution of technical issues like sediment accumulation or salinity increases. Their primary role is to negotiate interpretations of the treaty, embodying solutions in documents called “Minutes.” These Minutes become legally binding after 30 days if neither country objects, effectively integrating technical solutions into the treaty’s operational framework.<sup>3</sup>

Furthermore, the treaty incorporates flexibility in water delivery. Annual water amounts to Mexico are subject to a five-year running average, allowing for adjustments responsive to natural climatic variability. This mechanism encourages upstream parties to release surplus water in years of abundance, contributing to a longer-term equilibrium. During periods of severe droughts, the timeframe for making up deficiencies is extended to the subsequent five-year cycle. The treaty also provides for “international storage dams,” with costs and water shares divided proportionally, and guarantees free movement for personnel involved in these projects.

While effective in technical problem-solving, this technocratic style has shown limitations in addressing local and regional concerns. This is evidenced by the subsequent creation of binational committees focusing on “problem and region-specific” efforts, whose narrow focus is often cited as a factor in their success. Additionally, “Citizens’ Forums” are held to share information, though their role in facilitating substantial public input remains unclear.<sup>4</sup>

1 Howard F Cline, *The United States and Mexico* (Atheneum 1965) 265-272.

2 Treaty Between the United States of America and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (signed 3 February 1944, entered into force 8 November 1945) <https://www.ibwc.gov/wp-content/uploads/2022/11/1944Treaty.pdf> accessed 30 May 2025.

3 Stephen P Mumme, ‘The U.S.-Mexico International Boundary and Water Commission in the Sustainable Development Era’ (2001) 9 IBRU Boundary and Security Bulletin 117, 117-125 [https://www.durham.ac.uk/media/durham-university/research-research-centres/ibru-centre-for-borders-research/maps-and-databases/publications-database/boundary-and-security-bulletins/bsb9-2\\_mumme.pdf](https://www.durham.ac.uk/media/durham-university/research-research-centres/ibru-centre-for-borders-research/maps-and-databases/publications-database/boundary-and-security-bulletins/bsb9-2_mumme.pdf) accessed 30 May 2025.

4 Anabel Sanchez, ‘1944 Water Treaty Between Mexico and the United States: Present Situation and Future Potential’ (2006) 18 Frontera Norte 36 [https://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S0187-73722006000200005](https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0187-73722006000200005) accessed 30



### 3.2. The Middle Eastern Case: The Helmand River Water Treaty

For many years, Iran and Afghanistan have faced ongoing challenges in managing access to the Helmand River, an important transboundary water source that originates in Afghanistan's Hindu Kush mountains and flows into Iran's Sistan region. The river supports agriculture, drinking water, and fisheries for millions of people on both sides of the border. To regulate this shared resource, the two countries signed the Helmand River Treaty in 1973, which obliges Afghanistan to release an annual average of 820 million cubic meters of water to Iran.

It is important to note that for at least two centuries, the local people of the Helmand Basin and its surroundings in both countries had regulated water use through customary arrangements, largely without state intervention. In Afghanistan's Nimruz province (east of Iran's Sistan and Baluchistan province) "there is no document regarding problem solving." "Mirabs [water masters] are accustomed to applying their experience for justification, and also [the] problem is only with one season" - that is, the season of abundance.<sup>1</sup> Other scholarship, referencing the late 19th century, indicate that "while the question of water allocation remained unanswered, for 30 years disputes over the Helmand waters in the delta were apparently settled locally without intervention from central authority; that is, local residents – Afghans and Iranians – cooperated in sharing the same water."<sup>2</sup> The same authors describe 1905 to 1930 as a similar period. The point is not that if the local people on both sides of the border manage things, all will be well; rather, the point is that when all is well, the local people on both sides of the border manage things. If customary usages are present today, even partially, then they can be viewed as a positive human resource ("a feature, not a bug"), that allows the governments to focus on procedures meant to handle times of strain.

Floods, droughts, and the river's geomorphological changes over time require a level of binational planning beyond local capacity - so no argument for autarky is tenable here. Even in earlier periods, such as "from 1905 to 1930, an annual joint commission made up primarily of academics appointed by the two countries cooperated in jointly measuring and allocating the Helmand water at Band-e Kamal Khan."<sup>3</sup> The impetus for the 1973 Treaty may have derived in part from the severe drought of 1970-71, though its ratification and exchange of instruments did not occur until 1977.

The treaty has been a source of contention, with disagreements over interpretation, measurement, and compliance. Recurrent droughts and the growing water demands in both countries have further strained the arrangement. Since 1945, various Afghan governments have constructed or upgraded dams along the river, particularly the Kamal Khan and Kajaki dams, often reducing water flows to Iran. During the 1998-2001 drought, the Taliban regime closed sluice gates at Kajaki Dam, effectively halting flows into Iran. More recently, in March 2021, then-president Ashraf Ghani declared that Afghanistan would no longer provide Iran with unregulated excess water from the newly completed Kamal Khan Dam, proposing

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May 2025.

1 Abdul Qayum Karim, 'Codifying Water Rights in Contested Basins of Afghanistan' (2016) 18 [https://floodbased.org/wp-content/uploads/2021/02/Reconnaissance-Survey-and-Case-Studies-Nimroz-Afghanistan\\_Corr\\_2017\\_01.pdf](https://floodbased.org/wp-content/uploads/2021/02/Reconnaissance-Survey-and-Case-Studies-Nimroz-Afghanistan_Corr_2017_01.pdf) accessed 30 May 2025.

2 Mohsen Nagheby and Jeroen Warner, 'The 150-Year Itch: Afghanistan-Iran Hydropolitics Over the Helmand-Hirmand River' (2022) 15 Water Alternatives 559 [https://researchportal.northumbria.ac.uk/ws/portalfiles/portal/75408376/Art15\\_3\\_1.pdf](https://researchportal.northumbria.ac.uk/ws/portalfiles/portal/75408376/Art15_3_1.pdf) accessed 30 May 2025.

3 Ibid., p. 560.



instead a barter system where water would be exchanged for commodities like oil- further complicating the already fragile implementation of the 1973 agreement.<sup>1</sup>

The treaty largely delegates the implementation of its provisions to the respective governments. Protocol Number One of the Treaty states only that “the Commissioners shall be appointed from among high-ranking officials.”<sup>2</sup>

A key difference from the North American case lies in the treaty’s hierarchical dispute-resolution mechanism. The Commissioners and their deputies and advisors from both countries constitute a Joint Committee which meets regularly. However, even when in agreement, the Committee’s authority is ambiguous. Article 7 states, “[t]his Committee shall endeavor to solve expeditiously any problem which may arise in the performance of its duties under this Protocol. The decisions of the Joint Committee shall be binding within the limits of its authority.” However, Article 10 sets up another body that can overrule the Joint Committee. “Each party to the Treaty shall appoint a delegation headed by the Minister in charge of matters relating to water utilization. The delegations of the two parties shall together constitute the “Committee of Ministers...which shall have jurisdiction to solve any problem that may arise in the application of this Protocol.” Article 11 stipulates that should the Committee of Ministers fail to reach agreement, “each party ... shall submit a report to its respective Government in order that the two Governments seek for a solution through diplomatic channels.” Awkwardly, “any decision made or action taken by either Committee shall not in any manner whatsoever establish a precedent” - ensuring that recurrent problems necessitate restarting the entire process *ab initio*.

The final arbitral tier is outlined in Protocol No. 2, which lets the parties set up an Arbitral Tribunal of three members, including one non-national. This final provision is the only element of the treaty that distinctly echoes a colonial legacy, reminiscent of British arbitration practices in the late nineteenth and early twentieth centuries.<sup>3</sup>

While the technical or “bottom” level of decision-making has its authority circumscribed, the time flexibility for equitable problem-solving is also somewhat narrow. In low-water years, Afghanistan’s delivery obligations are adjusted downward, with increases mandated during high-water periods to specified levels (Article 3). In practice, this mechanism suggests that there is only a narrow two-year time frame in which the water deliveries can find equilibrium - a time frame in which Nature may not cooperate.

Analyzing this case through the lens of international water law and treaty obligations, principles enshrined in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses<sup>4</sup> (UN Watercourses Convention), to which many states adhere in principle (though Afghanistan and Iran have not ratified it) is instructive. The convention obligates riparian states to utilize an international watercourse in an equitable and reasonable manner (Article 5), considering all relevant factors and circumstances (Article 6), and to

1 Sara Elsayed Mahdi Ahmed, ‘The Impact of the Construction of the Kamal Khan Dam on Relations Between Iran and Afghanistan Since 2022’ (Research paper, Faculty of Politics & Economics, Suez University, April 2024).

2 Helmand River Water Treaty (signed 13 March 1973, entered into force 13 March 1973) art 3, Protocol n 1, 3 [https://www.internationalwaterlaw.org/documents/regionaldocs/1973\\_Helmand\\_River\\_Water\\_Treaty-Afghanistan-Iran.pdf](https://www.internationalwaterlaw.org/documents/regionaldocs/1973_Helmand_River_Water_Treaty-Afghanistan-Iran.pdf) accessed 30 May 2025.

3 See n 13.

4 Available at [https://legal.un.org/ilc/texts/instruments/english/conventions/8\\_3\\_1997.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf) (Accessed on 30 May 2025)

take all appropriate measures to prevent causing significant harm to other watercourse states (Article 7). It further requires cooperation and regular exchange of information (Article 11). Afghanistan's dam constructions, which restrict flows to Iran, must thus be evaluated against whether they respect Iran's equitable and reasonable share of the river, taking into account factors such as dependent populations and existing uses.

However, empirical evidence from the Helmand Basin suggests that local communities have often been more effective than state actors in managing

#### **4. Framing Cross-Border Water Conflicts for Classroom Analysis**

Developing a structured analytical approach to complex policy issues is crucial for students. While a comprehensive treatment is beyond the scope of this discussion, the authors will outline an initial framework for analyzing cross-border water rights, a topic frequently addressed in courses at Maryland University.

A comparative analysis of the North American and Middle Eastern cases reveals that water rights issues typically operate within three broad domains:

- **The Technical Domain:** This encompasses the expertise of water engineers and agricultural and environmental specialists.
- **The Usage Domain:** This pertains to the activities and practices of the populations residing in the affected regions.
- **The Political Domain:** This involves interstate diplomatic relations, foreign policy objectives, and high-level treaty governance concerning shared resources.

These domains can be conceptualized in two distinct ways. A hierarchical model positions the political domain at the apex, followed by the technical, and with usage at the base. In this conception, intractable problems can ostensibly be “escalated” to a higher level for resolution. Alternatively, an overlapping or integrated model posits these domains as qualitatively distinct yet interconnected, without inherent ranking. While problem-solving responsibility might be less clearly delineated in this latter conception, it potentially facilitates the integration of knowledge and resources from multiple domains to achieve durable solutions.

Analysis of relevant treaties highlights contrasting emphases. In the North American context, the treaty empowers Engineer Commissioners and their staff as central to its operation. Intervention from the political domain requires significant initiative to challenge decisions formalized as Minutes. Similarly, communities within the usage domain face challenges in securing substantive input into problem-solving processes.

Conversely, the Middle Eastern case appears to underemphasize the technical domain. The treaty even mandates that Commissioners be high-ranking officials rather than professionally qualified experts, though their staff presumably includes water engineers. The treaty lacks detailed provisions for the Committee's decision-making processes or the formalization of its decisions. In instances of deadlock, the option to escalate problems to the Committee of Ministers - which itself has a superior level - ensures the political domain remains readily accessible when policymaking becomes arduous. However, the “silent partner” in the Iran-Afghanistan treaty is notably the usage domain. Given the longstanding history of customary



water use among Afghans and Iranians, which tends to remain robust during periods of normal water levels, a breakdown in the political domain does not necessarily precipitate a collapse in water distribution; this largely depends on the severity of the specific circumstances.

These observations offer a foundational understanding. For classroom application, the subsequent step would involve developing specific menus of policy options aimed at enhancing each of these two treaties.

## Conclusion

This study has argued that Public Policy Education (PPE) is essential for promoting effective and good governance by equipping citizens with the knowledge and skills needed to understand, engage with, and influence policymaking processes. Far from being limited to the American context, PPE is globally relevant and adaptable, particularly when grounded in universal principles and substantiated by comparative, real-world case studies. The seven foundational principles outlined in this paper - from understanding governance systems to cultivating collaborative decision-making and public communication skills - are not uniquely American in origin but are broadly applicable across diverse political and cultural contexts. As such, educators around the world can adapt these principles to develop context-sensitive public policy curricula.

A practical strategy for achieving this involves engaging with globally relevant challenges addressed by international organizations, such as the International Telecommunication Union (ITU) and the Food and Agriculture Organization (FAO). Through the comparative analysis of two case studies - the US-Mexico Water Treaty of 1944 and the Iran-Afghanistan Helmand River Water Treaty of 1973 - this paper has shown that excluding local communities from decision-making can lead to enduring conflicts, while inclusive, participatory approaches often result in more sustainable and peaceful outcomes. These findings highlight the pedagogical value of integrating real-world international agreements into public policy curricula, enabling students to better understand complex cross-border policy dynamics.

Ultimately, the study advocates for an educational framework that not only equips students with the knowledge and skills needed for adaptive governance, but also empowers them to actively contribute to more inclusive, responsive, and effective policymaking. This study also seeks to emphasize that a limited and accountable state control alongside a meaningful citizen participation can bring about peaceful coexistence. In better words, the principles of good governance are rooted in active citizen participation not excessive state control. By ensuring that states have a limited role and citizens have both a voice in decision-making and oversight over government actions, a people-centered governance model shall emerge which is substantively more democratic than today's so-called democratic systems, and whereby societies would be able to promote justice and harmony genuinely.



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## COLLECTIVE PROTESTIVE EXPRESSION: THE NEXUS BETWEEN FREEDOMS OF EXPRESSION AND PEACEFUL ASSEMBLY AND THE RIGHT TO PROTEST

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Protest is one of the ways to express diverse viewpoints in society and critique the status quo. This article examines the interdependence between two foundational rights within international human rights law namely the right to freedom of expression and the right to freedom of peaceful assembly on one side and the right to protest on the other. Drawing upon Hohfeldian jurisprudential analysis, the study challenges the treatment of these rights as separate legal entitlements and instead argues that they function in a mutually reinforcing framework essential to democratic participation. The article approaches this relationship in two stages: first, by analyzing the connection between the right to protest and freedom of expression as a form of dissent-based communication; and second, by examining how freedom of peaceful assembly enables protest to manifest collectively and publicly. To conceptually integrate these dimensions, the article introduces the term Collective Protestive Expression, a construct that reframes protest as a communicative act rooted in expression and amplified through collective assembly. Unlike conventional understandings of protest as either political reaction or public disorder, this term positions protest as an essential rights-based practice and an expression of democratic citizenship. The article concludes that recognizing protest in this way provides both conceptual clarity and normative strength, especially in contemporary contexts where protest is increasingly restricted. By identifying protest as a product of the interplay between expressive and associational rights, this study offers a more holistic framework for understanding, protecting, and promoting protest within democratic legal orders.

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## Introduction

The present world is one focused on rights rather than duties. In other words, we are currently living in the era of rights, where all aspects of human life are interpreted and influenced through the discourse of human rights. Some scholars argue that the current human rights discourse has replaced the moral discourse. When an inappropriate action occurs in society, it is often described as a violation of human rights rather than an immoral act.<sup>1</sup> The modern conception of rights as the cornerstone of a new political language is inextricably connected to resistance movements against monarchies during the English, American, and French revolutions. Human rights, as a novel philosophical language, encompasses two concepts: rights and human beings, along with the relationship between them. Although both concepts existed in pre-modern thought, their meaning and interrelation were fundamentally transformed by the advent of modernity. In the classical view, rights were associated with truth and righteousness, and humans with the cosmos. By contrast, in the modern era, rights and humans became interconnected.<sup>2</sup> This modern notion of human rights is rooted in a time when the principles of equality and the acceptance of human differences gained serious attention.<sup>3</sup> This dual connection in the modern era serves to secure human freedom, a principle in tension with State power,<sup>4</sup> and “the existence of human beings guides them to attain the highest values and the noblest positions”.<sup>5</sup> Indeed, the very being and existence of human beings depends on their freedom and the capacity to live freely.

Human rights are inextricably linked to human needs. One of the reasons why individuals must enjoy human rights, in addition to protecting them from abuse by the powerful actors and encroachments of the state,<sup>6</sup> is the imperative to fulfill basic needs for a dignified life.

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2. Abbas Manoucheri, ‘Red Reason and Green Right: Esoteric Anthropology and Maximum Human Rights’ in Theoretical Foundations of Human Rights: A Collection of Papers from the Second International Human Rights Conference (Human Rights Studies Center of Mofid University May 2003) 159. [In Persian]

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6. Rebecca M. M. Wallace, International Law (fifth edition, Sweet and Maxwell 2005) 225.

Undoubtedly, one of the fundamental needs of humans for a flourishing life and dynamic society is awareness. Awareness, however, can only be attained in an environment where diverse viewpoints are expressed and a society wherein criticism of and protest against the status quo are possible. It has been aptly observed that “without a conscious society, constitutions and charters have no more value than the piece of paper they are written on”.<sup>1</sup> In this context, the elevated concept of freedom of expression plays a central role. This is why, according to some authors, the degree to which a constitution safeguards the expression of marginalized and dissatisfied individuals serves as a key indicator of its genuine commitment to freedom.<sup>2</sup> In this respect, some essential human rights, such as freedom of expression and the right to peaceful assembly, are brought to the forefront, and their convergence and interplay give rise to the right to protest, a vital need for humans as intellectual and evolving beings. This is where right and human thought converge, as thinking thrives in conditions of a lack, deficit, or ambiguity.

As noted by several scholars, the clarity of the nature and scope of every right is a prerequisite for its implementation and enjoyment. Any ambiguity in this area can lead to the potential misuse of a right by the beneficiary or the violation of the right by those responsible for upholding it. Within the realm of human rights, especially civil and political rights, where one side is invariably the State, such ambiguity can result in the constant violation of the relevant right.<sup>3</sup> In this context, the right to protest is a salient example of a right whose nature, scope, and boundaries remain inadequately delineated. Therefore, its analysis is not only scientifically valuable (in that it advances theoretical understanding and contributes to the body of scholarly knowledge) but also of substantial practical importance, particularly in informing governance and State administration. This lack of conceptual clarity and its importance motivate this paper to analyze the necessity of freedom of expression and peaceful assembly in the realization of the right to protest. Utilizing a qualitative-analytical approach and through a review of the relevant literature, this study will first examine the concept and typology of rights from a Hohfeldian perspective (Section 1). It will subsequently discuss freedom of expression and its relationship to the right to protest (Section 2). Next, the discussion moves to peaceful assembly and its connection to the right to protest (Section 3). The analysis will then introduce and examine the concept of ‘Collective Protestive Expression’ as the fusion of these three aforementioned rights (Section 4). Finally, based on the preceding analysis, the right to protest and correlative States’ obligations will be delineated (Section 5). A synthesis of these discussions and concluding observations will form the final part of this study.

## 1. The Concept of Right and Its Types from A Hohfeldian Perspective

The term “right” within legal scholarship is employed in various senses, and legal scholars have offered different definitions for it. An understanding of this, the most fundamental

1. Daron Acemoglu and James A. Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (translated by Seyed Alireza Beheshti Shirazi and Jafar Kheirkhah, second edition, Rozaneh 2020) 12. [In Persian]

2. Jamie Cameron and Nathalie des Rosiers, ‘The Right to Protest, Freedom of Expression, and Freedom of Association’, in Peter Oliver, Patrick Macklem, and Nathalie des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (OUP 2017) 739.

3. Nasim Zargari-Nejad and Amir-Hossein Ranjbarian, ‘The Right to Freedom of Assembly: An Analysis of the Performance of UN Special Rapporteur’ (Summer 2016) Vol 46 No 2 *Public Law Studies Quarterly* 207. [In Persian]



concept in law, can be achieved by distinguishing between the notions of “being right” and “having a right”. In the first sense, “right” refers to that which is true, honest, and correct. To assert that something is “right” signifies that it is true, honest, and correct, as opposed to false, invalid, or wrong. The concept of “being right” falls within the domain of value-related discussions (good and bad). In the second sense, “having a right” can be contrasted with duty; This conception emerged as a result of human efforts in securing liberty and equality during the modern era, subsequently taking root in human rights discourse and contemporary legal literature.<sup>1</sup> In analyzing the concept of “having a right”, the best starting point remains the Wesley Hohfeld’s analytical framework.<sup>2</sup> According to Hohfeld, legal rights can be classified into four fundamental types: 1) claim-rights; 2) privilege-rights (or liberties); 3) power-rights; and 4) immunity-rights. Each of these four types will be briefly discussed below.

One of the most important rights discussed by Hohfeld is the **claim-right**. Consider a scenario where person A has entered into a contract with person B, which stipulates that A must pay a certain amount of money to B. B has a right to demand payment from A, and correlative A is under a duty to pay that money. The essence of this right is a claim. Therefore, a claim-right is, in its essence, a claim that correlates to a duty in another.<sup>3</sup> According to Hohfeld, among the four types of legal rights he categorizes, only the claim-right entails a corresponding duty incumbent upon another party.<sup>4</sup> The content of claim-rights can be highly diverse, and they can be further subdivided into positive and negative claim-rights. Positive claim-rights are so named because they are met with a positive action or performance from those who bear duties. Rights such as the right to receive support, the right to compensation, and the right to social services are examples of positive claim-rights. Conversely, negative claim-rights refer to non-interference and are called negative because they require merely the forbearance or the self-restraint of others.<sup>5</sup> A negative duty is imposed on others, obliging them to refrain from certain actions. Rights such as the right to security, immunity from any kind of harm, assault, or torture, and protection from insults are examples of this type of right. Hohfeld also identified another type of right, which he termed the privilege-right (often referred to by subsequent philosophers as a liberty or a liberty-right). For example, a homeowner legally has the privilege (or liberty) to enter their house whenever they wish. Unless restricted by law, no one can compel them not to enter their home or to leave it. Therefore, the homeowner holds a liberty-right, meaning they are at liberty to enter, stay in, or leave their house. Others do not have the right to take this freedom away from them because they are not legally obligated in this regard, and the absence of a legal obligation upon the right-holder is sufficient to establish the right to freedom.<sup>6</sup> A person’s legal freedom

1. See Mohammad Rasekh, Right and Interest (Tarah-e-Nou 2002) 184-186. [In Persian]

2. See Matthew H. Kramer, Rights and Right-Holding: A Philosophical Investigation (OUP 2024) 16-98; Eleanor Eldridge, ‘Rights That’ (Winter 2024) 44 Oxford Journal of Legal Studies 4.

3. Seyed Mohammad Qari Seyed Fatemi, Human Rights in the Contemporary World (Volume 1: Introduction to Theoretical Discussions: Concepts, Foundations, Scope, and Sources) (third edition, Shahr-e-Danesh 2011) 20. [In Persian]

4. See Wesley Hohfeld, Fundamental Legal Conceptions (Yale University Press 1919) 36-39.

5. See Peter Jones, Philosophy of Law: Rights (translated by Moshtagh Zargosh and Mojtaba Hemmati) (Mizan Publication 2013) 31-32. [In Persian]

6. Mohammad Hossein Talebi, An Introduction to the Philosophy of Law (Research Institute of the Seminary and University 2014) 86. [In Persian]



to perform an act means that the law has not compelled them to perform or refrain from that act, and the legislator acknowledges their freedom in this regard. The right to freedom is a unilateral right (it does not imply a correlative duty in another), whereas a claim-right is a bilateral right (necessarily entailing a correlative duty).<sup>1</sup> In other words, a liberty-right exists independently of any other person's legal duty, while a claim-right necessarily presupposes that another individual or entity is legally bound to act or refrain from acting.

The third type of legal rights according to Hohfeld is the power-right. In this context, a power refers to the legal ability granted by the legal order to an individual, group, organization, or State to create, alter, or eliminate a legal status. Examples include the right to buy and sell, the right to conclude a contract, the right to vote, and the right to bring a lawsuit. In each of these instances, the holder of the right has the legal authority to influence these matters. Hohfeld also notes that individuals under guardianship do not possess such rights.<sup>2</sup> In fact, this right can be compared to legal competence to exercise rights or perform legal actions, which, when exercised by the right-holder, affects the legal position of others. For example, a testator wields the power to determine the share of heirs from their estate, thereby influencing their rights.<sup>3</sup>

Finally, the fourth type of legal rights in Hohfeld's classification is the immunity-right. This right refers to immunity from the legal power of others. A person with immunity is not affected by the legal acts of others, and others cannot change their legal relations.<sup>4</sup> This type of right contrasts with the power-right, where the holder of the right can use their legal authority to affect others. In other words, an immunity-right is the right not to be subject to the power of others, meaning that the holder of immunity is protected from the effects of another's legal power. Therefore, to assert that A holds immunity from B signifies that B lacks the legal power to affect A's rights.

If we classify human rights according to the revolutionary slogans of the French- liberty, equality, and fraternity- we can express the generations of human rights as follows: First generation of human rights comprising civil and political rights; Second generation of human rights comprising economic, social, and cultural rights; and Third generation of human rights comprising fraternity rights or solidarity rights. First-generation rights, namely civil and political rights, are primarily negative rights, meaning they are rights that should not be obstructed in their implementation by the right holders. Rights like freedom of religion and belief, freedom of speech, the right to vote, freedom from slavery, prohibition of torture and inhuman treatment, prohibition of arbitrary detention, freedom of movement are examples of civil and political rights, which fall under the first generation of human rights.<sup>5</sup> Henry Shue has labeled first-generation rights as negative rights.

The reason behind this classification is that these rights are guaranteed by non-interference in their implementation. The exercise of the right to freedom of religion, for example, is

1. Hohfeld (no 11) 36, 39-40.

2. Ibid, 50 & 57.

3. Dominika Bychawska-Siniarska, *Reflections on Freedom of Expression: Protection of the Right to Freedom of Expression in the Case Law of the European Commission and Court of Human Rights* (translation, research, and detailed introduction by Mostafa Fazaeli and Mousa Karami) (Shahr-e-Danesh 2020) 48/Translators' Note. [In Persian]

4 See Hohfeld (no 11) 59-60.

5 Mohammad-Hassan Asghar-Nia and Morteza Asghar-Nia, 'Cultural Rights: The Second Generation of Human Rights' (Spring 2016) No 303 Political and Economic Studies 92. [In Persian]



ensured by the absence of restrictive interference from the state, other organizations, or individuals. However, this does not mean that the State should not take positive action in this regard; indeed, the realization of some of these rights depends on specific actions being taken. Therefore, these rights demand non-restrictive interference from the State, while also requiring the State's supportive intervention to ensure their fulfillment. The State has no right to limit individuals' freedom of religion and must intervene to guarantee this right for the benefit of the right-holder.

## 2. Freedom of Expression and its Connection with the Right to Protest

In today's world, marked by the global predominance of nation-states, the protection of human rights has become an undeniable necessity for humanity.<sup>1</sup> Freedom of thought and expression is one of the fundamental and universal human rights, belonging to all individuals regardless of ethnicity, race, nation, religion, gender, political views, and so on.<sup>2</sup> It has been discussed from various religious, philosophical, social, ethical, legal, and international perspectives, reflected in domestic laws and international instruments and treaties. Renowned philosophers and thinkers such as Kant, Hegel, Hobbes, Locke, Rousseau, Voltaire, Hugo, Popper, and Sartre, each with their own perspective, interpretation, and definition of "right" and "freedom", have made significant contributions to the development and evolution of the concept of freedom of expression and thought.<sup>3</sup> In today's world, the principle of freedom of expression is one of the main components of respecting human rights. Prominent human rights institutions such as the European Court of Human Rights recognize freedom of expression as one of the foundations of a democratic society. Some thinkers also view it as a pillar of and essential for democracy and a prerequisite for the democratic flow within society.<sup>4</sup> Some have gone further, perceiving freedom of expression as a natural human right and an integral part of individual independence. According to these scholars, the principle of freedom of expression is an end in itself, and any restriction on it seems incompatible with the protection of human dignity and human rights. They argue that such limitations are only acceptable in exceptional cases.<sup>5</sup> These statements and conditions highlight the pivotal role of this right in determining the trajectory of human destiny, as well as in fostering a participatory and inclusive public sphere.

Prior to this paper, many writings have been published on freedom of expression and its components, conditions, and permissible limitations.<sup>6</sup> Therefore, this paper will not delve into these discussions, but rather highlights a few key points. According to the Human Rights Committee, as the treaty body overseeing the implementation of the International Covenant

1. Hossein Rahmani Tirkalai, 'Examining the Concepts of Freedom and Power in the Human Rights Discourse of the Islamic Republic of Iran and its Challenges' (Winter 2023) Vol 12 No 4 Islamic Human Rights Studies 117. [In Persian]

2. Erica Howard, *Freedom of Expression and Religious Hate Speech in Europe* (Routledge 2018) 1.

3. Seyed Hossein Rezvani, 'The Right to Freedom of Expression and the International Responsibility of States' (Winter 2016) Vol 30 No 4 Foreign Policy 67. [In Persian]

4. Okoye Blossom Chisom, 'Democracy and Right to Freedom of Expression: A Case Study on the Nigerian Youth Protest on Police Brutality' (2021) 11 Open Journal of Political Science 1, 34-53.

5. Mahdi Zahedi and Shirin Sharifzadeh, 'Freedom of Expression and the Principle of Duality of Idea and Expression' (Summer 2021) Vol 23 Issue 71 Public Law Research 97. [In Persian]

6. Mohammad Hossein Mozaffari, 'Understanding Islamophobia in Human Rights Context: a Conceptual Analysis of the OIC Initiatives against Hate Speech' (2023) 2 Iranian Journal of International and Comparative Law 6.



on Civil and Political Rights (ICCPR), in its General Comment No. 34, freedom of expression is considered an essential condition for achieving transparency and accountability, which, in turn, are necessary for promoting and protecting human rights.<sup>1</sup> In this General Comment, the Committee assigns a central role to the right to freedom of expression, which also underscores the indivisibility of human rights and their interdependence. It is also noteworthy that the Special Rapporteur on the right to freedom of expression and opinion of the Human Rights Council dedicated his 2023 report to the connection between freedom of expression and sustainable development, recognizing the former as a prerequisite for achieving the latter.<sup>2</sup> Additionally, in the conventional classification of human rights, freedom of expression is categorized as a negative right, whose realization and exercise are achieved through the absence of interference or restrictions by the State or other groups and individuals who might threaten it. However, this does not imply that the State has no role in ensuring the realization of freedom of expression. To put it more simply, the State has both a negative duty (to refrain from interference) and a positive duty (to protect and facilitate its exercise).<sup>3</sup> Clearly, the primary and fundamental duty of the State regarding this right is to refrain from obstructing its realization and exercise.

Freedom of expression is an absolute necessity both individually and socially.<sup>4</sup> In other words, its existence in any society is crucial both for the individuals that compose it, who, due to their personal and psychological needs, require the freedom to express themselves, and for the society itself, which needs a population capable of freely expressing its ideas in order to persist and achieve its collective goals that “suppressing it brings enormous loss”.<sup>5</sup> Some commentators have argued that this right is at least based on the freedom of thought.<sup>6</sup> In this context, scholars have rightly noted that it is through thinking and the ability to think that humanity distinguishes itself from other creatures and, indeed, excels. This distinction has been achieved thanks to the freedom of choice in personal life and destiny. If humans were subjected to the natural constraints or environmental forces like other inanimate or animate beings, thought and its products would not exist in their lives. Thus, freedom of thought is an inherent characteristic of humanity and cannot be taken away under any circumstances or pretexts. The development of thought is only possible through expression, that is, the verbal communication and exchange of ideas between individuals. Expression serves as a tool for both the development of thought and its realization. In linguistics, thought, expression, and

1. Human Rights Committee, ‘General Comment No. 34: Article 19: Freedoms of Opinion and Expression’ CCPR/C/GC/34 (September 12, 2011) para. 3.

2. Human Rights Council, ‘Sustainable Development and Freedom of Expression: Why Voice Matters; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ A/HRC/53/25 (April 19, 2023) paras. 1-17.

3. Seyed Mohammad Qari Seyed Fatemi, *Human Rights in the Contemporary World (Volume 2: Analytical Essays on Rights and Freedoms)*, 2nd edn, Shahr-e-Danesh 2010) 120. [In Persian]

4. Emily Howie, ‘Protecting the Human Right to Freedom of Expression in International Law’ (2018) Vol 20 No 1 *International Journal of Speech-Language Pathology* 12.

5. Richard Sorabji, *Freedom of Speech and Expression: Its History, Its Value, Its Good Use, and Its Misuse* (OUP 2021) 2.

6. Taha Mousavi Mirkalaie and Savalan Mohammadzadeh, ‘Freedom of Expression in the Case Law of the Human Rights Committee and the European Court of Human Rights’ (Summer 2023) Vol 53 Issue 2 *Public Law Studies Quarterly* 901. [In Persian]; Reza Karami and Mohammad Ghanbari, ‘Restrictions on the Right to Freedom of Expression in the African Charter on Human and Peoples’ Rights’ (Winter 2021) Vol 14 Issue 54 *International Legal Studies* 202. [In Persian]



speech are viewed as social products.<sup>1</sup> As *Eslami Nodoushan* has stated, “if expression is taken away from someone, it is as if thought has been taken away from them, and since thought has been taken away, it is clear that their human essence has been robbed”.<sup>2</sup> This is just one of the pivotal points that highlight the prominent position of freedom of expression.

Freedom of expression is of such profound importance for the society that, in the words of the *Mossadegh*, “those who fear expression and writing and seek to suppress it not only commit an act that contradicts the Constitution, but they also serve foreign interests and betray their homeland”.<sup>3</sup> This statement implies that the benefits of freedom of expression and, more broadly, human rights are not limited solely to individual and personal aspects. We must not overlook the necessity of these rights for maintaining a healthy nation capable of resisting external forces. Violating freedom of expression and other fundamental and legitimate rights in society mirrors the saying by the Great Saadi in his *Boustan* where he states, “one who cuts off the branch they sit on...”.<sup>4</sup> In fact, violating a right such as freedom of expression, besides being an affront to human dignity and the equality of individuals, gradually erodes the foundations of unity and cohesion in society and the nation, undermining the pillars of development and progress. This is why some believe that rulers, even if they do not accept freedom as an inherent right, must, for their own survival and success in governance, management, and politics, regard it as a respectable method.<sup>5</sup> This statement reflects the dual nature of freedom in general and freedom of expression in particular; freedom of expression holds intrinsic value, and it also serves as an instrument to achieve other goals. Although it must be emphasized that in the discourse of human rights, the intrinsic value of freedom and freedom of expression is paramount. It can be said that, with freedom in place, the full realization of other goals follows as well.

Freedom of expression provides the foundation for the formation and manifestation of the right to protest. In the human rights discourse, each individual in society, within the framework of permissible, legitimate, and legal limitations, is free to express their views, thoughts, and beliefs. This is because they have the right to be wrong and, in a sense, possess the right to err. The reason behind such a right must be sought in the inherent dignity of human beings and their equality with each other. As a result, no one can consider themselves humanly superior to others and, through this, impose their views, thoughts, and beliefs upon them. In other words, because of this equality and inherent dignity, human beings naturally have the right to express their views, thoughts, and beliefs, even if they are incorrect, mistaken, or contrary to the majority’s opinion, without needing to have this right granted by any authority, position, or specific law. It is within this framework that freedom of expression and the right of individuals to have this freedom, based on the prior right to error, form the theoretical foundation and practical basis for exercising the right to protest. In a clearer sense, if the right to protest is not enshrined for the individuals, the prior right to error

1. See Javanmir Abdollahi, Comparative Study of the Right to Freedom of Expression from the Perspectives of Islam and International Human Rights Documents (Ehsan Publication 2007) 31-32. [In Persian]

2. Mohammad-Ali Eslami Nodoushan, Mentioning the Human Rights Achievements in the Third World (Toos 1978) 84. [In Persian]

3. Mohammad Mosaddegh, Memoirs and Reflections of Dr. Mohammad Mosaddegh (edited by Iraj Afshar) (fourth edition, Elmi Publications 1986) 106. [In Persian]

4. Saadi Shirazi, Collected Works of Saadi, (edited by Mohammad-Ali Foroughi) (seventh edition, Tolou’ Publication 1992) 247. [In Persian]

5. Abdolkarim Soroush, The Ethics of Rulership and Religiosity (Serat Cultural Institute 2000) 94. [In Persian].

is disregarded and freedom of expression is violated. According to the authors of this paper, the deep connection between freedom of expression and the right to protest is such that the outcome of this connection can be observed in the phrase "protestive expression".

### **3. Freedom of Peaceful Assembly and Its Connection with the Right to Protest**

Throughout history, respect for human freedoms and rights has had many ups and downs. At certain times, even thinking about these issues was considered impossible, and at other times, efforts were made to uphold them to the highest degree. Social life demands that individuals form various assemblies more effectively enjoy human rights and freedoms, and through these, take the necessary actions to guarantee and realize their rights. International documents and national laws have also provided mechanisms to ensure and further respect these rights for citizens. Freedom of assembly is a crucial element in democracy, which is necessary during its establishment and plays a significant role in transitional periods, facilitating and providing a foundation for activities aimed at establishing democracy. As Article 20 of the Universal Declaration of Human Rights (UDHR), as the cornerstone of the global human rights movement, explicitly states: "Everyone has the right to freedom of peaceful assembly and association". In democratic systems, freedom of assembly also has a valued aspect. Furthermore, the existence of freedom of assembly is a prerequisite for democracy, and its degrees play a role in determining the quality of democracy. At the same time, it is important to note that freedom of assembly is closely linked to freedom of expression, belief, religion, publication, and writing. In fact, one manifestation of freedom of speech and expression is the ability to organize gatherings.

An exploration of the theoretical foundations of democracies and their developments reveals that freedom of peaceful assembly is not only of value, legal, and identity significance for democracy, but also essential for its very existence. Therefore, freedom of assembly serves both as the womb of democracy and as a foundation for its continued existence. Recognizing this intricate relationship makes the protection of the right to peaceful assembly an indispensable principle in democracies. What ensures the respect for citizens' rights, the autonomy of the people over their own destiny, and the prevention of the reconstruction of various forms of autocracy and authoritarianism is the equal and free access for all sectors of society, and for individuals with different political, cultural, and ideological views, to organize peaceful gatherings. On this basis, one of the key elements in defining autocratic and authoritarian regimes is the denial of the right to organize street protests and gatherings for everyone, limiting it to supporters and the circle of the regime's allies. Thus, freedom of assembly plays a decisive and significant role during the pre-democracy phase and the transitional period. The practice of politics and social action to influence the balance of social power requires the enjoyment of freedom of peaceful assembly by all; otherwise, political justice cannot be realized, and political participation and the formulation of policies for governing the country will be controlled by the ruling minority.

As a result of the significance and special position of freedom of assembly for human beings



and their lives, the right to assembly emerges. This right is one of the fundamental human rights and is naturally enjoyed by individuals. International and regional human rights instruments have recognized this freedom. Freedom of assembly is part of the first generation of human rights.<sup>1</sup> In the literature related to the international human rights system, it is referred to as the right to 'peaceful assembly'. Documents such as the UDHR, ICCPR, the Convention on the Rights of the Child, and regional human rights instruments such as the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights emphasize and affirm the right to freedom of assembly. This right has also been recognized in the constitutions of many countries. For example, in the Constitution of the Islamic Republic of Iran, the right to peaceful assembly is explicitly enshrined in Article 27. This Article provides as follows: "The formation of gatherings and demonstrations without carrying weapons, provided they do not disrupt the foundations of Islam, is free".

In Hofeld's classification of rights, freedom of assembly falls under the category of negative claim-rights. This means that, similar to freedom of expression and most other negative rights, there is a two-fold obligation for States regarding this right, whereby states must also intervene positively to ensure the effective realization of the right to freedom of assembly. Scholars in the field of freedom of assembly have stated that if freedom of assembly is viewed solely from the perspective of freedom, its negative aspect and, consequently, the lack of restrictive State intervention becomes more prominent. However, to fully realize and properly exercise the right to freedom of assembly, some positive intervention by the State is necessary. For this reason, while this right was considered a negative right at the time of the drafting of Article 21 of the ICCPR, in practice, it required State intervention. To facilitate and safeguard this freedom and address issues such as establishing enforcement mechanisms, ensuring the safety of participants through law enforcement, pursuing legal action, compensating for violations of the right to assemble, and providing reparations, the State must intervene and guarantee the order and security of assemblies.<sup>2</sup> In other words, the State is first obligated not to obstruct the exercise of this right by individuals, groups, or organizations, and subsequently, to protect the exercise of this right and its holders from unlawful interventions and obstacles such as insecurity.

The United Nations Human Rights Committee, in September 2020, issued General Comment No. 37 regarding Article 21 of the Covenant, which pertains to the right to peaceful assembly. According to the Committee, the fundamental human right to peaceful assembly enables individuals to collectively express themselves and participate in the formation of their communities. The Committee notes that the right to peaceful assembly is inherently important because it protects people's ability to exercise self-organization in society with others. Furthermore, alongside other related rights, it forms the basis of a governance system based on democracy, human rights, the rule of law, and pluralism. Peaceful assemblies can play a significant role in advancing viewpoints, goals, and aspirations in the public sphere,

1. Leila Pirshotorbani, 'Comparative Study of Freedom of Assembly in the Constitutional Law of the Islamic Republic of Iran and the United States of America and International Human Rights Documents' (Master Thesis, Tolou Mehr Non-Profit Higher Education Institute, Spring 2021) 10. [in Persian]

2. See Reza Eslami and Mohammad-Mahdi Kamalvand, Freedom of Assembly in the International Human Rights System and the Legal System of Iran (Majd 2015) 56-58. [In Persian]



as well as supporting or opposing these viewpoints and goals by the participants themselves. The Committee also highlights a significant aspect of this right related to the right to protest; in the view of this monitoring body, peaceful assemblies, when used to express grievances, provide an opportunity to resolve conflicts in an inclusive, participatory, and peaceful manner.<sup>1</sup> The Committee also refers to the instrumental aspect of the right to freedom of assembly. According to the Committee, this right is a valuable tool that can be used to identify and achieve a wide range of other rights, including economic, social, and cultural rights. The right to freedom of assembly is particularly significant for individuals and groups who are marginalized. The Committee explicitly states that failure to respect and guarantee the right to freedom of assembly is often an indicator of repression and oppression.<sup>2</sup>

The link between the right to protest and freedom of peaceful assembly is most evident in the concept of “peaceful protest” which has been a vehicle for social, economic, and political transformations throughout human history.<sup>3</sup> The Special Rapporteur on the right to freedom of peaceful assembly and freedom of association dedicated his 2022 report to the protection of human rights within the context of peaceful protests during times of crisis. After outlining the various forms and goals of protests, he highlights the critical role of protests as a means of expressing public views, particularly when inequality and marginalization worsen. More importantly, he underscores the position of peaceful protest as a gateway for the protection and realization of other rights. He then implicitly concurs with the Human Rights Committee, concluding that restricting and failing to support peaceful protests contributes to the violation of other human rights that protesters seek to promote, achieve, and defend.<sup>4</sup> Furthermore, in his most recent report from January 2024, the Special Rapporteur presented a model protocol for law enforcement agencies to enhance and protect human rights in the context of peaceful protests. In this report, he considers peaceful protest to be a significant form of exercising the right to freedom of peaceful assembly, freedom of expression, and freedom of association, as well as participation in public affairs. He includes this within the protective umbrella of these rights as articulated in the ICCPR and the UDHR.<sup>5</sup> He also emphasizes that the peaceful nature of protests should be assumed, unless there is compelling evidence to the contrary. Furthermore, in the event of a protest, it should be considered peaceful unless participants engage in widespread and severe violence.<sup>6</sup> It is from this perspective that the right to protest is closely intertwined with the freedom of peaceful assembly.

As mentioned above, freedom of expression provides the theoretical foundation for the realization of the right to protest. It should also be noted that the right to freedom of peaceful assembly actually provides the necessary groundwork for the exercise of this right. The most

1. Human Rights Committee, ‘General Comment No. 37 on the Right of Peaceful Assembly (Article 21)’ CCPR.C/GC/37 (September 17 2020) para. 1.

2. Ibid, para. 2.

3. Ona Flores, ‘Case Law on Peaceful Protests’ (June 2023), 6; <http://tinyurl.com/2bdgzm9n> accessed 2 March 2025 (last access on March 3, 2025)

4. Human Rights Council, ‘Protection of Human Rights in the Context of Peaceful Protests During Crisis Situations; Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association’ A/HRC/50/42 (May 16, 2022) para. 4.

5. Human Rights Council, ‘Model Protocol for Law Enforcement Officials to Promote and Protect Human Rights in the Context of Peaceful Protests; Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association’ A/HRC/55/60 (January 31, 2024) para. 11.

6. Ibid, para. 19.



prominent manifestation of protest in the contemporary era must be considered in the form of collective protests, as this type of protest, due to its significance, takes on a stronger human rights dimension than individual protests. In such protests, each individual exercises their right to protest, and it is the aggregation of these rights that increases the potential to achieve the goals and objectives of the protest in a peaceful manner. For this reason, scholars believe that the right to freedom of peaceful assembly is an essential component of a free system and belongs to fundamental freedoms, because individuals, in their capacity as single entities, lack significant political power to influence government decisions or exercise the right to self-determination and protect these fundamental freedoms. Therefore, to fulfil this potential, they must necessarily come together and participate, including by organizing protest assemblies.<sup>1</sup> From this, it can be understood that the freedom of peaceful assembly is the practical basis for the realization of the right to protest, and that freedom is a necessary precondition for exercising this right.

#### **4. The Concept of ‘Collective Protestive Expression’ as A Synthesis of Rights**

In analyzing the interconnection between the three core rights discussed in this article- namely, the right to freedom of expression, the right to freedom of peaceful assembly, and the right to protest- it becomes clear that these are not isolated rights operating independently. Rather, they exist in a mutually reinforcing, interdependent framework that underpins democratic participation and political agency. The term “Collective Protestive Expression” is introduced precisely to capture this intricate nexus, emphasizing the expressive, associational, and dissent-based dimensions of collective protest. At the foundation lies the right to freedom of expression, a cornerstone of all liberal-democratic orders and a prerequisite for the exercise of self-autonomy. Human beings, as thinking and reasoning agents, must be able to formulate and exchange their thoughts and ideas without fear or constraint. This right is not merely instrumental for personal development; it also plays a vital role in fostering public discourse, facilitating the search for truth, and holding those in power accountable. In short, the exercise of freedom of expression is central to both individual dignity and collective self-governance.

From this foundational premise, the link to the right to protest becomes evident. Protest is one of the most potent forms of expressing disagreement, dissatisfaction, or demands for change. In this sense, protest is not merely a political act- it is a deeply expressive one. When individuals assert their right to protest, they are engaging in a targeted form of expression, one that is inherently communicative and often directed toward societal transformation. Hence, protest can be understood as a specialized and essential, exercise of the broader right to freedom of expression. However, the right to protest, particularly in its collective form, cannot be fully realized without the protection of another right: the freedom of peaceful assembly. The collective nature of protest- wherein individuals join together to express shared concerns or demands- relies on the ability of people to gather publicly, peacefully, and with a shared purpose. This is more than a logistical

1. Milad Mansouri, ‘Study of Freedom of Assembly with a Focus on Iranian Domestic Law and International Human Rights Documents’ (Master Thesis, University of Tabriz, Winter 2013) 9-10. [In Persian]

requirement; it is a normative one. Freedom of peaceful assembly enables individuals not just to be heard as isolated voices, but to voice their message through solidarity, visibility, and public presence. It transforms private grievances into collective political expression.

It is from the dynamic interplay of these three rights that the concept of Collective Protestive Expression emerges. This expression is not a simple restatement of “protest expression” or “collective protest.” Rather, it is a carefully formulated term meant to highlight both the expressive character and the freedom-based foundations of collective protest. The grammatical structure of the phrase is intentional: whereas “collective protest expression” is composed of two juxtaposed nouns- ‘protest’ and ‘expression’- suggesting a descriptive link between them, “collective protestive expression” employs an adjective-noun construction, with “protestive” modifying and characterizing the nature of the expression itself. This is more than a semantic nuance. The term “protestive” functions to attribute a *protesting quality* to the expression in question. That is, the expression is not just any form of speech or communication; it is defined by its oppositional, resistant, and dissent-oriented nature. In doing so, it places expression- not protest- as the central grammatical and conceptual element, but now qualified by its protestive dimension. This framing aligns more closely with the article’s normative emphasis on expression as the core of political protest and with the legal ambition to defend protest as a legitimate and protected form of communication.

By contrast, the more familiar term “collective protest expression” risks obscuring this nuance. It foregrounds the act of protest and treats expression as merely a vehicle or component of that act. In legal terms, this could lead to a more limited interpretation of protest- one that potentially reduces it to action or assembly, rather than recognizing its deeply communicative nature. The term “Collective Protestive Expression” thus deliberately resists such reductionism. It stresses that protest, especially in democratic societies, is primarily a form of public expression that emerges from the exercise of both speech rights and assembly rights. This conception has important implications for both legal theory and human rights practice. It situates protest within the expressive freedoms framework, arguing that to protect freedom of expression and peaceful assembly necessarily entails protecting protest. The failure to recognize this integrated model may result in legal inconsistencies, such as protecting speech in principle while criminalizing protest in practice. The notion of “Collective Protestive Expression” provides a conceptual and terminological tool to resist such fragmentation. It insists on considering protest not as an exceptional or disruptive activity, but as an inherently expressive and associational right- and thus as a legitimate, protected element of democratic life.

Moreover, this expression captures the synergistic function of collective action. Protest becomes more than the sum of individual voices; it becomes a collective articulation of dissent, powered by common identity and purpose. That synergy- made possible only through the convergence of expression and assembly- is precisely what gives collective protest its unique political power. In this light, “Collective Protestive Expression” reflects not just a combination of rights, but a democratic function: the capacity of the people to speak truth to power in a unified, public, and visible way. In conclusion, the term “Collective Protestive Expression” is not a linguistic novelty



or stylistic embellishment. It is a conceptual synthesis grounded in the jurisprudential logic of rights interdependence. It affirms that the right to protest must be understood through the dual lenses of freedom of expression and peaceful assembly, and that only by safeguarding all three can societies fully guarantee democratic participation and pluralistic dialogue. In a time when protest is increasingly under threat worldwide, rearticulating its foundations as “protestive expression” may serve both theoretical clarity and practical advocacy.

In the final section of this contribution, the concept and nature of the right to protest and the obligations of States towards it will be discussed, in hopes of shedding more light on the various aspects of this important right.

## 5. The Concept and Nature of the Right to Protest and the Obligations of States Towards It

Protest, being a human phenomenon, manifests and expresses itself in various aspects of human life. One of its most prominent forms can be found in literature, particularly in poetry. As researchers have rightly pointed out, protest is one of the core elements in Persian poetry, addressing issues such as complaints about fate, misfortune, illness, envy, injustice, oppression by rulers, debauchery, etc. The literature of protest occupies a special place in the works of many Persian poets, so much so that through these poems, one can better understand the poet’s personality, their moods, the ideal society they envision, their expectations from society, and even their weaknesses and strengths, as these poems are heartfelt and express the poet’s true ‘self’. Naturally, dissatisfaction with the present situation is the main motivation behind protests. Protest literature, which occupies a significant portion of poetry not only in Persian literature but also in the world literature, though often disliked by poets due to their unpleasant interactions with rulers and tyrants, has often been welcomed by the majority, as it represents the voice of those who have suffered oppression throughout history. One of the most important themes in this genre of poetry, in world literature in general, is the tyranny and oppression of rulers.<sup>1</sup>

Protest, in its literal sense, means “criticism, objection, complaint, challenge, censure, accusation, faultfinding, and objection to a default judgement”.<sup>2</sup> However, in its technical sense, it refers to the individual or collective expression of opposing views, values, interests, or reactions in a responsible manner. Accordingly, this term encompasses actions such as individual or collective protests, as well as spontaneous protests, chosen in terms of method, form, or timing by the individual, including through digital technologies; individual or collective expressions regarding any disputed issue or problem; actions directed towards any audience, including public officials, private entities, individuals, or the general public; behaviors or expressions that may anger or upset those who oppose the views and claims raised in the protest, or behaviors that temporarily disrupt activities of third parties; actions that can take place in any location, whether public or private spaces, or even online; actions that may

1. Kolthoum Tabkh-Kar Hassan-Kiadeh; Mohsen Izadiyar and Shahrokh Hekmat, ‘The Causes and Motivations of Protest in Rumi’s Masnavi Based on Manuel Smith’s Psychology of Protest’ (Winter 2022) Vol 19 No 58 Sokhan-e Baharestan 163-164. [In Persian]

2. Mohammad Mo’in, Persian Dictionary (Adineh/Ketab Raye 2002) 168. [In Persian]



involve various degrees and methods of organization, including those with no predetermined organizational structure, hierarchy, or pre-established duration.<sup>1</sup> In other words, the technical meaning of protest, in the context of this paper, covers a broad range of individual and/or collective protest actions in public, private, or even cyberspace, which are directed against anything that contradicts the views, values, and interests of the individual or individuals, groups, or the protesting population.

Protest holds a prominent place in the realm of human rights. As philosophers of law have indicated, the roots of contemporary human rights, which are based on natural rights, can be traced to resistance against tyrants.<sup>2</sup> This form of protest against the status quo was historically an expression of the individual's stance against the State. Based on the definition of protest, the right to protest can be viewed as an individual and/or collective expression of current human rights, encompassing the right to freedom of expression, freedom of assembly and association, the right to participate in public affairs, the right to freedom of thought, conscience, and religion, the right to participate in cultural life, the rights to life, privacy, personal liberty and security, and the right to non-discrimination. The right to protest is also essential for securing all human rights, including economic, social, and cultural rights.<sup>3</sup> As can be seen, the right to protest is closely linked to other human rights and freedoms, with the rights to freedom of expression and freedom of assembly being of particular importance. The first, freedom of expression, forms the foundation for the right to protest, while the second, freedom of assembly, provides the necessary conditions for the exercise of this right. Since protest is a form of 'expression', it is more intimately connected to these two rights and freedoms than to others. One represents freedom of expression in its broadest sense, while the other lays the groundwork for collective expression. Although the right to protest is not formally and explicitly recognized in the current international human rights system, due to its inseparable link with the two aforementioned rights, it can be considered a negative claim right within the framework of Hohfeld's classification of rights. Therefore, the duties of States towards this right would be discussed in the following lines.

As scholars have pointed out, in international law, there are generally two types of 'obligations': one is negative obligation and the other is positive obligation. A negative international obligation is one in which States are required to refrain from certain actions, such as the obligation of non-intervention. In the specific realm of human rights, which addresses the relationships between States and individuals, a negative international obligation means refraining from interfering with fundamental rights and freedoms. For example, in the realm of the prohibition of torture, a State's negative obligation means that the State's organs must not torture individuals. In the realm of freedom of expression, such obligations mean that the State must not prevent the publication of a specific book or the presentation of a particular work of art. On the other hand, a positive international obligation is one in which States are required to take certain actions or respond to certain demands, such as obligations

1. ARTICLE 19, 'The Right to Protest: Principles on the Protection of Human Rights in Protests' (2016) 6; [https://www.article19.org/data/files/medialibrary/38581/Right\\_to\\_protest\\_principles\\_final.pdf](https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf) (last access March 2, 2025)

2. Nasser Katouzian, Philosophy of Law: Volume 1: Definition and Nature of Law (6th edition, Sahamiy-e-Enteshar Publishing Co 2013) 42. [In Persian]

3. ARTICLE 19 (no 44) 6.



to act or obligations to intervene. In the domain of human rights, a positive obligation of the State is to respect and ensure individual rights and freedoms. For example, in the realm of the prohibition of torture, a State's positive obligation means that its organs must ensure that individuals do not commit acts of torture against others. In the context of freedom of expression, this obligation entails assisting in the diversification of information, media, and ideas in society.<sup>1</sup> This obligation regarding the right to protest is a combination of both of these.

In other words, States' obligations in relation to human rights are divided into three areas: "respect, protect, and fulfill".<sup>2</sup> And this framework applies both offline and online.<sup>3</sup> Accordingly, the obligations of states regarding the right to protest can be understood as follows. In terms of respecting the right to protest, States should not obstruct, distort, or restrict this right, except to the extent that such limitations are accepted under international human rights law. To protect this right, States must take reasonable steps to support individuals seeking to exercise their right to protest, including taking necessary measures to prevent violations by third parties. Finally, in fulfilling their obligations regarding the right to protest, States must create a conducive and thriving environment for the exercise of this right, which includes effective redress for violations of it.<sup>4</sup> Simply put, the State is obligated not only to refrain from violating the right to protest or obstruct its exercise but also to prevent violations by others and to create the necessary conditions for its realization and exercise.

In this regard, States are obligated to recognize and implement the inseparable, interconnected, and integrated human rights embodied in the right to protest within their superior and ordinary laws in accordance with international human rights law. Essential rights for exercising the right to protest specifically include the right to freedom of expression, the right to freedom of peaceful assembly and association, and the right to public participation. Furthermore, rights that are often violated in cases of repression of protest and violations of the right to protest include the right to life, the right to freedom from torture and inhuman or degrading treatment, the right to privacy, and the right to personal liberty and security.<sup>5</sup> In this context, as discussed and analyzed in Sections 2 and 3, the two rights of freedom of expression and freedom of peaceful assembly have a profound and constructive link with the right to protest and are considered essential for its realization and exercise. On one hand, freedom of expression forms the theoretical foundation and practical basis for the realization of the right to protest, and their amalgamation can be seen in the authors' phrase "protestive expression". On the other hand, freedom of peaceful assembly provides the platform for the collective exercise of this right, which in contemporary times, particularly with the often sorrowful accounts of mass protests in reaction to government policies, actions, and

1. Hedayatollah Falsafi, *The Path of Reason in the System of International Law: The Fundamental Principles of International Legal Methodology* (second edition, Farhang-e-Nashr-e-Nou/Asim Publication 2020) 214-215. [In Persian]

2. Zahara Nampewo; Jennifer Heaven Mike and Jonathan Wolff, 'Respecting, Protecting and Fulfilling the Human Right to Health' (2022) Vol 21 No 36 International Journal of Equity in Health 2.

3. Cabor Rona and Lauren Aarons, 'State Responsibility to Respect, Protect and Fulfill Human Rights Obligations in Cyberspace' (2016) Vol 8 No 3 Journal of National Security Law and Policy 503-504.

4. ARTICLE 19, 'The Right to Protest: Principles on the Protection of Human Rights in Protests: Policy Brief' (2015), 12; <https://t.ly/3MjxK> accessed 2 March 2025 (last access March 3, 2025)

5. Ibid, 12-13.

deficiencies, gains significant importance. The right to protest, like most human rights and freedoms, is not absolute and may be subject to justified limitations, such as national security, public order, public health, and good morals, although such limitations should be interpreted narrowly and in the context of a democratic society.

In conclusion, it is worth mentioning that scholars have aptly regarded citizenship as a social status within the civil society, where citizens are members of a political community with rights and, of course, responsibilities. It has also been rightly pointed out that attention to the rights of the citizens of a society ensures the stability, legitimacy, and continuity of its political system.<sup>1</sup> In this context, the authors believe that recognizing the right to protest and providing the necessary conditions for its peaceful exercise by citizens not only promotes individual growth among the population of a country but also creates the necessary foundation for collective flourishing and greater solidarity among the various groups in society. Furthermore, it significantly reduces the likelihood of non-peaceful movements, which could potentially lead to the collapse of a nation. Recognizing the right to protest is, in fact, the recognition of fundamental rights and freedoms, which, although not limited to the two rights of freedom of expression and freedom of assembly, are fundamentally linked through laying the foundation for the right to protest (freedom of expression) and the groundwork for its exercise (freedom of assembly), thus providing the theoretical and practical grounds for justifying and ensuring the observance of citizens' right to protest. Respect for human rights, especially those that are inherently important and described as "fundamental", is not only of significant moral, human, and ethical importance but is also undeniably essential for the survival, stability, and progress of societies. The right to protest, both as a precondition and consequence, is closely linked with other essential rights, making it an imperative for States to give more attention to it, both practically and theoretically.

## Conclusion

This article has sought to conceptualize the intricate relationship between three fundamental rights central to democratic societies: the right to freedom of expression, the right to freedom of peaceful assembly, and the right to protest. Drawing on a jurisprudential and theoretical framework- particularly informed by Hohfeldian analytical framework- it has been argued that these rights are neither independent nor interchangeable; instead, they are normatively and functionally intertwined. Their convergence enables individuals and communities to articulate dissent, participate in public discourse, and engage in collective action, forming the backbone of democratic agency and civic resistance. To articulate the nature of this interdependence, the article introduced the term Collective Protestive Expression, a conceptual construct aimed at synthesizing the expressive and associational dimensions of collective protest. This term is not offered as a rhetorical flourish or a semantic invention; it is a deliberate theoretical intervention meant to reframe the legal understanding of protest as a form of protected communicative action. By framing protest in terms of "protestive

1. Farid Abbasi and Adham Dahani, 'The Role of Citizen Rights and Democracy in the Space Political Management' (Winter 2021) Vol 4 No 3 Geography and Human Relations 253. [In Persian]



expression,” the article underscores its expressive essence- its role as a communicative act rooted in individual conscience and political will, amplified through collective presence and visibility.

Unlike the conventional term “collective protest expression,” which may reduce protest to a discrete political act or public act of disobedience, *Collective Protestive Expression* invites a deeper normative reading. It conceptualizes protest as a manifestation of the exercise of at least two foundational rights- expression and assembly- whose convergence creates the political and legal conditions necessary for protest to emerge in democratic societies. In this light, protest is not simply a reaction to injustice; it is an affirmative articulation of voice, identity, and resistance- an essential practice of citizenship. Throughout the article, this interdependence was demonstrated in two key analytical moves. First, the right to freedom of expression was shown to be the normative root of dissent, without which protest loses its communicative function. Second, the right to peaceful assembly was identified as the condition that transforms individual expression into collective agency, enabling visibility, resonance, and impact. The right to protest, then, is revealed not as an autonomous domain but as a synergistic product- a right that only becomes meaningful when expression and assembly are jointly protected and exercised.

In current global contexts where protest is increasingly criminalized, restricted, or surveilled, this conceptual framing is both timely and necessary. Governments often seek to fragment protest into its constituent parts- labeling gatherings as unlawful assemblies, or treating speech as incitement- in order to undermine its legitimacy. By advancing the concept of *Collective Protestive Expression*, this article counters that tendency by insisting on a unified analytical framework. It urges legal systems and human rights institutions to recognize protest as a protected practice grounded simultaneously in expressive freedom and collective organization. Moreover, this concept has significant implications for international human rights jurisprudence. While treaties like the ICCPR do not explicitly codify a freestanding right to protest, they do enshrine freedom of expression (Article 19) and freedom of peaceful assembly (Article 21), which together provide the normative foundation upon which protest as a right is built. Understanding protest as protestive expression helps to fill that legal gap, aligning doctrinal interpretation with practical experience and social reality.

Ultimately, the term *Collective Protestive Expression* offers a refined vocabulary through which to reimagine protest within a human rights paradigm. It challenges reductive framings that isolate protest as an act of confrontation or civil disobedience, and instead centers it within a discourse of rights, democratic participation, and expressive legitimacy. It affirms that protest is not a threat to democratic order, but one of its clearest expressions. As such, ensuring the protection of this form of expression is not a matter of state tolerance, but of legal obligation and democratic necessity.



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## TRADE SECRETS DEFINITION IN THE NEW IRANIAN ACT ON INDUSTRIAL PROPERTY: A COMPARATIVE ANALYSIS WITH AMERICAN LAW AND THE TRIPS AGREEMENT

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Trade secrets have gained unprecedented importance in all fields of industry and have emerged as a critical component of many firms' intangible assets following the big changes seen during the past decades. Achieving and preserving a competitive advantage over competitors is vital for many enterprises and trade secrets are an essential means for fulfilling this goal. Nevertheless, the mere possession of valuable trade secrets is not enough. There must be adequate safeguards by trade secrets holder, and more importantly, effective legislative measures are necessary to ensure the secrecy of such information. In an attempt to accomplish this task, the Iranian legislator has provided for protection of trade secrets in a specific chapter of the new Act on Industrial Property. This paper, employing a descriptive-analytical method, examines the definition of trade secrets articulated by the Iranian legislator and compares it with the definitions enshrined in two main American statutes and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The analysis concludes that while the Iranian definition is an appropriate step forward, when compared to the U.S. and TRIPS counterparts, it remains imperfect in certain material respects and consequently requires amendment.



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## Introduction

Trade secrets play an important role in today's business environment. They are used in diverse sectors ranging from manufacturing and technology enterprises that market products to service-oriented entities such as restaurants (with respect to their recipes) and retail establishments (customized advertising methods). Given the importance of trade secrets in the innovation cycle, from research and development to commercialization, even universities and research institutions need to develop trade secrets protection strategies.<sup>1</sup>

If trade secrets are not protected sufficiently, firms may be faced with information leakage which, in turn, may precipitate the loss of their competitive advantage and cause significant losses. Consequently, it is imperative for all firms to ensure protection of their trade secrets.<sup>2</sup> However, such personal protections are, by themselves, inadequate. Unlike other intellectual property rights, since there are no private rights given by governments as to trade secrets, in case they are disclosed, even unintentionally, the original possessor cannot prevent subsequent utilization by others.<sup>3</sup>

It follows, therefore, that governments have a duty to provide adequate safeguards to protect trade secrets possessed by firms. As a result, the Iranian legislator has attempted to do so through a set of rules constituting a part of the new law on industrial property titled: the Act on the Protection of Industrial Property of 2024 (APIP). A similar legislative approach has been adopted by the American legislator, that has enacted important laws in this area, which will be referred to in this article as a guiding source to evaluate the definition of trade secrets in the APIP.

At the international level, the Paris Convention for the Protection of Industrial Property, as the main international convention governing this field, does not explicitly reference trade secrets. It merely stipulates in Article 10bis, titled unfair competition, that members shall take effective measures against acts of competition contrary to honest practices in industrial and commercial matters which according to this article, constitute acts of unfair competition. The article, then, provides a non-exhaustive list of such acts. In contrast, the Agreement on Trade-

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<sup>1</sup> World Intellectual Property Organization, *WIPO Guide to Trade Secrets and Innovation* (2024) 18.

<sup>2</sup> O Yaroshenko and others, 'Protection of Trade Secrets in Global Markets' in *Global Markets and International Business: Implications for Labor Relations* (2024) 1.

<sup>3</sup> Benjamin Chahkar Mian Poshteh, 'L'étude du secret commercial et industriel : approche comparatiste en droit civil par l'exemple de sa relation avec la propriété intellectuelle (France et Québec)' (DPhil thesis, Université de Strasbourg 2018).



Related Aspects of Intellectual Property Rights (TRIPS Agreement) addresses trade secrets in Article 39. The TRIPS Agreement is the first multilateral agreement that addresses the issue of trade secrets.<sup>1</sup> While it does not contain an express definition of the term ‘undisclosed information,’ it specifies the conditions of their protection in paragraph 2 of Article 39.<sup>2</sup> The first paragraph of that article refers to Article 10bis of the Paris Convention (1976) concerning unfair competition. Therefore, the TRIPS Agreement categorizes the issue of trade secrets protection as a part of unfair competition law in the Paris Convention.

It has been reported that there were substantial differences between the representatives of the Anglo-American and the continental European law traditions on this matter. Finally, the TRIPS Agreement followed the latter approach that protects trade secrets under the discipline of unfair competition, as established in Article 10bis of the Paris Convention.<sup>3</sup> Although a detailed discussion on this issue is beyond the scope of this paper, it should be noted that since the protection of trade secrets is deemed to be a part of unfair competition law, no exclusive rights are granted to the trade secrets holder.

In comparison to the TRIPS Agreement, the Iranian legislator, in his latest attempt, has acted differently. In fact, the APIP has distinguished between unfair competition and trade secrets and respectively dealt with the former in chapter 6 and trade secrets in an independent chapter (chapter 5) consisting of 7 articles. The enactment of this Act in 2024, which contains specific articles about trade secrets protection, is a milestone in Iranian industrial property law, since before that date, Iranian law lacked a comprehensive statutory regime specifically allocated to trade secrets protection. Even the Act on the Registration of Inventions, Trademarks, and Industrial Designs of 2007 (replaced by the APIP) didn't address the issue of trade secrets. Indeed, Article 64 of the Electronic Commerce Act (ECA) of 2003 protected electronic trade secrets as a means to protect fair and just competition in the context of electronic transaction. Although this legislative action deserves appreciation, the scope of protection provided thereby is limited to electronic trade secrets and the article is not applicable to traditional trade secrets. In addition, there were some articles in other laws that protected certain types of secrets including trade secrets. For instance, Article 648 of the Islamic Penal Code (as amended in 2024), criminalizes the illegal disclosure of personal secrets by those who by reason of their job or profession receive such secrets from clients. Clearly, this Article is of a general scope and was not enacted to exclusively protect trade secrets. Therefore, the Iranian legal system needed a reform in this field which was relatively achieved with the enactment of the APIP. This law has defined trade secrets in Article 122.

Despite being an up-to-date definition, the definition of trade secrets in the APIP is not precise and requires amendment. In order to do so, the definitions given in the United States laws and the TRIPS Agreement would be reliable sources. Based on the above, in the first section of this paper, to get acquainted with trade secrets, they will be defined in Iranian and American laws and the TRIPS Agreement. Then, in the second section, the elements of

1 UNCTAD, *Training Module on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* (2010) 25.

2 M Burri and I Meitinger, ‘The Protection of Undisclosed Information: Commentary of Article 39 TRIPS’ (2014) 2 <https://ssrn.com/abstract=2439180> accessed 26 April 2025.

3 UNCTAD (n 4) 39.



the definition of trade secrets in Iran will be explained and compared to their counterparts in American law and the TRIPS Agreement with a view to analyze them and identify the strengths and weaknesses of the Iranian definition and to find solutions to improve it.

## 1. Definition of Trade Secrets

This section will sequentially present the definition of trade secrets under Iranian law, U.S. federal law, and the TRIPS Agreement.

### 1.1. Iranian Law

There are two definitions of trade secrets in Iranian positive law. First, a general definition mentioned in the APIP. Second, a specific definition in the ECA.

#### 1.1.1. Definition of Trade Secret in the APIP.

Article 122 of the APIP defines a trade secret as follows:

*“Any type of commercial information which has independent actual or potential economic value or competitive advantage and due to being unknown to the public and not being accessible or identifiable easily by legitimate methods, its legitimate owner has adopted reasonable measures to preserve its secrecy”.*

The same article provides a non-exhaustive list of trade secrets:

*“Information such as all types and forms of engineering, economic, technical, commercial or financial information including patterns, maps, collections, programs and rules (formulas), plans and methods, means, techniques, processes, software, identifiers, customer lists, business methods, manufacturing secrets, unregistered inventions and designs and any other type of information”.*

#### 1.1.2. Definition of Trade Secret in the ECA

Article 65 of the ECA defines electronic trade secrets as:

*“...data messages ... that have independent economic value and are not publicly accessible and reasonable attempts have been made to protect them”.*

This act also provides a non-exhaustive list of examples, as the text itself indicates:

*“Information, formulas, patterns, software and programs, means and methods, techniques and processes, unpublished works, business methods, procedures, maps and derivations, financial information, customer lists, commercial plans”.*

## 1.2. United States Law

Two main statutes applicable to trade secrets protection will be analyzed in this paper: The Uniform Trade Secrets Act (UTSA) of 1979 and the Defend Trade Secrets Act (DTSA) of 2016.



### 1.2.1. Definition of Trade Secret in the UTSA

The following is the definition of trade secret in section 1(4) of the UTSA:

*“Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:*

- 1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*
- 2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”*

### 1.2.2. Definition of Trade Secret in the DTSA.

The DTSA defines a trade secret as:

*“All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if*

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.”<sup>1</sup>

### 1.3. Definition of Trade Secret in the TRIPS Agreement

Article 39 of the TRIPS Agreement allows both natural and legal persons to protect the information satisfying the requirements listed therein against certain acts which are contrary to honest commercial practices. Paragraph 1 of this article is in fact a means to tie the protection of undisclosed information to the protection against unfair competition dealt with in Article 10bis of the Paris Convention and has been described as enlarging the list of prohibited acts under Article 10bis (3) of the Paris Convention.<sup>2</sup>

The TRIPS Agreement does not apply the term trade secrets. Instead, it uses the term “undisclosed information.” This term is generally understood to encompass various terms including “trade secrets” or “business secrets” that are used by national legislators.<sup>3</sup> The commentators to the TRIPS Agreement consider the terms undisclosed information and trade secrets to be the same.<sup>4</sup>

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1 18 USC § 1839(3).

2 Burri and Meitinger (n 5) 114.

3 World Intellectual Property Organization (n 1) 20.

4 A Taubman, H Wager and J Watal (eds), *A Handbook on The WTO TRIPS Agreement* (CUP 2020) 137.



Article 39 of the TRIPS Agreement regards information as trade secrets where it has the characteristics:

- (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret; and
- (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

For a better understanding of the definition of trade secrets in Iranian law, its elements which are in fact the conditions of protection will be analyzed in detail and where necessary, compared to the definitions mentioned in the American statutes and the TRIPS Agreement.

## 2. Analysis of the Elements of Trade Secret Definition under the APIP

According to the APIP, trade secrets protection is afforded to information when the following conditions are present:

### 2.1. Commercial Nature of the Information.

Article 122 of the APIP stipulates that only “commercial information” may be regarded as trade secrets. In contrast, the ECA omits the qualifier ‘commercial’ from its definition. Since the APIP merely protects commercial information, other types of information a fall outside its protective scope. For example, information about one’s personal life irrespective of their importance and secrecy is not covered by the definition and subsequently this Act does not protect it. Instead, such information may be protected by other legal frameworks, such as the privacy rules codified in Articles 58 to 61 of the ECA.

Article 122 does not define the term “commercial,” nor is a definition provided in other laws. Therefore, the courts may encounter difficulties in handling cases involving this kind of information. A solution to this problem may be the reference to the Iranian Commercial Code that despite not having defined the exact word commercial, has enumerated commercial transactions in Article 2. As a consequence, any information related to those transactions is commercial. Nevertheless, the Iranian Commercial Code of 1932 dates back to almost a century ago and during this long period of time many developments concerning commercial transactions have occurred and a lot of new transactions and fields have appeared in the Iranian market which make it nonsensical to restrict the scope of commercial information to the information concerning transactions mentioned in such an old statute. If this solution is adopted, a large amount of information would be outside the realm of trade secrets and consequently not protected. A good example of new transactions is information technology transactions which did not exist at the time the Code’s enactment. Today, such transactions such as software development contracts or administration of websites or virtual accounts are widespread and no one may deny their commercial nature. Intellectual property transactions are another example that came into existence in Iran many years after the introduction of the



said Act. Again, such transactions are of a commercial nature. Accordingly, a better method should be found which is adapted to the circumstances of the society and is capable of meeting its needs. The authors believe that the best source to understand the concept of commercial information is the custom. It has the advantage of taking into consideration the rapid changes of the market and recognizing the newly emerging types of information that are considered by businesses as valuable assets and treated as trade secrets. In fact, custom is a source of law in Iran<sup>1</sup> and in certain instances the law has made specific reference thereto. As an example, Article 224 of the Iranian Civil Code states as follows:

*“The words used in a contract are understood according to their conventional meanings”.*

Therefore, in cases of disputes about the parties' intention with regard to the concept of a word and where no evidence exists in the contract to interpret it, the courts should identify their intention by reference to the conventional meaning of the term in question, i.e., how a reasonable person understands the term. Indeed, this is an example of a general rule that applies to the interpretation of the provisions of a statute as well. In fact, the legislator is the representative of the society as a whole and the laws are enacted to be implemented therein not in vacuum. Thus, the term 'commercial information' must be interpreted in accordance with its contemporary meaning which encompasses a variety of different types of information considered by members of each industrial sector to be commercial.

In contrast, the U.S law does not employ the qualifier 'commercial' in the statutory definitions of trade secrets. Instead, as stated by the UTSA, the information concerned must have economic value. "A variety of evidence suggests that the drafters perceived the terms 'economic' and 'commercial' value to be virtually identical in substance."<sup>2</sup> Some scholars have suggested that the economic value implies the requirement that the alleged trade secret be valuable to others as a result of its potential commercial use.<sup>3</sup>

## **2.2. Having Independent Actual or Potential Economic Value.**

According to this element, the commercial nature of information is not a necessary but insufficient condition for protection; the information must also have economic value to qualify as trade secret. Having economic value in Iranian law means to be property (māl). In fact, property is defined in Iranian law to be something that has economic value to people and they are ready to pay money for acquiring it.<sup>4</sup> The stipulation of this condition is reasonable due to the fact that protection of worthless information is not necessary and this type of information plays no role in the economic development of the country. An example of such information is a piece of information consisting of insignificant changes to an existing invention. Indeed, this type of information is not important to others and no one would attempt to acquire it.

1 N Katouzian, *Introduction to Law Science and a Study of Iranian Legal System* (2023) 168 et seq.

2 C Hrdy, 'The Value in Secrecy' (2022) 73 Hastings LJ 570.

3 S K Sandeen, 'The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act' (2010) 61 SC L Rev 526.

4 S H Safaei, *Preliminary Course of Civil Law-v.1, Persons and Property* (2017) 141; N Katouzian, *Preliminary Course of Civil Law: Properties and Ownership* (2016) 10; M J Jafari Langroudi, *Terminology of Law* (2016) 595.



Similarly, a list of customers without their detailed contact information and their preferences and habits may not meet the economic value requirement. Another example is interesting information someone knows about a company's history that others do not know.

If that information lacks the economic usefulness and could be easily known by others through a simple search, it has no economic value and therefore fall outside of the ambit of the trade secrets.<sup>1</sup>

A similar condition exists in the American law. As mentioned above, the UTSA requires that the information have economic value. The same requirement is provided in the DTSA.<sup>2</sup> Therefore, a relationship between the information and economic activity, wealth creation, profit-seeking, industry or trade must be established. Otherwise, the information may not qualify as having economic value. A good example is a recipe for cookies a person keeps secret and uses it to make cookies at home without any commercial intentions.<sup>3</sup>

The economic value requirement originated in U.S. common law.<sup>4</sup> According to Restatement (First) of Torts, for information to qualify as trade secret, it had to be continuously used in one's business and give its holder "an opportunity to obtain an advantage over competitors who do not know or use it".<sup>5</sup> Nevertheless, after common law was replaced by the UTSA, the first requirement of continuous use in a business was removed. Instead, the UTSA required the claimant to prove that the information has independent actual or potential value. As a result, the scope of trade secrets protection was expanded to include certain types of information such as search results or prototypes that despite not being practically used in business were economically valuable. However, the common law requirement that the holder of information must show possessing an economic advantage over competitors as a result of its secrecy was retained.<sup>6</sup>

The economic value may be proven by circumstantial evidence in the U.S courts. Such evidence may consist of investment in research and development, extent of security measures adopted, use of information by competitors, and the fact that the claimant's competitors have been ready to pay for access to the information.<sup>7</sup>

According to the U.S. statutes, the information concerned must derive economic value from not being generally known and not being readily ascertainable by others. As some commentators have explained, the economic value must be the result of secrecy and such secrecy must make the information valuable to competitors.<sup>8</sup> Consequently, the secrecy requirement is relative not absolute. In other words, the general public knowledge is not taken into consideration when a court attempts to determine secrecy. Instead, the knowledge of those active within a specific industry is of relevance.<sup>9</sup> An example of information deserving trade secrets protection is the Kentucky Fried Chicken which is globally known for a formula blending eleven herbs and spices. In spite of the fact that using one or more herbs and spices to flavor a piece of fried chicken is known to those working in the food industry,

1 G Perdue, 'Trade Secret Economics and Value' (2023) 25 Vand J Ent & Tech L 40.

2 USC § 1839(3).

3 Hrdy, 'The Value in Secrecy' (n 12) 571.

4 C Hrdy, 'Independent Economic Value' (2025) 108 Iowa L Rev 1.

5 American Law Institute, *Restatement (First) of Torts* (1939) s 757, comment b.

6 Hrdy, 'Independent Economic Value' (n 18) 1.

7 P Menell and others, *Trade Secret Case Management Judicial Guide* (Federal Judicial Center 2023) 212-.

8 Sandeen (n 13) 524.

9 S Nashkova, 'Defining Trade Secrets in the United States: Past and Present Challenges - A Way Forward?' (2023) 25 NC JL & Tech 652.



the combination and mixture of those eleven herbs and spices leading to a specific taste are not generally known nor readily ascertainable, even through reverse engineering.<sup>1</sup>

In addition, the amount of economic value must be more than trivial;<sup>2</sup> the rationale behind requiring a claimant to prove the economic value of information is to exclude illusory or unimportant information from the scope of protection.<sup>3</sup> In case a claimant fails to adequately demonstrate the economic value of information, the court may reject his claim that information has value based on the information's *de minimis* utility.<sup>4</sup> This principle was affirmed in a case<sup>5</sup> that minor software code segments lacked sufficient value to be regarded as trade secrets. In this case, the claimant only submitted ambiguous evidence that the routines were helpful in writing new codes, failed to prove that skilled engineers could not have written the same code and failed to provide evidence of the relative value of the code segments as a proportion of defendant's software. The court found that the code was not of value to competitors. Similarly, in *24 Seven, LLC v. Martinez*,<sup>6</sup> the court rejected the claim that outdated information qualified as trade secrets. The court argued that the claimant failed to explain how the old information at issue retained economic value over competitors. In the court's opinion, the economic edge that the claimant's reports would give to its competitors was marginal and would dissipate rapidly as the information aged.

However, it is noteworthy that the economic value need not be substantial. A claimant is not, for instance, obligated to prove an enormous investment in research and development.<sup>7</sup>

According to the TRIPS Agreement, the information must have commercial value due to its secrecy<sup>8</sup> which is the result of not being "known among or readily accessible to persons within the circles that normally deal with the kind of information in question".<sup>9</sup>

In Iranian law, the wording of Article 122 of the APIP that defines trade secrets is in a way that on the face of it, the definition does not require the economic value to be the result of the secrecy of information. More precisely, the definition of trade secret consists of two elements: the information must be commercial; it must have economic value without mentioning the origin of such value. However, as the term trade secret signifies, the economic value must derive from secrecy. Otherwise, a piece of information may not be considered as a trade secret. In other words, it is not reasonable to provide trade secret protection for information that has no relation to confidentiality. The APIP has not specified those to whom the information must be secret and not easily ascertainable. However, the U.S statutes and the TRIPS Agreement have made it clear that the general public is not intended and only those acting in the related sector must be taken into consideration.

The APIP also stipulates that the economic value must be 'independent.' Neither the

1 J Peterson, 'The Metes and Bounds of Federal Trade Secret Protections: Deriving Cohesive Damages Principles Under the Defend Trade Secrets Act' (2025) 97 NYU L Rev 710.

2 Menell and others (n 21) 2-12.

3 Sandeen (n 13) 526.

4 Menell and others (n 21) 2-13.

5 *Yield Dynamics, Inc v TEA Systems, Inc* 154 Cal App 4th 547 (2007).

6 *24 Seven, LLC v Martinez* No 1:2019cv07320 (SDNY, 2021).

7 Menell and others (n 21) 2-12.

8 Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement) art 39(2)(b).

9 TRIPS Agreement (n 31) art 39(2)(a).



Iranian Act, nor the UTSA, DTSA, or TRIPS Agreement elaborates on the meaning of this component, despite its significant function in limiting the subject matter eligible for protection. Considerable confusion surrounds its interpretation.<sup>1</sup> For example, it has been said that trade secrets have independent economic value when they are valuable in themselves and their value does not depend on other information.<sup>2</sup> In other words, “the value derived from the secret must be independent of the value that is intrinsic to the good or service, or that derived from other factors”.<sup>3</sup> As a result, trade secret protection for a password has been denied by a U.S. court relying on the argument that its value originates from information it protects.<sup>4</sup> In a similar case<sup>5</sup> involving the hack of a credit card data, the court did not consider such data as trade secret reasoning that it had no economic value absent its connection with the underlying bank account. However, this view has been criticized as it excludes a large amount of information from the scope of trade secret protection. In effect, to be economically valuable, almost the majority of trade secrets are dependent on other information. Therefore, another view is that the economic value must come from the mere fact that the information is secret.<sup>6</sup> As the plain text of the UTSA illustrates, the independent economic value of trade secrets must come from not being generally known to the public or readily ascertained through methods like reverse engineering.<sup>7</sup>

It is important to note that the confidential information may lose its economic value due to the changes of market conditions and business strategies and orientations. In such a situation, the trade secrets holder would be faced with the problem of non-protection of his information that despite being secret is no longer valuable to competitors. For example, software code that cannot be executed in a working system due to technological advances and is of no other value to its holder may not be regarded as a trade secret and therefore would not enjoy trade secret protection.<sup>8</sup>

Under article 39(2)(b) of the TRIPS Agreement, information which has commercial value as a result of being secret may qualify as trade secret. Therefore, if the value of undisclosed information is lost or impaired in case it ceases to be secret, such information meets the commercial value due to being secret.<sup>9</sup>

The APIP has distinguished between the information having economic value and the information that involves a ‘competitive advantage’ for its owner. As was observed, the UTSA and the DTSA do not contain such a distinction nor does the TRIPS Agreement which enumerates in Article 39 the conditions of trade secrets. In fact, in the U.S., the said statutes require that the information have independent potential or actual economic value in order to be qualified as a trade secret. This condition reflects the common law requirement of competitive advantage as reflected in Restatement Third of Unfair Competition.<sup>10</sup> Historically,

1 P Johnson, ‘The Secret Subject Matter’ (2010) 1 IPQ 554.

2 Hrdy, ‘The Value in Secrecy’ (n 12) 575.

3 Menell and others (n 21) 2-12.

4 *State Analysis, Inc v American Financial Services Ass’n* 621 F Supp 2d 309 (ED Va 2009).

5 *Bellwether Community Credit Union v Chipotle Mexican Grill* No 18-cv-00629 (DNH, 2018).

6 Hrdy, ‘The Value in Secrecy’ (n 12) 575.

7 Peterson (n 24) 709.

8 World Intellectual Property Organization (n 1) 23.

9 Taubman, Wager and Watal (n 10) 138.

10 Menell and others (n 21) 2-12.

trade secrets law was protected by common law<sup>1</sup> and specifically, has constituted a part of unfair competition law.<sup>2</sup> Restatement Third of Unfair Competition defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret *to afford an actual or potential economic advantage over others.*” The Supreme Court of the United States has stated in a case<sup>3</sup> that the economic value of a trade secret lies in the competitive advantage the owner enjoys over competitors as a result of his exclusive access to the data and if the data is disclosed or used by others, the competitive advantage would be destroyed.

As a general rule, businesses “need to seek out and develop competitive advantages that make it difficult for rivals to take market share”.<sup>4</sup> Competitive advantage stems from many discrete activities of a firm in different fields of designing, producing, marketing, delivering and supporting its products.<sup>5</sup> Among other mechanisms, trade secrets are suitable legal tools for a firm to preserve competitive advantages over its competitors.<sup>6</sup> In fact, “a trade secret can give one side a competitive advantage, which can lead to increased production efficiency, lower prices, and increased innovation”.<sup>7</sup> Such advantages would disappear if trade secrets are disclosed due to espionage, theft, the misconduct of a former employee, passage of time, etc. Trade secrets are elected by some firms instead of patents due to their unwillingness to disclose their valuable information in exchange for acquiring patent rights or because the information lacks the requirement of patentability.<sup>8</sup> Not surprisingly, firms with inventions that may not be copied or reverse-engineered easily may prefer the trade secrets protection to keep their leadership in the market.<sup>9</sup>

Considering the aforementioned, the Iranian legislator is recommended to correct the definition of trade secrets in Article 122 of the APIP in such a way that competitive advantage is merged in the economic value component. Even if the historical background of economic value in common law is disregarded, the economic value itself implies the competitive advantage; since, as mentioned earlier, economic value is another way of saying that something is a property. Indeed, competitive advantage over competitors constitutes a property because others would pay money in return for it. Therefore, competitive advantage is merely an example of what may have economic value, i.e., property in Iranian law, and it cannot be separated from other examples of property. Indeed, “this advantage must derive from the ‘secrecy’ of the information and not from other reasons, such as quality, completeness, or relevance of the information”.<sup>10</sup>

1 L Oswald, ‘The Role of “Commercial Morality” in Trade Secret Doctrine’ (2020) 72 Fla L Rev 152.

2 Hrdy, ‘The Value in Secrecy’ (n 12) 566.

3 *Ruckelshaus v Monsanto Co* 467 US 986 (1984).

4 V Crittenden, W Crittenden and R Pierpont, ‘Trade secrets’ (2015) 18 JABR 2.

5 M Porter, *Competitive Advantage, Creating and Sustaining Superior Performance* (Free Press 1998) 33.

6 Hrdy, ‘The Value in Secrecy’ (n 12) 567.

7 Yaroshenko and others (n 2) 12.

8 Hrdy, ‘The Value in Secrecy’ (n 12) 567.

9 K Strandburg, ‘What Does the Public Get? Experimental Use and the Patent Bargain’ (2004) Wisconsin Law Review 81, 31 <https://ssrn.com/abstract=438023> accessed 26 April 2025.

10 World Intellectual Property Organization (n 1) 22.



### 2.3. Actual or Potential Economic Value

As was observed, the APIP considers information to be trade secret when it has actual or potential economic value. Evidently, information has *actual* economic value when it is used practically by the owner in business. However, the meaning of *potential* economic value is not sufficiently clear and necessitating interpretation by the legislator. Potential as an adjective is defined as being “able to develop into something in the future when the necessary conditions exist”<sup>1</sup> or “a hidden effect in something which has not yet appeared”. Therefore, information which has the capability to produce economic value may be treated as trade secrets.

This formulation, however, raises a significant interpretive question: does the inclusion of “potential” value excessively broaden the scope of protectable subject matter to encompass virtually any piece of commercial information, given that almost any such information could conceivably become a valuable asset in the future?

A similar question has been raised in the United States because under its law, trade secrets may have potential value. In response, some commentators have referred to the commentary to the UTSA which indicates that the purpose behind applying this modifier is to clarify that trade secrets need not be practically used in business and they may consist of information such as research results, prototypes, etc. which have not been used in business. Indeed, the drafters of the Act have intended to extend protection to information that despite not being used by owners, are of economic value.<sup>2</sup> In other words, “the modern statutes of the United States explicitly eliminated the common law’s “used in one’s business” requirement”<sup>3</sup> and added the modifier potential to the actual economic value. The reason for adding the qualifier “potential” economic value to the definition of trade secrets was to emphasize that even if the information is not currently valuable to business but has only the potential to be so, it may qualify as a trade secret. The result of this change was ensuring more reliable protection for information consisting of prototypes, research and projects in an early stage.

Therefore, under the current trade secrets law of the United States, the independent value of a trade secret can be prospective and it need not be practically used, i.e., have actual economic value,<sup>4</sup> and it may be said that if the information can be used to obtain economic benefits it satisfies the economic value requirement.<sup>5</sup> To prove this feature, i.e., the potential economic value, the claimant must prove the existence of some reasonable expectation of such value in the future as a result of secrecy. Consequently, it has been asserted that in practice, where a firm acquires information during a research and development process, it may succeed in protecting this information as trade secrets due to the potential value it may possess, even if the future success of such information is uncertain.<sup>6</sup>

The TRIPS Agreement employs the absolute term of ‘commercial value’ without dealing with actual or potential nature of the economic value the information may possess.

1 Cambridge Dictionary ‘Potential’ <https://dictionary.cambridge.org/dictionary/english/potential> accessed 26 April 2025.

2 Hrdy, ‘The Value in Secrecy’ (n 12) 572.

3 Hrdy, ‘The Value in Secrecy’ (n 12) 569.

4 C Hrdy and M Lemley, ‘Abandoning Trade Secrets’ (2021) 21 Stan Tech L Rev 30.

5 Yaroshenko and others (n 2) 5.

6 World Intellectual Property Organization (n 1) 23.



## 2.4. Adoption of Reasonable Measures by the Owner

Under both U.S. law and the TRIPS Agreement, confidential information is considered as trade secrets when its owner has taken reasonable measures to preserve its secrecy.

*“A trade secret owner’s duty to be vigilant in protecting its secrets is built into the most frequently applied definition of a ‘trade secret’”.<sup>1</sup> The owner, in this way, shows his desire for secrecy particularly towards his employees which is a matter of fact and must be proven.<sup>2</sup>*

The APIP is no exception. The final clause of Article 122 of this act requires, as a condition to protect trade secrets, that the owner adopt reasonable measures to protect the secret information. Here again, the wording of Article 122 is in a way that differs from the UTSA and the TRIPS Agreement. The following is the exact text: “... and due to being unknown to the public and not being accessible or identifiable easily by legitimate methods its legitimate owner has adopted reasonable measures to preserve their secrecy”. Scholars believe that such wording is unnecessary. Since the legislator has stated in the first part of the same article that commercial information having economic value may be considered as a trade secret, it is better to state that the economic value must derive from the secrecy and as a third condition, the owner must take reasonable measures to safeguard such secrecy. Accordingly, the scholars recommend that the Iranian legislator modify the text of Article 122 of APIP to remove the problem existing therein.

The Act has not defined reasonable measures; therefore, a question arises: what is meant by reasonable measures? Clearly, the courts have to determine the examples thereof. Such determination must be the result of the efforts by courts on a case-by-case basis; i.e., the circumstances surrounding each separate case must be taken into consideration. For instance, as far as digital trade secrets are concerned, special measures compatible with the digital environment must be adopted. For example, restricting the access by off-site users, use of adequate encryption, implementing software to supervise the employees’ computer activities and automatically shutting off employees’ access after leaving the firm.<sup>3</sup> Conversely, where trade secrets are posted on those portions of Internet generally accessible by all users, the owner cannot establish that he has taken reasonable measures to safeguard his trade secrets and this is in fact a kind of self-destruction of such assets.<sup>4</sup>

The reasonableness itself has no fixed and clear definition in Iranian law, and custom and usage play an essential role in handling a case involving the issue of reasonable measures. Despite the use of the terms ‘reasonable measures’ and ‘reasonable efforts’ in the main laws concerning trade secrets protection in the United States, such words have not been defined by those laws and there is no obvious test about the amount and type of safeguards which are reasonable to protect the secrecy of information possessed by an owner.<sup>5</sup> Hence, there

1 V Cundiff, ‘Reasonable Measures to Protect Trade Secrets in a Digital Environment’ (2009) 21 IPTOS 362.

2 F Dessemontet, *Protection of Trade Secrets and Confidential Information* (Schulthess 2008) 13.

3 M Hussain, ‘Standards in Assessing Notice of Reasonable Security Measures in Trade Secret Law’ (2024) 25 NC JL & Tech 132.

4 Cundiff (n 60) 409.

5 Menell and others (n 21) 2-13.



are different interpretations in the American courts concerning these terms.<sup>1</sup> In fact, no clear standards have been established by the American courts to illustrate the exact meaning of reasonable ‘efforts’ and ‘measures’ under the concerning statutes.<sup>2</sup> However, certain factors appear in many cases which may be summarized as follows: physical marking of documents, employee access to trade secrets, sharing trade secrets with non-employees, secure storage of the information, employee access to information after termination.<sup>3</sup> In addition, the reasonable measures, efforts or steps may consist of “warning, video controls, restrictions of access to the place where the trade secrets are put to use, division of work, codes, safes and black box agreements with contractors”.<sup>4</sup> Some commentators have proposed a cost-benefit analysis to determine the reasonable efforts. Based on this analysis, three elements must be taken into consideration by a trade secrets owner: the value of secret information, the nature of the disclosure threat and the cost of any specific security mechanism.<sup>5</sup> In line with this analysis, it has been stated in some cases that in every particular case, the court must consider the efforts taken by the owner, the costs, benefits and the particularities of the surrounding circumstances.<sup>6</sup>

It should be noted that establishing that the claimant has taken ‘reasonable precautions’ to keep the secrecy of his information while failing to prove how it gave him an economic advantage is not enough to succeed in a trade secrets infringement case.<sup>7</sup> In other words, making reasonable efforts to preserve confidentiality is not in itself evidence of the economic value of a person’s information. Another important point is that despite the statutory reasonableness requirement, the measures taken need not be perfect or heroic.<sup>8</sup> Applying this rule, the court in *E.I. DuPont de Nemours & Co. v. Christopher*,<sup>9</sup> held that a trade secret owner is not required to watch out for the unanticipated, the undetectable, or the unpreventable methods of espionage now available... To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy’s trick.

## Conclusion

Constant changes and developments in the business world present new challenges with which governments must contend. Trade secrets protection is among such issues. The absence of exhaustive and appropriate rules to protect trade secrets as a key component of any firm’s intangible assets will undoubtedly lead to widespread infringement of the possessors’ rights. Being aware of this fact, the Iranian legislator has enacted specific provisions within an

<sup>1</sup> R Brown, ‘Rethinking “Reasonableness”: Implementation of a National Board to Clarify the Trade Secret Standard now that the Work-From-Home Culture has Changed the Rules’ (2023) 24 Chi-Kent J Intell Prop 280.

<sup>2</sup> Hussain (n 62) 133.

<sup>3</sup> Brown (n 65) 280-286.

<sup>4</sup> Dessemontet (n 61) 13.

<sup>5</sup> Menell and others (n 21) 2-14.

<sup>6</sup> *DM Trans, LLC v Scott* 38 F4th 608 (7th Cir 2022).

<sup>7</sup> *ATS Group, LLC v Legacy Tank & Industrial Services, LLC* 407 F Supp 3d 1186 (WD Okla 2019).

<sup>8</sup> Menell and others (n 21) 2-14.

<sup>9</sup> *E.I. DuPont de Nemours & Co v Christopher* 431 F2d 1012 (5th Cir 1970).



independent chapter of the new Act on the Protection of Industrial Property (APIP) to define and protect trade secrets.

This definition, like the TRIPS definition, covers ‘commercial’ information, while the U.S main statutes have used the identifier ‘economic’ that has been declared to be the same as commercial. Therefore, other kinds of information fall outside the scope of trade secrets. In order to qualify as trade secrets, the APIP requires that the commercial information have independent economic value which is equal to being property in Iranian Civil Code. The source of such value has not been stipulated. On the contrary, under U.S. law and the TRIPS Agreement, the economic value must derive from the secrecy of information. In addition, the APIP has separated information having ‘economic value’ from information involving a ‘competitive advantage’ while in U.S. law and the TRIPS, such a distinction is not observed and in fact, in U.S. law competitive advantage leads to economic value.

The economic value may be actual or potential. As a consequence, information consisting of research results that are not yet in use may enjoy trade secrets protection. According to the definition of trade secrets in the APIP, a condition of trade secrets is the adoption of reasonable measures by the holder of information due to their not being publicly known or easily ascertainable. This condition needs to be amended and like U.S. law and the TRIPS Agreement, the state of not being publicly known or easily ascertainable must be declared as a feature of trade secrets and taking reasonable measures as a necessary condition for protection. The Iranian act has not specified the concept of ‘public’ while in U.S. law and the TRIPS Agreement, merely those acting in the sector concerned are intended. Given the above said, it is clear that the Iranian statutory definition of trade secrets is from many aspects similar to those in U.S. law and the TRIPS Agreement. However, it must be amended to be more accurate. Therefore, the authors propose the following revised formulation for Article 122 of the APIP, which synthesizes the core elements from American law and the TRIPS Agreement into a more robust and legally sound definition:

*“A trade secret is commercial information that: (a) has actual or potential independent economic value derived from not being generally known to or readily accessible by persons within the circles that normally deal with that kind of information, through legitimate means; and (b) is the subject of reasonable measures under the circumstances by its legitimate owner to maintain its secrecy.”*



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*E.I. DuPont de Nemours & Co v Christopher* 431 F2d 1012 (5th Cir 1970)

*Ruckelshaus v Monsanto Co* 467 US 986 (1984)

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## THE INTERPLAY BETWEEN NATIONALITY AND THE INDEPENDENCE AND IMPARTIALITY OF THE ARBITRATOR

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| Article Info  | ABSTRACT  |
|---|---|
| <b>Article type:</b><br>Research Article                | Independence and impartiality are essential indicators for qualified arbitrators. However, the criteria for assessing these indicators differ among competent authorities when addressing challenges to arbitrators. One contentious aspect is the nationality of the arbitrators. By examining arbitration rules and issued decisions, a distinction was made between commercial arbitration and investment arbitration. The ICSID rules of arbitration explicitly mention common nationality with the parties as a criterion for challenging an arbitrator. The ICSID practice has also influenced investment arbitration outside of ICSID, given the significant role of nationality throughout investment law. Conversely, in commercial arbitration, the role of nationality is less pronounced, to the extent that the international character of arbitration in various legal systems is determined by the differences in the parties' places of business rather than their nationalities. Consequently, the nationality of arbitrators in commercial arbitration cannot solely serve as a basis for challenging an arbitrator without other supporting factors. |
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## **Introduction**

In transactions where the parties have different nationalities or places of business, the concerns regarding the independence and impartiality of the dispute resolution body significantly influence the parties' choice of arbitration as the preferred method for resolving disputes. Parties are generally reluctant to have their disputes settled in the courts of the country where the opposing party is based, as they fear potential bias from the adjudicator due to shared nationality with the other party. Thus, in such scenarios, the nationality of the arbitrators becomes increasingly critical to achieving this objective.

This issue is particularly sensitive in investment arbitration, where one of the parties is a state, especially for the investor. Therefore, the role of arbitrators' nationality in both commercial and investment arbitration must be examined as a factor in determining the independence and impartiality of arbitrators and, consequently, the potential for challenging them. This paper aims to clarify the limitations associated with shared nationality between arbitrators and either party, as well as the legal implications that arise from this regarding the composition of the arbitral tribunal and the validity of its award.

The primary question this research seeks to answer is whether the nationality of arbitrators should be considered in their appointment. In other words, can a person's nationality serve as an obstacle or limitation to their selection as an arbitrator? Is there a difference in the perception of arbitrators' nationality in investment arbitration versus commercial arbitration? Finally, what are the implications of shared nationality between the arbitrator and the parties on the arbitral award?

To address these questions, this research employs a descriptive-analytical method. The data collection method is primarily library-based. The first section explores the importance of arbitrators' nationality in relation to their independence and impartiality. The second section focuses on the specific rules related to the nationality of arbitrators in commercial and investment arbitration. Finally, the third section discusses the implications of an arbitrator's nationality as a factor that may compromise the validity of the arbitral award.



# 1. The Role of Arbitrators' Nationality in Their Independence and Impartiality

In this section, we will examine the role of nationality in determining the independence and impartiality of arbitrators. To begin with, we must define independence and impartiality before delving into the significance of nationality in this context.

## 1.1. Concept of Independence and Impartiality

The prevailing view is that independence and impartiality represent two distinct concepts, each reflecting a specific obligation that must exist in the relationship between the arbitrator and the parties involved. While these two concepts are two sides of the same coin, they should be defined separately.<sup>1</sup>

Independence refers to the objective relationship of the arbitrator with the parties to the dispute.<sup>2</sup> An independent arbitrator is one who does not have any type of relationship with either party that could lead to direct or indirect benefits from the outcome of the dispute. According to this definition, if the arbitrator has any ongoing relationships with either party, whether as a subordinate or superior, they are no longer considered independent. If an individual is employed permanently, part-time, occasionally, or receives fixed or contingent fees from one of the parties, their independence as an arbitrator is compromised. Similarly, if the arbitrator has any form of employment or contractual relationship with one of the parties, this creates an objective relationship that calls their independence into question.<sup>3</sup>

On the other hand, the lack of impartiality signifies the arbitrator's inclination towards one party's perspective or interests. Impartiality is an internal and personal standard, lacking an objective dimension.<sup>4</sup> Therefore, when discussing impartiality, we deal with a subjective concept, making its assessment and verification challenging.<sup>5</sup> For this reason, many arbitral awards show that the threshold for proving an arbitrator's lack of impartiality is lower than that for establishing a lack of independence. This approach helps prevent the appointment of arbitrators whose impartiality is genuinely compromised. For instance, according to various arbitral awards and some arbitration rules and guidelines from international bar associations regarding independence, impartiality, and challenges to arbitrators, the mere existence of reasonable suspicion and evidence indicating the arbitrator's inclination towards one of the parties or their arguments is sufficient for a successful challenge.<sup>6</sup>

## 1.2. Nationality of the Arbitrator: A Compromise to Independence or Impartiality?

Nationality establishes an objective relationship between an individual and their state. Therefore, shared nationality between an arbitrator and either party in a dispute does not imply

1 A Redfern, *Law and Practice of International Commercial Arbitration* (Thomson Sweet & Maxwell 2004) 201.

2 L Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators* (2008) 807.

3 M Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (2017) 20.

4 M Kinnear and F Nitschke, 'Disqualification of Arbitrators under the ICSID Convention and Rules' in *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015) 50-51.

5 N Rubins and B.C Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration* (2010) 155.

6 C.D Kee, 'Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration' in *Investment and Commercial Arbitration: Similarities and Divergences* (2009) 184.



a direct relationship between the arbitrator and that party; rather, it signifies a connection to the respective state. As a result, a direct relationship between the arbitrator and that party is excluded.

Although the definition of independence does not limit itself to direct relationships and shared interests, when considering indirect relationships and interests, any doubt regarding the arbitrator's independence must be reasonable and significant. In commercial arbitration, the potential for significant indirect interests between the arbitrator and the disputing party, merely because they share the same nationality, is minimal. For instance, does a ruling favoring one party with shared nationality with another party create any indirect benefits for that party? Does the impact of a commercial case's ruling on a country and its economy generate sufficient benefits for all individuals sharing nationality with the parties involved?

While answers to these questions should be case-specific and context-dependent, a general examination reveals that in the vast majority of cases, the answers are negative. The ruling in a commercial dispute typically does not have enough national or geographical significance to confer benefits on individuals who have no relationship with the parties aside from shared nationality. However, the situation may differ in investment arbitration, which will be discussed further in the next section.

In practice, there is often an overemphasis on the distinction between the two concepts of independence and impartiality,<sup>1</sup> and at times, they are used interchangeably.<sup>2</sup> However, if we delve into the philosophy behind these criteria, we realize that their establishment as prerequisites for an arbitrator's qualification aims to ensure fair adjudication, balanced treatment of the parties, and the reassurance of the parties involved. Consequently, some authors use the term "Neutrality" to refer to both impartiality and independence of the arbitrator.<sup>3</sup>

Neutrality can be described as a concept that encompasses more than mere independence and impartiality. In a broad definition, it can be interpreted as treating both parties equally while maintaining independence from them in thought and action.<sup>4</sup> The common view is that this concept in international arbitration pertains to the absence of dependence and bias concerning geography and nationality.<sup>5</sup> Some theorists have gone further, defining *neutrality* essentially as a lack of dependence from the standpoint of nationality, coining the term "Neutral Nationality" for this concept.<sup>6</sup>

In arbitral practice, there is a growing trend to consider impartiality based on nationality as one of the conditions for a qualified arbitrator.<sup>7</sup> Some even regard it as a fundamental

1 Ibid, 183; C.A Rogers, *Ethics in International Arbitration* (2015) 227

2 W.M Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration* (1989) 29.

3 T Landau, *Composition and Establishment of the Tribunal* (1998) 45-52; P Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration* (1984) 23.

4 Ibid, 26; T Varady, J.J Barceló and A.T.V Mehren, *International Commercial Arbitration: A Transnational Perspective* (2009) 265.

5 R.E Goodman-Everard, *Cultural Diversity in International Arbitration – A Challenge for Decision-Makers and Decision-Making* (1991) 156.

6 Ibid; D Bishop and L Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (1998) 400-401; Landau, Op. Cit. (1998) 45-52; Lalive, Op. Cit. (1984) 74.

7 Bishop & Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration* (1998) 404; N.B KC, C.P KC and A Redfern, *Redfern and Hunter on International Arbitration: Student Version* (2023) 202; Landau, Op. Cit. (1998) 45-52; L Lalive, Op. Cit. (1984) 73.



requirement.<sup>1</sup> It is argued that failing to consider this criterion creates an atmosphere of doubt and fear surrounding the arbitration process.<sup>2</sup> While it may be contested that bias cannot be proven merely due to the absence of such a criterion, it is argued that proving bias practically is not necessary; the mere existence of a reasonable possibility of bias suffices to create legitimate concerns.<sup>3</sup> When one of the parties shares nationality with the arbitrator, they may have a greater chance of having their arguments accepted, as they may share cultural and preference similarities that help the party present their positions in a manner more palatable to the arbitrator.<sup>4</sup>

Beyond *neutrality*, impartiality itself may also be compromised due to shared nationality between the arbitrator and one of the parties. This issue, like independence, should be examined on a case-by-case basis. However, it can be generally asserted that most individuals tend to feel a greater commonality with someone who shares their nationality and may seek to support them against foreign parties. In other words, sharing nationality with either party in a dispute can potentially give rise to the suspicion that the arbitrator may favor that party and may not be able to handle the dispute with the other party, who is a foreigner, impartially.

Yet, when we move away from this broad perspective and enter the realm of professional arbitration, we encounter arbitrators whose careers, income, status, and even academic positions depend on their reputation and credibility. These individuals typically prioritize their professional integrity over feelings of commonality and inclination towards a fellow citizen in matters that are fundamentally not national in nature, and they are unlikely to sacrifice their international professional standing for such concerns.

### 1.3. Parties' Discretion in Selecting Arbitrators

A fundamental element of arbitration is the parties' control over the arbitration process and the formation of the arbitral tribunal from start to finish. Therefore, the parties may agree that an arbitrator who shares nationality with one of them will adjudicate their dispute.<sup>5</sup> However, such an agreement is not always valid everywhere. There may be mandatory rules that prevent the parties, or one of them, from agreeing to arbitration by a person with shared nationality with the other party. Such mandatory rules can be found in the national laws of the parties involved.

For example, the Iranian Law concerning International Commercial Arbitration (LICA, adopted in 1997) states that Iranian individuals cannot consent in advance to arbitration by a person with shared nationality with the other party regarding potential future disputes. Therefore, if arbitration is conducted under the LICA or if the enforcement of the award is requested from Iranian courts, compliance with this provision is mandatory, and any agreement contrary to it lacks legal validity. While finding similar examples of such provisions may

<sup>1</sup> Ibid.

<sup>2</sup> Ibid., 25.

<sup>3</sup> Ibid.; A Azrieli, *Improving Arbitration under the US-Israel Free Trade Agreement: A Framework for a Middle-East Free Trade Zone* (1993) 224-225; N.B KC, C.P KC & Redfern, *Redfern and Hunter on International Arbitration: Student Version* (2023) 204;

<sup>4</sup> Landau, Op. Cit. (1998) 45-52; Lalive, Op. Cit. (1984) 73.

<sup>5</sup> I Lee, *Practice and Predicament: The Nationality of the International Arbitrator (with Survey Results)* (2007) 612.



be rare and challenging, their existence can limit the parties' discretion in controlling the arbitration process.

If the parties do not have an agreement in this regard—meaning they have not consented to arbitration by a person who may share nationality with one of them, and they have not agreed that arbitration by an arbitrator with shared nationality is permissible—the decision regarding the possibility of such an occurrence will largely depend on the arbitration rules governing the process, which will be addressed further.

## 2. Nationality of Arbitrators in the Rules of Various Arbitration Bodies

In this section, we examine the role of nationality as a criterion for determining the qualifications of arbitrators or as a basis for challenging them in the arbitration rules of several prominent arbitration bodies. Generally speaking, the criterion of nationality is addressed in many arbitration rules across various organizations.

### 2.1. London Court of International Arbitration (LCIA)

The arbitration rules of the London Court of International Arbitration address the issue of arbitrators' nationality. According to Article 6 of the LCIA Arbitration Rules, several scenarios are considered:

- 1. Parties with Shared Nationality:** In this case, the nationality of the arbitrator is not particularly significant. A sole arbitrator, party-appointed arbitrators, or a presiding arbitrator can have the same nationality as the parties involved in the dispute or may have different nationalities.
- 2. Parties with Different Nationalities:** In this scenario, depending on the number of arbitrators and their roles, several sub-scenarios are possible:
  - 1. Sole Arbitrator:** In this case, the nationality of the arbitrator must not be the same as that of either party in the dispute.
  - 2. Multiple Arbitrators:** Here, the arbitration rules allow for party-appointed arbitrators to have shared nationality with either party. However, the presiding arbitrator cannot share nationality with either party to the dispute.

In the rules of this arbitration body, there is a general exception for all the aforementioned criteria, which is the written agreement and consent of the parties. This means that an arbitrator who shares nationality with one of the parties can be appointed as a sole arbitrator or as a presiding arbitrator if the party with a different nationality gives written consent to proceed with that arbitrator.<sup>1</sup>

### 2.2. International Chamber of Commerce (ICC) Arbitration

The ICC Arbitration Rules, which govern one of the busiest arbitration organizations in commercial disputes, pay particular attention to the nationality of arbitrators. Two different scenarios concerning the importance of arbitrators' nationality are considered:

<sup>1</sup> London Court of International Arbitration, *Arbitration Rules* (2020), art. 6.1.



**1. Arbitration Agreement in a Private Document:** If the arbitration agreement is set out in a private document, either as a separate agreement or as a clause in a contract, then if the arbitrator is a sole arbitrator or serves as a presiding arbitrator in a multi-arbitrator panel, they cannot share nationality with the parties in the dispute. Unlike the LCIA rules, the ICC rules do not mention situations where the parties share nationality, and it can be inferred that even if the parties have shared nationality, the arbitrator's nationality must differ from theirs. However, it is noted that if circumstances warrant and the situation demands, an arbitrator with shared nationality with the parties may still be appointed, provided that neither party objects within the specified timeframe. If either party does object, the appointment of that arbitrator is nullified.

The exception in the LCIA rules is expanded in the ICC rules, in that all requirements regarding the nationality of arbitrators pertain to the situation where the ICC selects a sole arbitrator or presiding arbitrator, and there are no such restrictions regarding party-appointed arbitrators.<sup>1</sup>

**2. Arbitration Agreement Arising from a Treaty:** In this case, since a treaty involves governments, stricter criteria regarding the nationality of arbitrators are imposed. The ICC cannot appoint an arbitrator with shared nationality with either party under any circumstances, and this restriction also applies to party-appointed arbitrators. However, the parties still retain the discretion to agree that an arbitrator with shared nationality may serve as a presiding arbitrator, sole arbitrator, or party-appointed arbitrator despite this limitation.<sup>2</sup>

One notable aspect of the ICC rules is the general obligation for the tribunal to consider the nationality and residence of potential arbitrators in light of the nationality of the parties in the dispute, other arbitrators, and available candidates for selection to the arbitration panel.<sup>3</sup> Thus, the ICC is tasked as the appointing authority to prioritize the nationality and residence of arbitrators when selecting them.

### 2.3. The Stockholm Chamber of Commerce Arbitration Center

The rules of the Stockholm Chamber of Commerce (SCC) regarding arbitrators' nationality are quite similar to those of the LCIA. According to SCC rules, if the parties to the dispute have different nationalities, the nationality of the sole arbitrator and the presiding arbitrator must differ from that of the parties involved and must not be shared with either party. However, like the rules of other arbitration bodies, there are exceptions to this general rule.

The first exception, as usual, is the agreement and consent of the parties to appoint an arbitrator with shared nationality with one of the parties, although this does not stipulate that the agreement must be in writing. The second exception is unique in that it permits the appointing authority (the SCC) to decide that such an appointment is appropriate without requiring the consent of the parties.<sup>4</sup> In any case, the tribunal has a general obligation to consider the nationality of the parties when selecting arbitrators.<sup>5</sup>

An important point in these rules is that Article 18 emphasizes the necessity of the independence

<sup>1</sup> International Chamber of Commerce, *Arbitration Rules* (2021), art. 13 (5).

<sup>2</sup> Ibid., art. 13 (6).

<sup>3</sup> Ibid., art. 13 (1).

<sup>4</sup> SCC, *Arbitration Rules* (2023), art. 17 (8).

<sup>5</sup> Ibid., art. 17 (7).



and impartiality of the arbitrator and the specific conditions pertaining to them. This indicates that, from the perspective of the SCC's rule authors, nationality is a separate criterion from independence and impartiality. As a result, shared nationality does not necessarily disqualify an individual from serving as an arbitrator unless it compromises their impartiality or independence.

## 2.4. Dubai International Arbitration Centre (DIAC)

The rules of the Dubai International Arbitration Centre regarding the criterion of arbitrators' nationality closely resemble those of the Stockholm Chamber of Commerce. According to DIAC rules, if the parties to the dispute have different nationalities, the sole arbitrator or presiding arbitrator must have a nationality different from that of the parties involved. Exceptions to this general principle include the agreement of the parties and the decision of the DIAC Tribunal.<sup>1</sup>

Many other arbitration bodies, such as the World Intellectual Property Organization (WIPO) Arbitration Centre, also address the issue of arbitrators' nationality. In the WIPO Arbitration Rules, specific conditions that necessitate appointing an arbitrator with specialized expertise are mentioned as exceptions to the nationality criterion.<sup>2</sup>

The UNCITRAL Arbitration Rules also state that the appointing authority should consider selecting an arbitrator with a nationality different from that of the parties as advisable and acceptable.<sup>3</sup> In the rules of the Iranian Chamber of Commerce Arbitration Centre, the only exception allowing a sole arbitrator or presiding arbitrator to share nationality with one of the parties in international arbitration is the parties' agreement.<sup>4</sup>

In some arbitration bodies, such as the Permanent Court of Arbitration (PCA),<sup>5</sup> the China International Economic and Trade Arbitration Commission (CIETAC),<sup>6</sup> and the Swiss Rules of International Arbitration (2021), the issue of arbitrators' nationality is not explicitly addressed. However, as stated above, the rules of ICSID, as a specialized investment arbitration center dealing with disputes between foreign investors and host governments, differ in significant ways, which are discussed further.

## 2.5. International Centre for Settlement of Investment Disputes (ICSID)

In investment arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), nationality becomes significant in three key areas: first, when the state and the Administrative Council of ICSID appoint arbitrators to the list of potential arbitrators; second, when the arbitral tribunal is constituted; and third, when a committee is formed to review a request for annulment of an arbitral award according to ICSID rules.

### 2.5.1. List of Arbitrators

ICSID maintains a list of arbitrators from which arbitrators for each dispute are selected.<sup>7</sup> Each member state can nominate four arbitrators for inclusion on this list, and these arbitrators

1 Dubai International Arbitration Centre, *Arbitration Rules* (2022), art. 11 (1).

2 World Intellectual Property Organization, *Arbitration Rules* (2021), art. 20 (b).

3 UNCITRAL, *Arbitration Rules* (2021), art. 6 (4).

4 Arbitration Center of Iran Chamber of Commerce, *Arbitration Rules* (2023), art. 14.

5 Permanent Court of Arbitration, *Arbitration Rules* (2012).

6 China International Economic and Trade Arbitration Commission (CIETAC), *Arbitration Rules* (2005); B.O Kostrezewa, 'China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?' (2006) 519-529.

7 ICSID Convention, Art. 12.



may share the nationality of that state or have different nationalities.<sup>1</sup> The President of the ICSID Administrative Council may also nominate ten arbitrators, who must have different nationalities.<sup>2</sup> Additionally, when selecting these individuals, the President is required to consider that the nominees represent the major legal systems of the world and principal forms of economic activity.<sup>3</sup>

It's important to note that arbitrators serving on ICSID tribunals do not have to be chosen from this list unless appointed by the President of the Administrative Council as the appointing authority.<sup>4</sup>

### 2.5.2. Constituting the Arbitral Tribunal

During the drafting of the ICSID Convention, the nationality of arbitrators was a topic of considerable debate, with some representatives advocating for the complete removal of arbitrators of national origin.<sup>5</sup> Ultimately, a compromise was reached stating that the majority of arbitrators may not share the nationality of either party unless the parties agree to each member of the tribunal individually.<sup>6</sup> This provision was written to prevent a situation where a third arbitrator, appointed as the sole impartial arbitrator, would find themselves in a position akin to that of a sole arbitrator and must balance the interests of party-appointed arbitrators who share nationality with the parties, each of whom would act more as advocates for the parties that appointed them.<sup>7</sup>

Consequently, arbitrators sharing nationality with the parties are permitted to serve on the tribunal only if they constitute a minority of the tribunal, for example, if the tribunal consists of five or more arbitrators, in which case each party may have an arbitrator of shared nationality.<sup>8</sup>

When the parties do not reach an agreement on the constitution and composition of the tribunal, a three-member tribunal is formed based on the following default procedure: each party appoints one arbitrator, and the third arbitrator, who acts as the presiding arbitrator, is determined by mutual agreement of the parties.<sup>9</sup> In this case, each party must nominate two individuals. One of them must not share nationality with either party, and they will be appointed by the party as their arbitrator, while the other will be proposed as the presiding arbitrator.<sup>10</sup>

In other words, the arbitrators appointed according to the default procedure cannot be nationals of either party in the dispute or share nationality with each other; however, the presiding arbitrator, who is appointed by mutual agreement of the parties, may share nationality with either party or other arbitrators.<sup>11</sup>

1 Ibid., Art. 13(1).

2 Ibid., Art. 13(2).

3 Ibid., Art. 14(2).

4 Ibid., Art. 40(1).

5 S.W Schill, L Malintoppi, A Reinisch, C.H Schreuer and A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2022) 498-499.

6 Rule 1(3) of the ICSID Arbitration Rules; ICSID, *Report of the Executive Directors on the Convention, annexed to the ICSID Convention*, para. 36.

7 ICSID, *History of the ICSID Convention* (1968) 983.

8 ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965), para. 36.

9 ICSID Convention, Art. 37(2)(b).

10 ICSID, *Arbitration Rules* (2022), Rule 3(1)(a).

11 C Titi, *Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy Options for the Multilateral Investment Court* (2020) 45.



If the parties cannot agree on the arbitrators, the procedure outlined in Article 38 of the ICSID Convention is implemented. According to this, the President of the ICSID Administrative Council appoints the remaining arbitrators at the request of one party and after consulting both parties, taking their views into account as much as possible.<sup>1</sup> The arbitrators appointed by the President under this procedure cannot share the nationality of the state party to the dispute or the nationality of the investor's home country.<sup>2</sup>

### **2.5.3. Constituting the Annulment Committee**

In contrast to the formation of arbitral tribunals in preliminary proceedings, when it comes to annulment under the ICSID Convention, all three members of the annulment committee are appointed by the President of the Administrative Council.<sup>3</sup> In this scenario, specific restrictions apply, such as the prohibition against appointing anyone who served as an arbitrator in the original tribunal that issued the award under review.<sup>4</sup>

Additionally, the President cannot appoint an individual who is a national of the state party to the dispute, has a nationality similar to that of the investor, or shares nationality with any member of the original tribunal that issued the award. Furthermore, the President is barred from appointing someone who was nominated by the state party to the dispute or the investor's home country for inclusion on the ICSID list of arbitrators.<sup>5</sup>

This last restriction (the prohibition on appointing someone nominated by the party to the dispute or the investor's home country, who does not share nationality with them) does not seem to apply to appointments made by the President under Article 38, which pertains to the original arbitral tribunal. However, since in that case the President must consult with the parties to the dispute when appointing arbitrators, it appears unlikely that an individual nominated by the state party to the dispute or the investor's home country would be appointed, even if they hold a different nationality.<sup>6</sup>

## **3. Invalidating an Arbitral Award Based on Non-Compliance with Arbitrators' Nationality Criteria**

In this section, we explore the possibility of annulment or non-recognition of international commercial and investment arbitration awards based on the New York Convention for the Enforcement of Foreign Arbitral Awards (1958) and the ICSID Convention and rules.

### **3.1. New York Convention**

Under the New York Convention, the courts of the contracting states are obligated to enforce arbitral awards made outside the territory of the state of the court in question, thereby classifying them as foreign arbitral awards. However, this obligation to enforce awards has exceptions, and if these exceptions are proven, the court may refuse to recognize and enforce the award. These exceptions are detailed in Article V of the Convention.

1 ICSID Convention, Art. 38; ICSID, *Arbitration Rules* (2022), Rule 4(4).

2 Ibid., Art. 38.

3 Ibid., Art. 52(3).

4 Ibid.

5 Ibid.,

6 Titi, Op. Cit. (2020) 46.



According to subparagraph (d) of Article V, one of the grounds for refusing enforcement of an arbitral award is that “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”<sup>1</sup> If nationality is one of the criteria for determining a qualified arbitrator as stipulated in the agreed arbitration rules, and this criterion is not adhered to as specified in those rules, the tribunal’s composition is not in accordance with the parties’ agreement. Consequently, the court requested to enforce the award may refuse enforcement upon the defendant’s request.

Additionally, subparagraph (e) of Article V stipulates that the court shall refrain from enforcing an award that has been suspended by a competent authority.<sup>2</sup> Therefore, if non-compliance with the rules regarding the nationality of arbitrators leads to the annulment or suspension of the award by the competent court in the seat of arbitration, requesting enforcement from courts in other countries will also encounter difficulties. This issue is particularly relevant for ICSID awards if the award is annulled according to ICSID rules by the annulment committee, and one party seeks enforcement of the award based on the New York Convention (rather than the ICSID enforcement framework) from a court in another country.

### 3.2. ICSID

The ICSID Convention provides a mechanism for reviewing requests for annulment of awards issued by the arbitration tribunals of this specialized investment arbitration institution. This mechanism, referred to as the annulment committee or ad hoc committee, is only constituted if at least one of the five conditions outlined in Article 52 of the Convention exists or is claimed. If the claimed condition is proven, the committee may annul the award.

The first of these five conditions is the improper formation of the tribunal.<sup>3</sup> It is evident that if the conditions and rules regarding the nationality of arbitrators are not adhered to during the selection or appointment of the tribunal’s arbitrators, the tribunal has not been constituted correctly, which provides grounds for annulling the award. In this case, the award would not be enforceable under the ICSID Convention, the New York Convention, and likely not under the domestic laws of the countries involved.

## Conclusion

Arbitrators must meet certain conditions to be recognized as qualified for a dispute. The conditions of independence and impartiality are general requirements that are universally acknowledged and emphasized across all legal systems, whether in ad hoc arbitration rules or institutional arbitration regulations.

In some arbitration rules, nationality is not explicitly mentioned as a separate criterion for determining an arbitrator’s qualifications; it only becomes relevant if it can be shown that the arbitrator’s independence or impartiality has been compromised. Conversely, in other arbitration rules, nationality is treated as a specific and distinct criterion for determining the qualifications of

<sup>1</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. 5 (d).

<sup>2</sup> Ibid, Art. 5 (e).

<sup>3</sup> ICSID Convention, Art. 52(1).



independent and impartial arbitrators. These rules often establish clear guidelines to prevent a sole arbitrator or presiding arbitrator from sharing nationality with either party involved in the dispute.

The primary exception to this limitation is typically the agreement of the parties, although in a few cases, the discretion of the administrative authority of the arbitration center or organization is also considered.

In ICSID rules, which serve as the specialized framework for investment arbitration, more complex nationality rules are in place due to the nature of investment disputes and the fact that one of the parties is a state. These rules ensure that, even with the parties' consent, a majority of the arbitrators cannot share nationality with the parties to the dispute, and the appointing authority is also restricted from selecting any arbitrators from those sharing nationality with the parties.

The consequences of failing to comply with the rules regarding arbitrators' nationality, according to the New York Convention, include the non-enforcement of the award, while under the ICSID Convention, it may lead to annulment and non-enforcement of the award.



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## PROTECTION OF FOREIGN INVESTORS IN THE LAW OF IRAN AND SAUDI ARABIA: LEGAL GUARANTEES AND DISPUTE RESOLUTION MECHANISMS

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| Article Info  | ABSTRACT  |
|---|---|
| <b>Article type:</b><br>Research Article  | This article conducts a comparative analysis of the legal frameworks for the protection of foreign investors in Iran and Saudi Arabia, focusing on legal guarantees and dispute resolution mechanisms. Given the crucial role of foreign investment in economic development, this research examines the transparency and sustainability of legal protections in each country and assesses the attraction of these frameworks for investors. Saudi Arabia has recently undertaken extensive legal reforms in alignment with its Vision 2030 to attract foreign investment, whereas Iran faces challenges due to economic sanctions and a lack of legal updates. Both countries provide varying degrees of legal guarantees against expropriation and dispute resolution mechanisms, including the possibility of arbitration. The new Investment Law in Saudi Arabia, set to take effect in 2024, aligns with international standards, reflecting a progressive approach to fostering a favorable investment environment. In contrast, Iran's Foreign Investment Promotion and Protection Act (FIPPA), while offering fundamental protections, lacks comprehensive reforms comparable to those in Saudi Arabia. This study contributes to filling the gap in comparative research in this field and offers insights for improving investment policies in Iran. |
|                |   |
| <a href="https://ijicl.qom.ac.ir/article_4019.html">https://ijicl.qom.ac.ir/article_4019.html</a> |   |

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## Introduction

Foreign investment is considered one of the essential pillars of economic development in any country, playing a critical role in attracting financial resources, enhancing technology, and improving economic infrastructure. To attract foreign investors, a transparent, reliable, and sustainable legal framework is of paramount importance. Investors typically seek countries that not only offer economic opportunities but also provide adequate legal protections, allowing them to operate with confidence in the preservation of their rights and assets. Legal protections against unlawful expropriation, the existence of effective mechanisms for dispute resolution, and the assurance of fair and non-discriminatory treatment are among the most significant factors that transform a country into an attractive destination for foreign investment.

In the Middle East, Iran and Saudi Arabia hold substantial strategic importance for foreign investors due to their geographic location and rich resources. However, there are significant differences in the approaches of these two countries regarding the protection of foreign investors and the legal frameworks associated with dispute resolution. In recent years, Iran has faced numerous challenges in attracting foreign investments due to economic and political sanctions. Conversely, Saudi Arabia has initiated extensive policies aimed at attracting foreign capital and reforming its laws, particularly since the announcement of its Vision 2030. This dichotomy in legal and economic policies provides a suitable background for conducting a comparative analysis of the legal frameworks of these two countries.

When discussing the attraction of foreign investment, it primarily concerns private sector investments from other countries. While governments also engage in investment activities, the framework of international investment law has developed primarily to support non-governmental investors. When the private sector invests in the territory of another state, it naturally seeks the strongest guarantees to protect its security, assets, and profits.

The international investment environment has evolved towards securing robust guarantees from host governments due to experiences following World War II and the decolonization processes in developing countries. These guarantees can be analyzed across several dimensions.

One of the key dimensions of attracting foreign investment is the mechanisms for

dispute resolution. Foreign investors generally seek assurance of the existence of reliable legal mechanisms to resolve potential disputes with the host government. These mechanisms may include international arbitration, domestic courts, or commercial arbitration centers specifically established for investment dispute resolution. Saudi Arabia has endeavored to create a conducive environment for dispute resolution with the establishment of the Saudi Center for Commercial Arbitration (SCCA). On the other hand, Iran also has domestic arbitration centers; however, due to the impact of sanctions and legal restrictions, the confidence of foreign investors in these systems may be lower than that in Saudi Arabia.

Another significant issue in foreign investment law is the legal guarantees against expropriation and deprivation of property rights. The laws of each country must be structured to provide the highest level of assurance to investors regarding the non-expropriation of assets, ensuring that foreign investors are entitled to fair and equitable compensation in the event of expropriation or nationalization of their assets. This issue is regulated differently in Iran and Saudi Arabia. Saudi Arabia has structured its laws to minimize the likelihood of expropriation without compensation, aiming to attract more foreign investment. In contrast, Iran faces greater challenges in this regard due to its specific political and economic conditions, and its laws do not always fully align with international standards.

The legal developments in both countries over the past two decades reflect efforts to reform and enhance the legal frameworks for foreign investment. In Saudi Arabia, extensive reforms have been implemented under the Vision 2030 project, aimed at diversifying the economy and reducing dependence on oil. These reforms include legal changes regarding foreign ownership, the establishment of free and special economic zones, and the provision of tax incentives for foreign investors. On the other hand, Iran has also sought to improve its laws to attract foreign investment in the face of international pressures and sanctions, although these efforts have encountered significant limitations.

Despite these developments, legal and practical gaps between Iran and Saudi Arabia persist. This article aims to conduct a comparative analysis of the similarities and differences in the laws of these two countries concerning the protection of foreign investors and dispute resolution mechanisms. The objective of this research is to provide a comprehensive legal perspective on the legal frameworks that Iran and Saudi Arabia have established to attract foreign investors and ensure their legal security.

The significance of this article is further underscored by the examination of the new investment law in Saudi Arabia, which has undergone substantial revisions in various aspects of interest to foreign investors following the Foreign Investment Law enacted in 2000. The law approved by the Council of Ministers in 2024 introduces significant developments, particularly in the realm of legal guarantees for investment security and new solutions for dispute resolution. Notably, Iran also enacted the Foreign Investment Promotion and Protection Act (FIPPA) around the same time as Saudi Arabia in the early 2000s; however, since then, there have been no comprehensive regulatory reforms in terms of facilitating foreign investment. Iran's economic structure is in dire need of foreign financial resources and advanced technology. There is a pressing need to create an environment conducive



to attracting foreign investment and removing existing barriers. Iran's necessity to attract foreign investment stems from a lack of financial resources and a critical need for advanced technology, and increasing the share of foreign investments indicates an improvement in Iran's economic credibility and, consequently, an enhancement of its status in the global economy.<sup>1</sup>

To present itself as a safe and predictable destination in this domain, Iran needs to revisit its laws and regulations governing foreign investment. The legal and regulatory actions taken in Saudi Arabia in this area and the examination of the foreign investment environment in that country can serve as a valuable guide for potential legal and regulatory changes in Iran.

The innovation of this article lies in its focus on the legal aspects and recent legal developments in both countries, in contrast to many previous studies that primarily analyzed economic and political dimensions. Moreover, the comparative analysis of dispute resolution mechanisms and legal guarantees against expropriation is a topic that has been underexamined comprehensively. Therefore, this article can contribute to filling the research gap in this area and provide new insights for policy-makers and researchers in international investment law.

In conclusion, this research seeks to answer the question of which of the two countries, Iran or Saudi Arabia, provides a more favorable legal framework for the protection of foreign investors and the resolution of investment-related disputes, and what reforms could enhance these frameworks. Given the current conditions in the Middle East and the increasing importance of foreign investment in economic development, this study can serve as a valuable guide for future policymaking in both countries. Following this introduction, we will compare the legal investment environments in the two countries.

## 1. Bilateral Investment Treaties (BITs) and International Investment Law

Bilateral Investment Treaties (BITs) are fundamental instruments in international investment law, established to protect foreign investments between two countries. These treaties typically encompass commitments to ensure fair and equitable treatment, protection against unlawful expropriation, and the possibility of resolving disputes through international arbitration.<sup>2</sup> From a legal perspective, BITs create binding obligations for states, which include improving the legal conditions for attracting foreign investments and providing legal guarantees for foreign investors.<sup>3</sup> The significance of BITs in developing economic relations between countries and attracting foreign investments is widely acknowledged. These treaties serve as effective tools for mitigating political and legal risks associated with investments, assuring investors that impartial international arbitration mechanisms will be available in the event of disputes.<sup>4</sup> Additionally, BITs can contribute to establishing legal and economic stability in the host country, thereby accelerating economic development.<sup>5</sup>

<sup>1</sup> Tadbit Economics Research Institute, *Foreign Investment: Opportunities and Challenges* (2004) 77.

<sup>2</sup> M Herdgen, *Principles of International Economic Law* (Ganj Danesh Publications 2021).

<sup>3</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012).

<sup>4</sup> K J Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010).

<sup>5</sup> M Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017).



According to reports by UNCTAD,<sup>1</sup> Iran has signed 75 bilateral investment treaties despite economic sanctions, of which 59 are currently enforceable.<sup>2</sup> Conversely, Saudi Arabia has signed a lesser number of treaties, with 25 bilateral investment agreements, of which 21 are in force.<sup>3</sup> Furthermore, both countries are members of multilateral investment treaties, which also include provisions for dispute resolution.

## 2. Legal Guarantees

Legal guarantees play a crucial role in creating legal security and economic assurance for both domestic and foreign investors in the investment environment. These legal assurances ensure that investors' assets are protected through clear and supportive legal frameworks, safeguarding them from risks such as unjust expropriation, sudden changes in laws, or legal discrimination.

One of the most significant legal guarantees in international investment law is protection against unlawful expropriation. According to international standards, such as the International Court of Justice's landmark ruling in the case of the *Chorzów Factory* (1928), expropriation should occur only under public law and with full compensation.<sup>4</sup> This principle assures investors that in the event of expropriation, their assets are protected, and they will receive fair compensation if necessary.

Moreover, the right to freely transfer profits and capital is another key principle recognized in many BITs and domestic laws, such as the Saudi Investment Law (2024). This legal guarantee is vital for investors as it allows them to transfer their investment profits and proceeds abroad without undue restrictions.<sup>5</sup>

Another important element of legal guarantees is the resolution of disputes through international arbitration or alternative dispute resolution (ADR) methods. These mechanisms enable investors to utilize a neutral and efficient process for resolving disputes with states or other parties in the event of a conflict.<sup>6</sup> These methods ensure that investors are not confined to domestic legal systems and can benefit from international protections.

Overall, legal guarantees in international investment law not only enhance investment security but also foster transparency, predictability, and legal stability in investment environments. These guarantees are essential for attracting long-term investments and assist countries in drawing more investors in a competitive global market.

## 3. Dispute Resolution Mechanisms in Foreign Investment

Dispute resolution in international investments plays a crucial role in establishing a sense of security for foreign investors. When mechanisms for resolving disputes, such as international

1 United Nations Conference on Trade and Development

2 UNCTAD, 'Iran: International Investment Agreements' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of> accessed 1 December 2024.

3 UNCTAD, 'Saudi Arabia: International Investment Agreements' <https://investmentpolicy.unctad.org/international-investment-agreements/countries/185/saudi-arabia> accessed 1 December 2024.

4 Dolzer & Schreuer, 2012

5 Vandevelde, 2010

6 Sornarajah, 2017



arbitration, are in place, investors are assured of their ability to obtain their rights impartially and swiftly in the event of a disagreement. Such mechanisms, including arbitration systems like ICSID,<sup>1</sup> mitigate political and legal risks, thus enhancing the willingness to invest in various countries. According to UNCTAD, 93% of bilateral and multilateral investment treaties include provisions for resolving disputes between the host state and foreign investors, highlighting the significance of this clause in the context of investment.<sup>2</sup>

It can be argued that treaties serve as the primary source of international investment law. In the case of *Mondev v. United States* in 2002, the arbitration tribunal stated that the numerous existing bilateral investment treaties reflect customary international law in protecting foreign investors.<sup>3</sup>

The principle of peaceful dispute resolution occupies a central position within the United Nations system. This principle is articulated in various conventions and is recognized as a customary legal principle. The Permanent Court of International Justice defined “dispute” in the *Maastricht* case in 1924 as “a disagreement on a legal or factual matter, a conflict of legal views or interests between two parties.”<sup>4</sup> This principle encompasses the scope of international disputes. Traditionally, international disputes are resolved through diplomatic-political means as well as judicial-legal methods. While diplomatic-political avenues are not the focus of this discussion, Saudi Arabia’s new investment law acknowledges these methods alongside arbitration.

Legal methods are divided into adjudication and arbitration. However, the judicial process, which adheres to the mandatory procedural rules of the host country, is often less favored by foreign investors, although recourse to this avenue remains open. Arbitration, on the other hand, is preferred by foreign investors due to its flexible and relatively impartial nature. Arbitration can be categorized into state-to-state arbitration and mixed arbitration. State-to-state arbitration is primarily conducted through panels established by the World Trade Organization (WTO) and its appellate body.

Mixed arbitration in international investment law refers to arbitration where one party is a state (or state entities) and the other is a private foreign individual or company. These types of arbitrations typically occur within the framework of BITs or international trade and economic agreements, aimed at resolving disputes arising from foreign investments. The jurisdictional basis (pertaining to the state’s consent to arbitration and procedural norms) and substantive standards are derived from the agreement between the host state and the investor’s home state, thus rooted in public international law.<sup>5</sup>

Numerous studies indicate that international arbitration plays a significant role in resolving investment disputes, and many host countries, including Iran and Saudi Arabia, have sought to address this need through international arbitration or by establishing national arbitration centers based on international standards.

1 International Centre for Settlement of Investment Disputes

2 UNCTAD, ‘Yellow series: Investor-state disputes prevention and alternatives to arbitration’ <https://investmentpolicy.unctad.org/publications/38/> accessed 1 December 2024.

3 *Mondev International Ltd. v United States of America* 42 ILM 85, 6 ICSID Reports 192 (2002) para 102.

4 *Mavrommatis Palestine Concessions Case* (1924) PCIJ Ser A No 2, 11; also see *ICJ, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (1998).

5 C Brown and E Douglas, *International Arbitration and the Settlement of Investment Disputes* (Oxford University Press 2013).



Research has also been conducted on BITs and their impact on resolving foreign investors' disputes. Iran has specifically sought to create effective dispute resolution mechanisms by signing BITs with several countries. These studies highlight the role of international arbitration and the challenges in enforcing international arbitration awards in Iran. Furthermore, following the enactment of the FIPPA, Iran joined the New York Convention, while Saudi Arabia, in addition to joining the New York Convention and establishing the SCCA, has also become a member of the ICSID Convention, striving to create a framework for resolving commercial and investment disputes.

#### **4. Legal Background of Foreign Investment Protection in Iran and Saudi Arabia**

The legal framework for foreign investment in Iran was established with the enactment of the Foreign Investment Attraction and Protection Act in 1955. For many decades, this law served as the principal guide for policy-makers and decision-makers in the country until, in line with the need for economic reforms, the Iranian Parliament proposed a new foreign investment law titled the Foreign Investment Promotion and Protection Act (FIPPA), which was ultimately ratified in 2002. This new law replaced the earlier framework, significantly enhancing the legal structure and operational environment for foreign investors in Iran.<sup>1</sup> Numerous studies have critically examined these laws, particularly the new FIPPA, focusing on the rights and obligations of foreign investors and assessing their legal status regarding expropriation, nationalization, and the challenges posed by sanctions. Additionally, there are other relevant laws and regulations that, directly and indirectly, impact this area, which will be discussed further.

Saudi Arabia, traditionally reliant on oil and petroleum products, has made significant efforts in recent decades to create a favorable environment for attracting foreign investment. The first foreign investment law in the country was enacted in 1956 and updated in 1963. Subsequently, the enactment of the 1979 Foreign Investment Law marked a more comprehensive approach, gradually moving away from a joint investment system.<sup>2</sup> The 2000 Foreign Investment Law (FIL) represented a significant step forward, although it still imposed limitations and challenges on foreign investors.<sup>3</sup> Among these challenges were the licensing process governed by the Saudi Ministry of Investment and the existence of a "negative list" that restricted foreign investors from operating in certain industries.

With the onset of the 21st century, particularly following the ascension of Mohammed bin Salman as Crown Prince in 2017, Saudi Arabia initiated extensive reforms in its economic and social laws. These reforms are part of the broader Vision 2030 program, aimed at reducing dependence on oil and diversifying the economy. Notable social changes during this period included the relaxation of Sharia law restrictions, granting women the right to drive,

<sup>1</sup> Invest in Iran, 'About the Foreign Investment Law' (n.d.) <https://investiniran.ir/fa-ir/FI-Service/about-the-foreign-investment-law> accessed 1 December 2024.

<sup>2</sup> S Beighton and B Adkins, *Foreign Direct Investment Regimes* (ICLG 2023).

<sup>3</sup> UNCTAD, 'Saudi Arabia: Foreign Investment Law' <https://investmentpolicy.unctad.org/investment-laws/laws/74/saudi-arabia-foreign-investment-law> accessed 1 December 2024.



reopening cinemas, and hosting concerts and cultural events. Judicial efforts have also been made to modernize the system and mitigate stringent religious rulings.

To achieve the goals of Vision 2030 and create a more competitive environment for attracting foreign investment, Saudi Arabia approved a new investment law on August 11, 2024, which is set to take effect in January 2025. This law will replace the previous 2000 legislation and specifically focuses on enhancing and promoting the investment environment. Although the executive regulations for this law had not been published at the time of writing, it is evident that these changes aim to clarify conditions for both domestic and foreign investors in alignment with the objectives of Vision 2030.<sup>1</sup>

Comparative studies analyzing the protection of foreign investors in Iran and Saudi Arabia are quite limited. Most existing research has focused on the legal analysis of each country separately, with less attention given to a detailed comparative analysis between the two. In this paper, we will analyze the investment environments of both countries, emphasizing dispute resolution mechanisms and examining the legal guarantees provided to foreign investors.

## 4.1. Introduction to Foreign Investment Protection in Iran

In Iran, the protection of foreign investors is formally enacted through the FIPPA, which was passed in 2002.<sup>2</sup> This law serves as the primary legal instrument for attracting and safeguarding foreign investors, replacing the earlier Foreign Investment Attraction and Protection Law (1955), which imposed greater restrictions on foreign investment. This section examines the key provisions of FIPPA and other related laws concerning the protection of foreign investors in Iran, including mechanisms for dispute resolution, legal guarantees against expropriation, and other legal protections.

### 4.1.1. FIPPA

**4.1.1.1. Definition of Foreign Investment:** According to Article 1, foreign investment encompasses cash, equipment, technology, and intellectual property rights that are brought into the country for production, industrial, and service activities. This law does not explicitly cover indirect foreign investment.

**4.1.1.2. Guarantee Against Expropriation:** Under Article 9, the assets of foreign investors shall not be subject to expropriation or nationalization except under exceptional circumstances and for public interest. In such cases, compensation must be fair and based on international standards, such as *full compensation standard*.<sup>3</sup>

**4.1.1.3. Transfer of Profits and Capital:** Article 13 permits the transfer of profits and capital abroad without discriminatory restrictions. This provision aligns with international standards such as BITs and the OECD Convention.<sup>4, 5</sup>

### 4.1.1.4. Dispute Resolution Mechanisms in FIPPA

1 MISA, *Executive Summary of Updated Investment Law* (2024) <https://misa.gov.sa/app/uploads/2024/08/Executive-Summary-of-Updated-Investment-Law-En.pdf> accessed 1 December 2024.

2 Expediency Discernment Council of the State, General Policies of the State Regarding Article 44 of the Constitution (2005) <https://maslahat.ir/fa/news/5170/> accessed 1 December 2024.

3 UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) United Nations.

4 Convention on the Organisation for Economic Co-operation and Development

5 OECD, *Code of Liberalisation of Capital Movements* (2019).



**4.1.1.4.1. International Arbitration:** According to Article 19, if arbitration is stipulated in the investment contract, disputes may be resolved through international arbitration.

**4.1.1.4.2. Domestic Arbitration Centers:** Institutions such as the Iranian Chamber of Commerce play an active role in resolving investment disputes and have garnered a degree of trust from foreign investors.

#### 4.1.2. Other Relevant Laws

**4.1.2.1. Law on the Implementation of General Policies of Article 44 of the Constitution:** This law facilitates foreign investment in large economic projects and state-owned enterprises.<sup>1</sup>

**4.1.2.2. Free Zones and Special Economic Zones Law:** Free zones offer tax exemptions, reduced tariffs, and simplified financial and customs regulations, creating an attractive environment for foreign investors.<sup>2</sup>

#### 4.1.3. Challenges and Issues in Protecting Foreign Investors in Iran

Despite FIPPA and other relevant laws aiming to create a favorable environment for investors, several significant challenges may hinder foreign investment attraction:

- **Non-Membership in the ICSID Convention:** Iran has joined the New York Convention (1958) but has not accepted membership in the ICSID Convention. This omission is viewed as a deficiency in the legal framework for foreign investment, as ICSID plays a supplementary role in resolving investment disputes.
- **Implementation Issues:** Insufficient transparency in law enforcement, administrative corruption, lengthy legal processes, and non-compliance with international standards are principal barriers. These factors diminish foreign investors' confidence in Iran's legal system.
- **International Sanctions:** U.S. sanctions and other international restrictions have obstructed the flow of foreign investment into Iran, creating challenges such as limitations on the transfer of profits and capital for active investors.
- **Government Interference in the Economy:** Extensive state ownership and rent-seeking conduct during the privatization process have restricted competition and weakened the private sector. These factors have rendered Iran's investment climate unattractive for foreign investors.

### 4.2. Introduction to Foreign Investment Protection in Saudi Arabia

As previously mentioned, the most recent law in this area pertains to the year 2024. This law, often referred to as the "Updated Investment Law," aims to enhance and strengthen the competitiveness of the investment environment in Saudi Arabia, which will be examined in this section. This new law specifically addresses the reform and improvement of the investment climate, replacing the previous law to create clear and equitable conditions for

1 Expediency Discernment Council of the State, General Policies of the State Regarding Article 44 of the Constitution (2005) <https://maslahat.ir/fa/news/5170/> accessed 1 December 2024.

2 Ministry of Commerce, *Investment Law* <https://mc.gov.sa/en/Regulations/Pages/details.aspx?lawId=ea0fc797-4127-4667-962d-aec400ee9f72> accessed 1 December 2024.



both domestic and foreign investors. It is part of the broader Vision 2030 initiative, aimed at reducing dependency on oil and diversifying the economy. In this section, we will discuss the key provisions of this new law.

#### 4.2.1. New Investment Law (2024)

##### 4.2.1.1. Overview

This law replaces the 2000 legislation and is designed to achieve the objectives of Vision 2030. It focuses on enhancing competitiveness, transparency, and streamlining administrative processes. Both foreign and domestic investors are granted equal rights, with reduced licensing requirements and simplified business registration processes.

##### 4.2.1.2. Legal Guarantees

- **Protection of Assets:** According to Article 4, expropriation or nationalization is only permissible through a judicial ruling and requires fair compensation.
- **Freedom of Capital Transfer:** Article 4(d) ensures that investors can freely transfer their profits and revenues without currency restrictions.
- **Intellectual Property Protection:** Article 4(f) guarantees comprehensive protection for intellectual property rights and trade secrets.
- **Administrative Facilitation:** The Ministry of Investment is mandated to provide necessary administrative information and services to investors and to simplify registration and licensing processes.

**4.2.1.3. Access to Special Economic Zones (SEZ):** Projects like NEOM and support from the Public Investment Fund (PIF), with assets amounting to \$925 billion, create unique opportunities for foreign investors. While SEZs have their specific regulations, investors benefit from the general advantages provided by the new law.<sup>1</sup>

#### 4.2.2. Dispute Resolution

**4.2.2.1. International Arbitration:** Saudi Arabia is a member of the New York Convention (1958) and ICSID, ensuring the enforcement of international arbitration awards.

**4.2.2.2. Domestic Arbitration Laws:** The 2012 Arbitration Law and the SCCA provide a neutral framework compliant with international standards for dispute resolution.

#### 4.2.3. Challenges and Limitations

**4.2.3.1. Restricted Activities:** Certain strategic sectors, including oil exploration and extraction, pilgrimage services, and investments in Mecca and Medina, are prohibited for foreign investors.

**4.2.3.2. Legal Stability:** Frequent changes in laws and ambiguities in regulatory drafting have led to reduced predictability in the investment environment.

**4.2.3.3. Judicial Concerns:** Some investors express concerns regarding the independence and transparency of the Saudi judicial system.

**4.2.3.4. High-Risk Sectors:** Delays in issuing permits and bureaucratic complexities in sectors such as energy and infrastructure continue to pose challenges for investors.

<sup>1</sup> Public Investment Fund, *Annual Reports* <https://pif.gov.sa/en/our-financials/annual-reports> accessed 1 December 2024.



### 4.3. Conclusion

Saudi Arabia, through extensive reforms, the 2024 Investment Law, and participation in international conventions, has created an attractive legal environment for foreign investors. However, challenges such as cultural, judicial, and legal ambiguities still require further reforms.

## 5. General Comparison of the Investment Environment in Iran and Saudi Arabia

The investment environment in each country depends on the set of laws, policies, and protections that governments provide to attract and retain foreign investors. A comparative examination of Iran's FIPPA of 2002, and Saudi Arabia's Investment Law of 2024 reveals that both countries have taken steps to attract foreign investors, but differences in approaches and incentives are evident.

### 5.1. Definition and Scope of Foreign Investment

- **Iran (FIPPA):** In FIPPA, foreign investment is defined as foreign direct investment (FDI) or joint ventures. This investment can include cash, technology, machinery, equipment, and intellectual property; however, the law does not explicitly cover indirect investments or those through securities.
- **Saudi Arabia (2024 Law):** The new Saudi investment law adopts a broader approach, encompassing all forms of direct investment and intellectual property. It explicitly states that foreign investment grants investors the right to operate in all economic sectors (except those listed as negative) and guarantees equal access to the Saudi domestic market for foreign investors.

**Difference:** The Saudi investment law is more comprehensive than Iran's, recognizing investments across various sectors and allowing foreign investors broader access to a wider range of economic activities.

### 5.2. Prohibited Industries and Sectors (Negative List)

- **Iran (FIPPA):** Despite the absence of a clear negative list in FIPPA, general restrictions are imposed in certain sectors such as oil and gas, nuclear energy, and some military industries. These sectors typically remain under state control, and foreign investors face legal limitations.
- **Saudi Arabia (Article 8 of the 2024 Law):** Saudi Arabia has transparently established a negative list for foreign investors, including sectors such as oil exploration and extraction, military activities, private security, and ownership in Mecca and Medina. This approach provides greater clarity for foreign investors about which sectors are closed to foreign investment.

**Difference:** Unlike Iran, Saudi Arabia clearly identifies sectors that are exempt from foreign investment, offering greater transparency in this area.



### 5.3. Facilities and Incentives in Special Economic Zones

- **Iran (FIPPA and Free Zone Law):** In Iran, free trade-industrial zones and special economic zones provide special incentives such as tax exemptions, reduced customs tariffs, and legal facilities for foreign investors. These benefits are outlined in the Free Zones Law and FIPPA, encouraging foreign investment in these areas.
- **Saudi Arabia (2024 Law and the Public Investment Fund):** Saudi Arabia is also developing special economic zones and initiatives such as the large NEOM project and other infrastructure projects to attract foreign investors. These economic zones offer special tax conditions and legal exemptions, allowing foreign investors to operate with greater ease. Additionally, the PIF of Saudi Arabia is one of the largest financial support entities for these projects, enhancing their attractiveness.

**Difference:** Saudi Arabia emphasizes attracting foreign investors in special economic zones through significant financial resources and extensive infrastructure projects like NEOM, whereas Iran relies on tax incentives and specific facilities to attract investors.

### 5.4. Facilitation of Administrative Processes and Reduction of Bureaucracy

- **Iran (Article 6 of FIPPA):** Foreign investment in Iran requires navigating complex administrative processes, including obtaining multiple permits. Although FIPPA aims to simplify administrative processes, bureaucratic obstacles and lack of transparency in law enforcement remain significant challenges for foreign investors.
- **Saudi Arabia (Article 4, Clause G of the 2024 Law):** The Saudi investment law places significant emphasis on facilitating administrative processes. The Ministry of Investment is required to provide support services to investors, reduce administrative steps, and simplify company registration processes. This approach aligns with efforts to improve the business environment and increase transparency for foreign investors.

**Difference:** The Saudi investment law operates more effectively in reducing bureaucracy and facilitating processes than Iran's, allowing foreign investors to engage in activities more swiftly and at lower costs.

## 6. Comparative Analysis of Allowable Foreign Ownership for Investors in Iran and Saudi Arabia

The extent of permissible ownership for foreign investors is a significant factor influencing their investment decisions in different countries. The laws of Iran and Saudi Arabia regarding foreign ownership differ, which will be analyzed below.

### 6.1. Ownership Extent in Various Industries

- **Iran (FIPPA and Related Laws):** In Iran, the FIPPA does not impose specific restrictions on the extent of foreign ownership in companies; however, there are



limitations in certain key industries. In strategic sectors such as oil and gas, nuclear energy, and defense industries, full or significant foreign ownership is prohibited, and participation is often defined through joint venture agreements or service contracts. Additionally, in sectors like telecommunications and finance, foreign ownership is capped to retain the state's strategic control over these industries.

- **Saudi Arabia (Article 7 of the 2024 Law):** In Saudi Arabia, foreign investors are generally permitted to own 100% of their companies in many sectors, except for those industries listed on the government's negative list. This negative list includes sectors such as oil exploration and extraction, military and security activities, and certain pilgrimage-related services. In other sectors, foreign investors can have complete ownership, reflecting Saudi Arabia's more open policy towards attracting foreign investment.

**Difference:** Saudi Arabia's law offers greater flexibility to foreign investors by allowing full ownership in various sectors. In contrast, Iran imposes restrictions in some key industries, necessitating local participation in many cases.

## 6.2. Ownership in Special Economic Zones

- **Iran (Free Trade-Industrial Zones Law):** In Iran, foreign investors can have full ownership in free trade-industrial zones and special economic areas. These zones offer various benefits such as tax exemptions, reduced customs duties, and eased regulations, allowing foreign investors to operate with full ownership. However, this full ownership is only applicable within the designated special and free economic zones, and investors cannot extend these benefits outside these areas.
- **Saudi Arabia (2024 Law and Special Economic Zones):** In Saudi Arabia, SEZs allow foreign investors to have full ownership and provide attractive conditions, including tax exemptions and specific regulations for these areas. The country aims to attract foreign investors to these zones through projects like NEOM and financial support from the PIF.

**Difference:** Both countries permit full ownership for foreign investors in special economic zones, but Saudi Arabia offers greater appeal through extensive support and massive infrastructure projects like NEOM.

## 6.3. Ownership Restrictions in Strategic Industries

- **Iran (General Policies of Article 44 of the Constitution and FIPPA):** The general policies of Article 44 of the Constitution emphasize restrictions on foreign ownership in strategic industries. These limitations are particularly applicable in sectors like oil and gas, which play a critical role in the country's economy, where foreign investors cannot achieve full ownership. Ownership in these industries is primarily through service contracts and indirect investment.
- **Saudi Arabia (Article 8 of Negative List):** Similarly, in Saudi Arabia, there are



restrictions on foreign investors in certain strategic industries. According to the negative list, industries such as oil exploration and production, military and security activities, and certain public services like pilgrimage-related services are sectors in which foreign investors are not allowed to have ownership. However, Saudi Arabia has generally sought to liberalize foreign ownership in many non-strategic industries.

**Difference:** While both countries impose restrictions on strategic industries, Saudi Arabia provides a clear negative list, allowing investors to assess their options more accurately. In contrast, Iran fully limits foreign ownership in some cases due to legal restrictions and protective policies in key industries.

**Table 1: This table illustrates the key differences in ownership policies and the legal environment between the two countries. Saudi Arabia seeks to attract more foreign investments with a transparent and open approach, while Iran continues to impose restrictions in certain key industries.**

| Comparison                  | Iran   | Saudi Arabia   |
|-----------------------------|--|--|
| <b>Main Law</b>             | Foreign Investment Promotion and Protection Act (FIPPA)  | New Investment Law 2024  |
| <b>Regulatory Authority</b> | Organization for Investment and Economic and Technical Assistance of Iran (OIETAI)                                   | Ministry of Investment of Saudi Arabia (MISA)  |
| <b>Foreign Ownership</b>    | Full ownership permitted in free zones and special economic zones; significant restrictions in strategic industries. | Full ownership allowed in many sectors; restrictions in strategic industries such as oil and security, defined by a negative list. |
| <b>Tax Exemptions</b>       | Tax exemptions in free zones and for a limited duration.   | Broader and longer-term tax exemptions in special economic zones and specific projects.  |
| <b>Investment in Oil</b>    | Only through partnership with the National Iranian Oil Company and downstream projects.                              | Still limited to partnership contracts and downstream projects.  |

## 7. Comparative Analysis of Legal Guarantees for Foreign Investors in Iran and Saudi Arabia

Legal guarantees for foreign investors are among the most crucial factors in gaining their trust and confidence in the investment environment of the host country. Investment laws in Iran and Saudi Arabia aim to establish these guarantees and create a supportive framework for foreign investors. However, there are differences in the extent of support and the types of guarantees provided by the two countries.

### 7.1. Protection Against Expropriation and Nationalization

- **Iran (Article 9 of FIPPA):** According to Article 9 of the FIPPA, the Iranian government does not have the right to expropriate or nationalize the assets of foreign investors, except under specific conditions where public interest and national security are at risk. In such cases, fair and equitable compensation to the investor is mandatory, and this compensation must be complete and based on market value. This law aligns with international principles, including the “full compensation standard.”
- **Saudi Arabia (Article 4 of the 2024 Law):** The new investment law in Saudi Arabia also explicitly states the principle of protecting the assets of foreign investors.



According to Article 4, expropriation and nationalization of foreign investors' property are only permissible based on a final judicial ruling and with appropriate and fair compensation. This provision reassures investors that expropriation can only occur in specific cases and with adherence to legal processes, consistent with international standards.

**Difference:** Both countries align on the principle of preventing illegal expropriation and providing compensation. However, Saudi law places greater emphasis on a final court ruling as a prerequisite for expropriation, which provides more clarity to investors.

## 7.2. Freedom to Transfer Profits and Capital

- **Iran (Article 13 of FIPPA):** In Iran, Article 13 of the FIPPA allows foreign investors to transfer their profits, revenues, and capital abroad without currency restrictions, provided they have fulfilled their legal obligations. This article aligns with international principles of "freedom of capital transfer," but its implementation faces challenges due to international sanctions and currency restrictions.
- **Saudi Arabia (Article 4, Paragraph D of the 2024 Law):** The Saudi law explicitly states in Paragraph D of Article 4 that foreign investors have the right to transfer their profits and revenues abroad without delay or restrictions. This law assures investors that currency restrictions will not affect capital transfers, allowing them to easily move their earnings.

**Difference:** While both countries fundamentally guarantee the freedom to transfer profits and capital, sanctions and currency conditions in Iran may create limitations that do not exist in Saudi Arabia, which has a more open currency system connected to the global economy.

## 7.3. Protection of Intellectual Property and Commercial Rights

- **Iran (FIPPA):** The FIPPA does not explicitly mention the protection of intellectual property; however, other Iranian laws, such as the Industrial and Commercial Property Law, contain provisions for protecting the intellectual rights of foreign investors. Nevertheless, the lack of explicit mention in the investment law may create ambiguity for foreign investors.
- **Saudi Arabia (Article 4, Paragraph F of the 2024 Law):** The new investment law in Saudi Arabia clearly guarantees the protection of intellectual property and trade secrets of foreign investors. This assurance provides confidence to investors in technology and knowledge-based industries that their intellectual property rights will be protected against infringement and misuse.

**Difference:** Saudi Arabia explicitly incorporates the protection of intellectual property and trade secrets into its investment law, while Iran lacks such provisions in the FIPPA and refers to other laws for this matter.



## 7.4. Legal Facilitation and Administrative Streamlining

- **Iran (Article 6 of FIPPA):** Article 6 of the FIPPA empowers the OIETAI to facilitate administrative processes and obtain permits for foreign investors. However, bureaucratic complexities and the need for approvals from multiple authorities remain significant challenges in Iran's administrative system.
- **Saudi Arabia (Article 4, Paragraph G of the 2024 Law):** In Saudi Arabia, the Ministry of Investment is mandated to provide support services, facilitate, and simplify administrative processes for foreign investors. This approach has reduced bureaucracy and increased transparency in registration and permitting stages, ensuring that investors can start their activities more quickly and easily.

**Difference:** While Iranian law attempts to provide facilities for foreign investors, bureaucratic complexities remain a major barrier to investment. In contrast, Saudi Arabia offers a more comfortable experience for investors due to its simpler bureaucratic structure and clearer processes.

**Table 2:** This table illustrates the major differences in legal guarantees between the two countries, with Saudi Arabia providing a more attractive environment for foreign investors through greater assurances in capital transfer, protection of intellectual property, and reduction of bureaucracy.

| Subject  | Iran  | Saudi Arabia   |
|--|---|--|
| <b>Protection against expropriation and confiscation</b>     | According to Article 9 of FIPPA, expropriation is only permitted for public interest and with full compensation, based on fair market value.              | Article 4 of the 2024 Law states that expropriation is only permissible with a final court ruling and fair, complete compensation.   |
| <b>Freedom to transfer profits and capital</b>               | According to Article 13 of FIPPA, transfer of profits and capital abroad is allowed, provided that legal obligations are met.                             | Article 4, Section D allows for the free and immediate transfer of profits and capital; not subject to any currency restrictions.  |
| <b>Protection of intellectual property and trade secrets</b> | Lacks direct specification in FIPPA; however, separate laws such as the Industrial and Commercial Property Law provide support for intellectual property. | Article 4, Section F explicitly guarantees protection of intellectual property and trade secrets of investors.   |
| <b>Administrative facilitation</b>                           | Article 6 of FIPPA assigns the task of facilitating processes to the Organization for Investment and Economic Assistance, but bureaucracy remains.        | Article 4, Section G reduces bureaucracy and facilitates administrative processes with the support of the Ministry of Investment; simpler and more transparent procedures. |

## 8. Comparative Analysis of Dispute Resolution Mechanisms for Foreign Investors in Iran and Saudi Arabia

Dispute resolution mechanisms between foreign investors and the host government are fundamental factors in investors' decision-making processes. Both Iran and Saudi Arabia have established various mechanisms to assure foreign investors, but there are notable differences in these mechanisms and their implementation.

### 8.1. Possibility of International Arbitration

- **Iran (Article 19 of FIPPA):** The FIPPA law in Iran allows foreign investors to resort to international arbitration in case of disputes, provided that arbitration is



expressly agreed upon in the investment contract. Iran is a member of the New York Convention, making international arbitration awards enforceable within its judicial system. However, Iran is not a member of the ICSID Convention, which could be considered a limitation for foreign investors.

- **Saudi Arabia (2024 Law):** Saudi Arabia also permits foreign investors to use international arbitration and is a member of both the New York and ICSID Conventions. This gives investors the assurance that in case of a dispute, they can utilize global and impartial arbitration mechanisms, and the awards issued by these arbitrations are fully enforceable within the Saudi judicial system.

**Difference:** Saudi Arabia's membership in the ICSID Convention, which provides a specific mechanism for resolving investment disputes, reflects a greater commitment to impartial dispute resolution. Conversely, Iran's non-membership in this convention may pose challenges for international investments.

## 8.2. Existence of Domestic Arbitration Centers for Dispute Resolution

- **Iran (Chamber of Commerce and FIPPA):** In Iran, foreign investors can utilize domestic arbitration centers, such as the Iran Chamber of Commerce, Industries, and Mines. This center has significant experience in resolving commercial disputes and serves as a domestic arbitration option for foreign investors. However, bureaucratic complexities and insufficient transparency can hinder the effectiveness of this center.
- **Saudi Arabia (2024 Law and SCCA):** Saudi Arabia has established the SCCA, providing foreign investors with a specialized domestic entity to resolve disputes. The SCCA operates according to international standards and plays a crucial role in resolving disputes between foreign investors and the government or other business parties. This center assures investors that their disputes will be handled impartially and in compliance with international arbitration laws.

**Difference:** The SCCA in Saudi Arabia is an official and internationally recognized institution for dispute resolution, while domestic centers in Iran, like the Chamber of Commerce, primarily operate within national frameworks and implement fewer international standards.

## 8.3. Enforceability of International Arbitration Awards

- **Iran (Arbitration Enforcement Law and FIPPA):** As a signatory of the New York Convention, Iran is committed to enforcing international arbitration awards. However, practical and bureaucratic obstacles can sometimes lead to delays or complications in implementing these awards. This may cause investors to doubt the swift and complete enforcement of arbitration awards in Iran.
- **Saudi Arabia (2012 Arbitration Law and 2024 Amendments):** Saudi Arabia is also a member of the New York Convention, thus international arbitration awards are enforceable in the country. Recent amendments in Saudi arbitration law have



made the enforcement process clearer and faster, providing foreign investors with greater assurance regarding the enforcement of arbitration awards.

**Difference:** Recent amendments in Saudi Arabia to expedite the enforcement of awards and increase transparency have led to greater investor confidence in the enforcement of international arbitration awards in the country, whereas bureaucratic processes in Iran may affect the enforcement of such awards.

#### 8.4. Alternative Dispute Resolution (ADR) Methods

- **Iran (FIPPA):** The FIPPA law in Iran primarily emphasizes arbitration and pays less attention to alternative dispute resolution methods such as mediation and conciliation. While parties may utilize these methods in some cases, they are not explicitly provided for in the investment law.
- **Saudi Arabia (Article 11 of 2024 Law):** The new investment law in Saudi Arabia officially recognizes alternative dispute resolution (ADR) methods, including mediation and conciliation. These methods, alongside traditional arbitration and court systems, enable investors to resolve disputes more quickly and at lower costs, particularly beneficial for smaller and less complex disputes.

**Difference:** By formally recognizing alternative dispute resolution methods, Saudi Arabia provides greater flexibility for foreign investors, reflecting the country's commitment to creating a secure and reliable investment environment.

Table 3: This table illustrates that Saudi Arabia provides greater assurance to foreign investors through more extensive and transparent dispute resolution mechanisms. Although Iran recognizes international arbitration, its non-membership in ICSID and bureaucratic challenges may pose difficulties in enforcing arbitration awards.

| Subject                                     | Iran  | Saudi Arabia   |
|---|---|--|
| <b>International Arbitration</b>            | Article 19 of FIPPA allows for international arbitration if agreed upon by the parties; Iran is a member of the New York Convention but has not joined ICSID. | The 2024 Law provides for international arbitration; Saudi Arabia is a member of the New York and ICSID Conventions, facilitating the enforcement of awards.   |
| <b>Domestic Arbitration Centers</b>         | Domestic centers such as the Iran Chamber of Commerce exist for dispute resolution, but issues of transparency and bureaucracy may hinder effectiveness.      | The Saudi Commercial Arbitration Center (SCCA) operates with international standards, allowing for the resolution of both domestic and international disputes. |
| <b>Enforceability of Arbitration Awards</b> | Due to Iran's membership in the New York Convention, enforcement of international arbitration awards is possible, but bureaucracy can cause delays.           | New laws in Saudi Arabia ensure faster and more transparent enforcement of arbitration awards, providing a more reliable environment for foreign investors.    |
| <b>Alternative Dispute Resolution (ADR)</b> | Emphasis is primarily on arbitration, and alternative methods such as mediation and conciliation are not formally specified.                                  | The 2024 Law recognizes ADR methods, including mediation and conciliation, as quicker alternatives.  |

### Conclusion

Both Iran and Saudi Arabia have witnessed legal developments and reforms in recent decades. One potential advantage that Iran has over Saudi Arabia is the relative abundance of Saudi

legislation, which can lead to confusion for foreign investors in the investment environment. Despite Saudi efforts to enhance legal transparency, this remains a concern for investors.

Saudi Arabia has created a more attractive legal environment for foreign investors by implementing large-scale economic projects such as NEOM and developing special economic zones. In contrast, Iran, despite the adoption of FIPPA and the establishment of free zones, faces greater challenges in attracting significant foreign investments due to international sanctions and internal executive issues.

Economically, both countries have traditionally been engaged in a mono-sectoral, oil-based economy, although recent efforts have been made to escape this situation. Iran is pursuing the development of free and special economic zones and aims to diversify its economy by strengthening agricultural and technological industries, enhancing non-oil exports, and increasing trade relations with Asian countries and neighbors. Conversely, Saudi Arabia, through its reform programs encapsulated in Vision 2030, seeks to reduce its dependence on oil and expand non-oil sectors such as technology, tourism, and renewable energy. The country is attracting substantial foreign investments through massive projects like NEOM and other infrastructure initiatives.

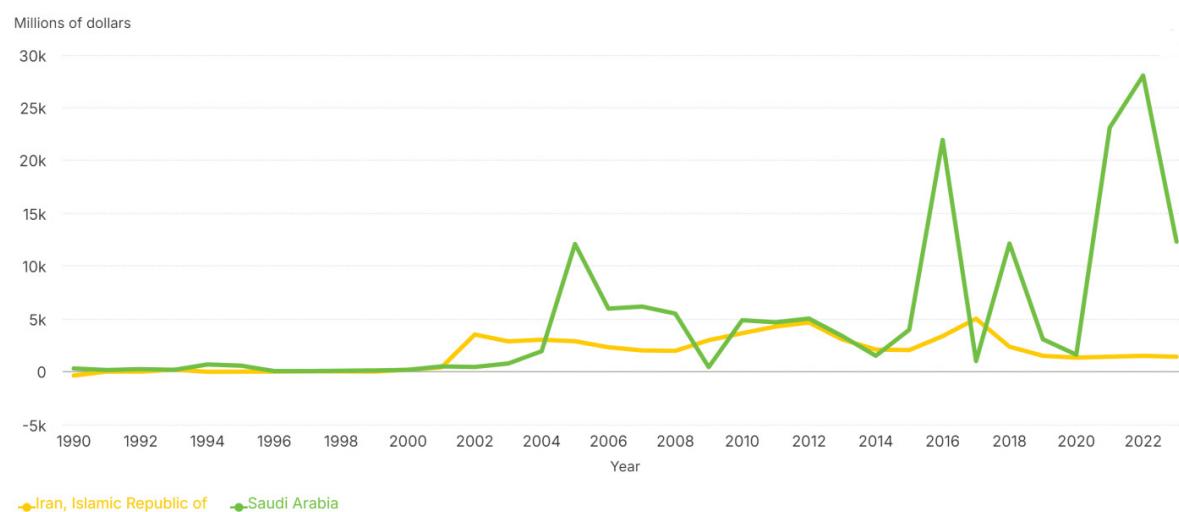


Figure 1: Investment Attraction in Iran and Saudi Arabia in Millions of US Dollars Over Time (UNCTAD)

Figure 1 indicates that the set of policies adopted by Saudi Arabia over at least the past decade has yielded more favorable results in attracting foreign investment. The correlation of these results with legal changes aimed at enhancing foreign investment and ambitious projects such as Vision 2030, which have significantly impacted the legal environment for foreign investment, suggests that appropriate legal measures and the facilitation of investment mechanisms influence foreign investors' decisions regarding their investment destinations.

Furthermore, Iran faces challenges in accessing international markets due to international sanctions and their resultant restrictions. The country has attempted to increase access to regional markets by strengthening trade cooperation with Asian countries and neighbors. However, the limitations imposed by sanctions remain a significant barrier to broad entry into global markets.



In contrast, Saudi Arabia is widely enhancing access to international markets through Vision 2030 and improved diplomatic and trade relations with Western and Asian countries. Through legal reforms and the attraction of foreign investors, the country has become an international business hub in the region and plays a crucial role in global energy supply.

A comparative analysis of the legal frameworks in Iran and Saudi Arabia shows that while both countries have endeavored to create attractive legal and economic environments for foreign investors, Saudi Arabia has provided more favorable legal conditions through broader reforms and by joining international treaties such as the ICSID Convention. On the other hand, Iran faces greater challenges in attracting foreign investors due to international sanctions and internal restrictions in certain areas. One of the most significant issues for foreign investors in Iran is the lack of access to the ICSID. Joining the ICSID Convention would enhance investors' confidence in dispute resolution mechanisms and provide them with greater international support. This step could play an important role in alleviating investors' concerns regarding legal risks.

Additionally, Iran needs to create stronger legal guarantees for foreign investors, particularly against expropriation and sudden changes in laws. Currently, Article 9 of the FIPPA provides certain guarantees, but investors require more practical assurances to ensure their rights are protected in the event of disputes. This can be strengthened through the implementation of international arbitration laws and the expedited enforcement of arbitration awards.

Crucially, transparency in laws is of utmost importance for Iran. In most cases examined and compared, Saudi Arabia has offered higher transparency to foreign investors. A review of Iran's laws and regulations to create a more transparent environment, along with increased cooperation with the international community, could significantly improve the legal conditions and attract foreign investment.



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## THE EFFECT OF MARRIAGE ON NATIONALITY: A COMPARATIVE STUDY BETWEEN NIGERIA AND IRAN

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| Article Info   | ABSTRACT  |
|--|---|
| <b>Article type:</b><br>Research Article   | Marriage, as a social institution with inevitable legal consequences, brings about legal effects within any legal system and has historically constituted a primary source of conflict of laws in Private International Law. This article examines the issues arising from these effects comparatively, aiming to elucidate how familial interactions, specifically marriage, influence questions of nationality, among which dual citizenship is a well-known phenomenon. In Nigeria, marriage is not strictly codified; the domestic legal order officially recognizes three distinct types: customary, Islamic (Shariah), and statutory marriages, each governed by its own legal regime. Internationally, however, the Nigerian government only recognizes only the statutory marriage, by virtue of its formal registration. As a result, marriages contracted under customary or Shariah law are more vulnerable to legal issues on the international stage. These issues have prompted many couples in Nigeria to opt for the so-called "double-decker marriage," a combination of two marriages: a customary or shariah marriage along with a statutory marriage, mainly to reduce international legal complications by securing a state-issued marriage certificate. In Iran, by contrast, the legal landscape is markedly distinct. The State recognizes only one form of marriage: statutory marriage. Iran maintains a stricter stance on nationality issues, ensuring that public order, legislative intervention when needed, and state prerogative are consistently upheld. Everyone in the country, regardless of religion, sect, or custom, must follow this one mode of marriage. Notably, failure to register a "permanent marriage" (nikah da'im) in Iran is a criminal offense punishable by law. A noteworthy commonality between the two jurisdictions is the influence of Shari'ah law, although each follows a distinct school of Islamic jurisprudence (madhab). In family law, especially marriage, the legal schools of both nations share many similarities. |
| <br><a href="https://ijicl.qom.ac.ir/article_4020.html">https://ijicl.qom.ac.ir/article_4020.html</a> |   |
| <b>Keywords:</b><br>Nationality, International Family Law, Marriage, Principle of Unity of Family Status, Principle of Independence, Transnational Couples, Comparative Law.             |   |

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## Introduction

The sanctity of marriage is a well-established standard globally, and matrimonial relationships are universally recognized and respected as a necessary prerequisite for the establishment of a legally recognized family.<sup>1</sup> Marriage is a social institution governed by socio-cultural and religious norms in every society. Where people of different ethnicities and religions populate a nation, the recognition and application of various legal systems will naturally be required to govern their respective customs, a reality reflected mostly in the forms of their ceremonies, including marriage.<sup>2</sup>

Nowhere is this legal pluralism more evident than in Nigeria, Africa's most populous country, with a population of 239.7 million people.<sup>3</sup> It is also one of the most ethnically diverse countries in the world, with well over 250 ethno-linguistic groups, some of which are larger than many sovereign states in Africa.<sup>4</sup> Roughly half of the population in the country is Muslim, followed by a large percentage of Christians, and a minority population of traditional religious practitioners and atheists.<sup>5</sup> Reflecting the multi-ethnic and multi-religious nature of the country, the Constitution of Nigeria<sup>6</sup> sanctions three systems of marriage, namely statutory marriage, customary marriage, and Islamic marriage, which are acknowledged as distinct and separate from each other.<sup>7</sup> Conversely, in the Islamic Republic of Iran, a state renowned for its implementation of Islamic law based predominantly on the Shi'i (Ja'afari) school of jurisprudence, the demographic and legal landscape presents a different model. With an estimated population of 92.8 million people<sup>8</sup> and numerous ethno-linguistic groups, including Kurdish, Turks, Arabs, and others, the Iranian legal system has established a unitary

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1 Halima Doma-Kutigi, 'Certification of Islamic Marriages in Nigeria: Realities, Challenges, and Solutions' (2022) 12 *Journal of Islamic and Middle Eastern Law* 23.

2 Isaac Oluwole Agbede, *Themes on Conflict of Laws* (Lagos 1989) 67-.

3 'Nigeria Population (2025)' *Worldometer* <https://www.worldometers.info/world-population/nigeria-population/> accessed 14 December 2025.

4 'World Directory of Minorities and Indigenous Peoples' (Minority Rights Group) <[www.minorityrights.org](http://www.minorityrights.org)> accessed 20 March 2025.

5 Abdullahi Ahmed An-Na'im (ed), *Islamic Family Law in a Changing World: A Global Resource Book* (London 2002) 299.

6 Constitution of the Federal Republic of Nigeria 1999.

7 Accordingly, the formation, annulment, and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto, are in the Federal Exclusive Legislative List.

8 'Iran Population (2025)' *Worldometer* <https://www.worldometers.info/world-population/iran-population/> accessed 14 December 2025.



framework. Despite the internal differences in language, culture, and ethnicity, the legislature has instituted a united legal sphere in which national laws are applied uniformly. This is particularly evident in the law governing marriage.

The legal framework governing religious recognition and practice in Iran emphasizes the country's constitutional commitment to Islam (and shariah law), particularly the Twelver Ja'fari school of Shia Islam, as the official state religion. This establishes a clear legal hierarchy in which Shia Islam is prioritized, while also acknowledging other Islamic schools, such as Sunni traditions, and guaranteeing a degree of autonomy in personal status matters for their followers. The recognition of these Sunni schools indicates a policy to accommodate intra-Islamic diversity, permitting their adherents to manage personal status issues like marriage, inheritance, and divorce according to their respective legal traditions (*fiqh*). This aspect reflects a decentralized approach to governance in specific religious matters, allowing local councils to create regulations that align with the predominant school of thought in their regions, subject to the overarching state law.<sup>1</sup>

With respect to religious minorities, the Iranian Constitution explicitly recognizes Zoroastrians, Jews, and Christians as the officially protected non-Islamic faiths (*ahl al-kitab*). These recognized minorities are granted the right to practice their religions and administer their personal affairs according to their own laws, albeit within the confines of the broader Iranian legal and constitutional framework.<sup>2</sup>

Overall, it can be concluded that the Iranian legislature has, to a significant extent, managed the complex interface between state law and religious communities, balancing a strong constitutionally-mandated Islamic identity with a degree of accommodation for certain religious practices and recognized communities.

## 1. Nature of Marriage in Nigeria

Three systems of marriage fully recognized under Nigerian law - statutory or registry marriage, customary marriage, and Islamic marriage - each operating as a distinct and separate legal regime.<sup>3</sup> The primary laws regulating marriage in Nigeria are the Marriage Act, which governs statutory marriage; the customary law (of the various ethnic groups in Nigeria), which governs customary marriage; and the Shariah law, which governs Islamic marriage.<sup>4</sup>

### 1.1. Statutory Marriage

This form of marriage is contracted under the Marriage Act, a federal enactment providing for the solemnization of a voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage.<sup>5</sup> This type of marriage colloquially termed “registry marriage” or “marriage under the Act”, is strictly monogamous; thus, parties must be unmarried at the time of the ceremony. Furthermore, a party cannot during the lifetime

1 The Constitution of the Islamic Republic of Iran, art 12.

2 Ibid., art 13.

3 Emmanuel Nnamani, ‘Misconceptions and Inadvertences Affecting the Customary Courts System in Nigeria’ (2017) 3 NJI Law Journal 1322, 1323.

4 Halima Doma-Kutigi (n 1) 25.

5 Marriage Act (cap M6 LFN 2004).



of the other, lawfully contract another marriage, whether under customary or statutory law, unless the prior union has been dissolved by a court of competent jurisdiction. Section 33(1) of the Marriage Act provides that: "No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person to whom such marriage is had." Additionally, the marriage must not be between parties within prohibited degrees of consanguinity or affinity, a prohibition common to both statutory and Shari'ah law. Christians in Nigeria go through a statutory marriage in the Marriage Registry before proceeding to the church for solemnization. However, this preliminary step is unnecessary if their church is recognized as a licensed place of worship for marriage. Such licenses are obtained from the Ministry of the Interior, authorizing the church to conduct statutory marriages upon fulfillment of certain requirements.

## 1.2. Islamic Marriage

This marriage is conducted according to the tenets of Islamic law. It is also permissibly polygynous, allowing one man to marry up to four wives, provided the man is capable of meeting the requirements and conditions stipulated under Islamic law. For a valid Islamic marriage, the following conditions must be satisfied: there must be a clear proposal (*ijab*) and acceptance (*qabul*), two competent witnesses (*shuhud*), a dower (*mahr*), and a guardian (*wali*) for the bride, if applicable. In Nigeria, it is a settled principle that Islamic law and customary law marriages are in no way inferior in status to marriages contracted under the Act. Instructive in this regard is the Supreme Court decision in *Jadesimi v. Okotie Eboh*, which held that "the status of being married under Islamic law or customary law is well recognized in this country and such marriages should not be accorded any status that is inferior to that of marriage conducted under the Marriage Act."<sup>1</sup>

## 1.3. Customary Marriage

This is essentially a marriage contracted and regulated under the native laws and customs of the various communities in Nigeria. It is the most prevalent form of marriage in Nigeria, and it is recognized under the law as a legitimate matrimonial union absent formal registration. There is no single, uniform system of customary law applicable throughout Nigeria; rather, customary laws differ from one locality to another. However, under the indigenous customary laws of Nigeria, marriage is conceptualized as a union of a man and a woman for the duration of their lives, involving a wider association between two families or sets of families. Thus, customary marriage is conducted as proof to the community the couple's status as husband and wife, to establish the children's parentage; and to uphold customary values.<sup>2</sup> From the foregoing, it is clear that customary law expressly permits and facilitates polygamy, imposing no limit on the number of wives a man may marry. The basic requirements for a valid customary law marriage are: legal capacity,<sup>3</sup> the consent of the parties and their families, payment of the

1 *Jadesimi v Okotie-Eboh* (1996) 2 NWLR (Pt 429) 128, 142.

2 M C Onokah, *Family Law* (Ibadan 2003) 144146-.

3 Child's Rights Act 2003, s 21. The parties to the marriage must be of marriageable age. Although no custom expressly states any age for marriage, the Child's Rights Act provides that 18 years is the minimum age for any marriage.



bride price, and the celebration of marriage through a ceremony. Prohibitions on marriage within certain degrees of kinship often exist under customary law, but the specific prohibited relationships differ significantly from those under the two other systems.

#### 1.4. Multi-tiered/Double-decker Marriage

A fourth, hybrid type of marriage practiced in Nigeria is the multi-tiered or “double-decker” marriage, wherein a single couple contracts marriages under different systems of law.<sup>1</sup> This practice is termed “double-decker marriage” by *M.C. Onokah*, who defines it as “involving the celebration by the same couple of a marriage under one system and their subsequent marriage under another system”.<sup>2</sup> The author posits that the Nigerian Marriage Act has given validity to this practice by allowing those who are married under customary law to remarry each other under statute. Further statutory accommodation can be inferred from Section 35 of the Marriage Act 1914, which prohibits couples from contracting any further marriage(s) after a statutory marriage, whether with each other under a different law or with a third party. Any such subsequent marriage is declared null and void, with attendant punishments under Sections 47 and 48 of the Act. The Act, however, permits subsequent “customary law” marriage between the same spouses. Historically, the term ‘customary law’ as used in the 1914 Act was intended to include Islamic law.<sup>3</sup> Many Nigerians opt for statutory marriage mainly for its perceived formal “legality”, the assurance of monogamy, the utility of the state-issued certificate, urbanization pressures, and social status.<sup>4</sup> There is also a general impression that couples who engage in several forms of marriage are somehow “more securely married” and thus are entitled to greater legal and social protection.<sup>5</sup>

##### 1.4.1. Registration of Marriage in Nigeria

As Boparai notes, of all forms of legally-recognized marriages in Nigeria, only statutory marriage is formally registered *ab initio*, with an official certificate issued to the parties.<sup>6</sup> This observation merits analysis. No legal principle requires the registration of a customary or Islamic marriage; therefore, evidentiary proof of such a marriage entails greater difficulty than for statutory marriages. Although the matrimonial process and ceremony are public, which serve as *prima facie* evidence, the probative value of such evidence is attenuated by its reliance on witness testimony, which may become unavailable or unreliable over time.<sup>7</sup> Thus, efforts have been made around the country to provide for the registration of customary law marriages. To this end, the local government laws in most states of the federation have authorized local authorities to enact bylaws for the registration of customary law marriages within their respective jurisdictions. For example, the Registration of Marriages, Adoption By-Laws Orders, applicable in Lagos, Ogun, Oyo, Ondo, and Bendel States, require a husband in

1 Muhammad Kamaldeen Imam-Tamim, ‘A Doctrinal Review of Literature on Multi-Tiered Marriage in Nigerian Family Law’ (Postgraduate Colloquium on Innovation in Postgraduate Research, Goal Centre, USIM, 10 June 2015).

2 Onokah (n 15) 144-146.

3 Native Courts Ordinance 1914, s 2.

4 Onokah (n 15) 147-151.

5 Doma-Kutigi (n 1) 26.

6 Harinder Boparai, ‘The Customary and Statutory Law of Marriage’ (1982) 46 Rabel Journal of Comparative and International Private Law 530, 548.

7 Ibid., 553



a customary law marriage (which includes Islamic law) to register the marriage in the relevant local government office within one month of its celebration.<sup>1</sup> The by-law also states that any person may, on the payment of the appropriate fees, inspect or make copies of the contents of the marriage register. The records, however, may be extremely unreliable because the registrar can only record the particulars as submitted by the parties. Many of these bylaws do not stipulate any penalty for non-compliance, a notable contrast to the Iranian model discussed *infra*, thereby reinforcing the belief held by many people that registration is not necessary.

This laxity regarding registration is particularly prevalent in the predominantly Muslim northern part of the country. Many Muslims believe that in an Islamic marriage, paperwork is not necessary and registration is not a validating condition. However, as Imam-Tamim points out, neither the Qur'an nor the Sunnah contain explicit provisions for or against registration of marriage.<sup>2</sup> Therefore, it has been argued that the purpose for which Muslims conduct a multi-tiered marriage is to protect against modern challenges and perceived injustices faced by unregistered marriages, and, as such, rendering registration an obligation for the public interest (*maslahah*) and protection of society at large. The emergent trend indicates increasing awareness among Muslim couples of the need for registration, driven largely by the practical exigencies requiring a marriage certificate. Hence, in most urban centers in the North, the officiating cleric (*imam*) or mosque, which conduct the *nikah*, often facilitates registration and provides a corresponding certificate. The salient question that arises is the extent of legal recognition accorded to such certificates, both in Nigeria and abroad, especially when compared to the certificate issued under the Marriage Act.<sup>3</sup>

## 2. Nature of Marriage in Iran.

In the Islamic Republic of Iran, matrimonial relationships are governed by a unitary statutory system. Under the country's Civil Code, two distinct types of marriages are recognized: permanent marriage (*nikah da'im*) and temporary marriage (*nikah munqati'*).<sup>4</sup>

Permanent marriage corresponds to the globally practiced form of a legally binding conjugal contract based on a relationship that is often presumed to be life-long. This marriage does not have an end date and continues until dissolved by the parties or by law. Its solemnization is contingent upon the compulsory submission of an application by the couple, followed by an official process that includes blood tests and vaccinations. Upon approval, registration of the marriage by a state-authorized notary, and the endorsement of the marriage information in both spouses' civil identification documents (*shenasnameh*) is mandatory. The ceremony is typically officiated in the presence of witnesses, during which the contract is executed and the parties verbally exchange the offer and acceptance. These formal registration requirements are not applicable to temporary marriage.<sup>5</sup>

1 Western Region of Nigeria Legal Notice No 4 of 1957; see also Laws of Eastern Nigeria 1963, cap 79, ss 84, 90; Laws of Northern Nigeria 1963, cap 77, s 38.

2 Imam-Tamim (n 17).

3 See further, Doma-Kutigi (n 1) 29.

4 Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32 Critical Inquiry 629, 629-645.

5 Abolfazl Alishahi and Farzaneh Eskandari, 'Investigating Juristic and Legal Consequences of Not Registering Marriage by Official Registration Authorities' (2018) 23 Fiqh and Family Law 121-143.



Temporary Marriage has historically been referred to as a legal form of marriage between a man and a woman for a short and predefined period, in exchange for a specified remuneration (*mahr*) to the woman. While the practice is proscribed in Sunni traditions of Islam, it remains legitimate under Shi'i jurisprudence and is legally sanctioned in Iran.<sup>1</sup>

In both forms of marriage, any offspring are legitimate and possess inheritance rights from their parents. The obligatory waiting period (*'iddah*) also applies to the woman following the termination of either union.<sup>2</sup> There are, however, differences between the two types of marriage: While inheritance from the spouse is the natural result of a permanent marriage, such rights do not accrue in a temporary marriage.<sup>3</sup> Additionally, permanent marriage requires a formal divorce (*talaq*), whereas a temporary marriage automatically dissolve automatically after the predefined period of marriage has passed. In discussing the legal structure of temporary marriage, Shi'i jurists employ the analogy to a contract of lease in contrast to the conceptualization of permanent marriage as a contract of sale.<sup>4</sup>

In contemporary Twelver Shi'a Islam in Iran, temporary marriage remains a legal and religious union between an unmarried woman and a married or unmarried Muslim man (due to laws that permit polygyny), contracted for a fixed period in return for a specified dower.<sup>5</sup> The practice is not only permitted but also encouraged in dominant Shi'i discourses. This is because any form of extramarital sexual relationship (*zinā*) is prohibited (*harām*) by Islamic law and prevailing social norms.<sup>6</sup> Temporary marriage is, in this context, promoted as a religiously-permissible (*halāl*) alternative, providing an Islamically-sanctioned avenue to avoid premarital, extramarital, and other “illegitimate” sexual relationships. It is thus considered a sanctified means of fulfilling earthly sexual desires without having to step outside of religious moral precepts.<sup>7</sup>

It is notable that this form of marriage finds no recognition in Nigerian law, where only the permanent Islamic marriage is accorded legal status. Moreover, most of the Islamic countries today do not recognize temporary marriage. And not only do they not legalize it, but they also illegitimize it. Although the reason behind such acts isn't the nature of the marriage, but rather, the school of thought it was derived from.

## 2.1. Registration of Marriage in Iran

As noted above, permanent marriages, which are the default marriage to be registered, take place only after a compulsory submission of an application by the couple, followed by an official process that includes blood tests and possible vaccinations. If the application is

1 Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (New York 2014).

2 Iranian Civil Code 1928, art 1150. This is the period after a divorce during which women should abstain from marrying another man. *Idda* only applies to women and in Shi'a, this period is three lunar months.

3 Leila Saadat Asadi, 'Critique of Laws on Marriage Registration' (2008) 10 Women's Strategic Studies 103.

4 Ayatollah Ja'far Sobhani, *Doctrines of Shi'i Islam: A Compendium of Imami Beliefs and Practices* (tr and ed Reza Shah-Kazemi, London 2013).

5 Mohammad Jalal Abbasi-Shavazi and others, 'The “Iranian Art Revolution”: Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran' (2008) 4 Journal of Middle East Women's Studies 1.

6 Ladan Rahbari, 'Premarital Dating Relationships in Iran' in Constance L Shehan (ed), *The Wiley Blackwell Encyclopedia of Family Studies* (Chichester 2016).

7 Farzaneh Milani, *Veils and Words: The Emerging Voices of Iranian Women Writers* (Syracuse 1992).



approved, registration of the marriage by a notary and entering the marriage information in the IDs of both spouses will become compulsory.<sup>1</sup>

While an Islamic marriage does not require state registration to be religiously valid, it lacks legal effect absent such formalization. As such, unregistered marriages, though religiously valid and not considered illicit sexual conduct (*zinā*) if provable, are deemed unlawful by the state and deprive the parties, particularly women, of legal protections. Non-registration carries legal penalties, including fines and possible imprisonment for the male partner,<sup>2</sup> as well as for any officiant solemnizing a marriage without state authority. The law mandates that the husband register the marriage (and any subsequent divorce) at an official registry within twenty days of the religious ceremony.

The existence of such strict rules, however, does not mean that unregistered marriages do not take place. Data on unregistered marriages in Iran is scarce, and they are frequently omitted from official government statistics.<sup>3</sup> The practice has connections to other socio-legal challenges, such as early or child marriage (discussed subsequently), which are more prevalent in context where registration is also commonly avoided. Unregistered marriages can have severe social and legal consequences, especially for women, whose entitlements to maintenance (*nafaqah*), divorce, and inheritance remain unenforceable in state fora.

### **3. The Effect of Nationality in Marriages Between a Citizen and a Foreigner**

Any marriage involving nationals of different states are governed by special laws referred to as global private matters, which fall within the realm of Private International Law. Rather than being subject to a harmonized international regime, these matters are domestically dealt with. This decentralized approach affords each State the sovereign prerogative to enact laws it deems most conducive to the interests of its nationals and affected foreign persons.

Two principles elucidate the issue of spouses' nationality. The default scenario in transnational marriages involves spouses of different nationalities. The legal effects of marriage - such as the status of children, divorce, and cohabitation - can give rise to complex international issues, including dual nationality, statelessness, and the potential for discriminatory treatment, especially against women, as documented in several countries.

The governing principles are: first, the principle of dependent nationality (also known as the principle of unity of spouses), and second, the principle of the independent nationality of spouses.

#### **3.1. The Principle of Dependent Nationality**

This principle entails the assimilation of spouses' nationalities into a single one, meaning either both the spouses and the children acquiring the husband's nationality or the wife's. Historically, most legal scholars and States have traditionally privileged the husband's

1 Iranian Civil Code 1928, art 993.

2 Marriage and Divorce Registration Act 1937, art 2.

3 *Veiled and Wed: Enforced Hijab Laws, Early Marriages, and Girl Children in the Islamic Republic of Iran* (Justice for Iran 2015).



nationality.<sup>1</sup> According to this classical theory, which held sway well into the 20th century, marriage *ipso facto* alters a woman's nationality, subsuming it under that of her husband.<sup>2</sup> This theory posits the family as a unitary legal entity and, for which a unified nationality is deemed essential; hence, imposing the nationality of one spouse upon the other, should their nationalities differ.<sup>3</sup>

### 3.2. The Principle of Independent Nationality

In contrast, this principle advocates for the retention of separate nationalities by the spouses. Thus, in a transnational marriage, each spouse retains their original nationality; the wife is not automatically conferred her husband's nationality, nor is the husband subjected to any analogous imposition.

The principle of independent nationality gained momentum during the 20th century. This transformation was grounded on the modern idea of gender equality and the global movement to eliminate discrimination against women. Advocates argue that a woman's personal commitment in marriage is to her husband as an individual, not to his nationality, domicile, or legal status.<sup>4</sup> As a result, in their vigorous efforts, pro-women communities and movements emphasized that the imposition of husbands' nationality upon women must be revoked.<sup>5</sup> This advocacy, supported by progressive legal scholarship, led several States to place women on equal grounds with men.<sup>6</sup>

The advantage of the absolute independence system is that it empowers women to marry foreigners without having worries about the imposition of the husband's nationality on them. Moreover, it ensures that such marriages do not make changes to the country's population. Notwithstanding these merits, this system presents certain drawbacks. For example, it precludes the application of a single national law to all familial relations, potentially creating fragmentation within the family unit. Moreover, the likelihood of acquiring dual nationality for the children intensifies at birth, depending on the *jus sanguinis* rules of both parents' states. In addition, when the diplomatic relations between two countries reaches a critical point or a war starts, limitations are imposed on foreign nationals, which can undermine the unity of families and exacerbate conflicts on the rules and regulations affecting transnational spouses.<sup>7</sup>

#### 3.2.1. Governing Principle of Nationality for Spouses – Iran

The Iranian legislature adheres to the principle of "unity of spouses" as the governing principle for the nationalities of spouses. Accordingly, if an Iranian man marries a foreign woman, and if an Iranian woman marries a foreign man, the nationality of the husband is imposed on his

1 Eg, British Nationality Act 1948; Code Civil (France); Bürgerliches Gesetzbuch (Germany).  
Eg, Hans Kelsen, Hugo Grotius, Sir Edward Coke.

2 Mohammad Nasiri, *Private International Law* (Teyf-e-Negareh Press 2006) 6.

3 Seyyed Mohsen Hashemi-Nasab Zavareh, Elham Ghaffarian and Naser Ghamkhar, 'The Principles of the Dependent and Independent Nationality of Spouses...' (2018) 7 *Ius Humani* 101, 108.

4 Nasiri (n 41) 53.

5 Mohsen Sheikh-al-Eslami, *Private International Law* (Ganj-e-Danesh Press 2005) 42.

6 Fatemeh Bodaghi, 'Marriage and the Iranian Woman's Nationality' (2004) 6(24) *Women's Strategic Studies* 123, 126.

7 Hossein Mehrpour, *Internal Law System* (4th edn, Etela'at Publications) 445.



wife.<sup>1</sup> The rationale behind this view is that transnational marriages are increasing worldwide due to tourism, education, employment, asylum, or family relocation, or for some other reasons. In this type of marriage, regarding the matter of nationality, because the legal systems apply different approaches, there is often a conflict of laws. Essentially, if a man and a woman who wish to get married have different nationalities, the situation becomes more complicated due to various legal issues related to nationality, family name, property, and child custody. To resolve this conflict, the traditional solution was to implement the principle of unity of the spouses' citizenship, and the husband's nationality was imposed on his wife.<sup>2</sup> However, the principle of independence of spouses' nationality has recently been considered in the Iranian nationality law, as explained beneath.

### 3.2.2. Governing Principle of Nationality for couples – Nigeria

An analysis of Nigerian regulations on married couples indicates that the principle of independent nationality of spouses is, in fact, applied in most matters concerning spousal nationality.<sup>3</sup> This is evident in the Nigerian Constitution's express refusal from imposing Nigeria's nationality on a foreign spouse; instead, it provides for acquisition through registration for a foreign wife of a Nigerian citizen, and through naturalization as the sole avenue for a foreign husband of a Nigerian citizen. Scholars such as *Ngwoke Rita* and *Ukoh* have critiqued this provision as discriminatory in the conferment of citizenship.

For instance, while the principle of dependent nationality typically allows a woman to acquire her husband's nationality upon marriage, this benefit is not reciprocally extended to a Nigerian woman vis-à-vis her foreign husband. Section 26(2) of the 1999 constitution (as amended) provides that the President may confer Nigerian citizenship on "any woman who is or who has been married to a citizen of Nigeria." By implication, this limits the right of a Nigerian woman to transmit her nationality to a foreign husband *ipso iure*. However, the same Constitution provides the right to freedom from discrimination on grounds including sex:<sup>4</sup>

*"No citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall, by reason of being such a person, be subjected either expressly by, or in the practical application of any law, to any disabilities or restrictions to which citizens of Nigeria, or any other community, ethnic group, place of origin, sex, religion, or political opinion are not made subject."*<sup>5</sup>

The rationale behind the Nigerian lawmaker's rejection of the principle of unity of spouses is unclear but somewhat complementary, as independence of women from Nigeria who are married abroad and foreign women who are married in Nigeria will be secured, meaning they don't have to depend on their husband's citizenship, which might attribute having limit

1 [Manuchehr Tavassoli](#)

Naeini, 'A Comparative Study of the Impact of Marriage to Foreigners on Nationality in the Laws of France, Germany, and Iran' (2021) 5 Comparative Law Review 67.

2 Ibid, 70.

3 Constitution of the Federal Republic of Nigeria 1999, s 26(c).

4 RA Ngwoke and FN Ukoh, 'A Critical Appraisal of the Principles of Dependent Nationality' (Research Gate) 280-281.

5 Constitution of the Federal Republic of Nigeria 1999, s 42.



their privileges of living. It also mitigates the risk of statelessness in case of divorce or the death of the husband. The children are also protected from statelessness, having acquired dual nationality, a status possessing both advantages and complications in the contemporary international arena.

Thus, while the unity of family nationality retains theoretical appeal, in the modern world, its practical disadvantages are widely perceived to outweigh its benefits.

Under Nigerian law, although millions of Nigerians marry foreign individuals and live both in and out of the country, this indisputably brings about legal implications and consequences that only nationality regulations could cover. The Nigerian Citizenship Act, along with the relevant constitutional provisions, however, have remained unaddressed for over five decades. This seems to be a notable weakness in the Nigeria's legal framework for transnational matters, which requires swift reform.

Examining the Nigerian legal system more broadly, discourse on "foreign" marriages often focuses not on non-Nigerians, but on Nigerians who are non-indigenes of a particular state within the federation. Given the countries' political structure as a federal republic, Nigeria's laws exhibit differences between states, though this is tempered by the application of Islamic law in the northern region, which covers a majority of the national territory and population.<sup>1</sup> The *Shariah* law applicable in the north governs all legal aspects of civil status for Muslims, operating alongside customary and statutory laws, including marriage. From the general provision of marriage in Islam, nationality does not have any effect whatsoever on individual and social interactions between Muslims and even non-Muslims alike. And thus, in Nigerian *Shariah* law, which is in accordance with the Maliki school(*madhhab*), differences in nationality do not affect the validity of a marriage contract nor alter its inherent legal effects.

#### 4. Marriage with a Foreign Person in Iranian Law

The rules of nationality in the Civil Code of Iran were enacted over nine decades ago. This legal framework has largely been influenced by Islamic law and the Twelver Shi'i (*Imamiyah*) jurisprudence, which does not emphasize "nationality" in its conventional sense. This is because nationality, in its conventional meaning, pertains to the arbitrary territorial borders, whereas Islamic legal principles are predicated on religious convictions (*ummah*).<sup>2</sup>

Nevertheless, the influence of certain European legal systems, such as those of France and Switzerland, can be observed in specific provisions. However, in certain areas, such as the transfer of nationality *jure sanguinis* through the father or the application of the law of the husband's nationality in family disputes involving transnational spouses, the jurisprudence of *Imamiyah* has impacted Iran's nationality law. Since the enactment of the Civil Code of Iran, the global community, and particularly Iranian society, has undergone numerous political, economic, and social transformations that necessitate a revision of this law.<sup>3</sup> In this law,

<sup>1</sup> Central Intelligence Agency, *The World Factbook: Nigeria*. 70% of the land is covered by the north, and around 60% of the population as well.

<sup>2</sup> Ahmad Arab Ameri, and Mohammad Reza Parsamanesh, 'Citizenship in Islam' (2003) 11 Islamic Law Quarterly 110, 114.

<sup>3</sup> Naeini (n 46) 69



transnational marriage is divided into two categories: marriage of an Iranian man to a foreign woman and marriage of an Iranian woman to a foreign man.<sup>1</sup>

#### 4.1. Marriage of an Iranian Man to a Foreign Woman

Article 976 of the Iranian Civil Code specifies the conditions for Iranian citizenship. Clause 6 of this article states: “Any foreign woman who marries an Iranian man” is considered Iranian. This provision aligns with the traditional doctrine of dependent nationality or “ following the husband’s citizenship,” which was historically accepted by most States.<sup>2</sup> It appears that Clause 6 is derived from Articles 12 and 19 of the French Civil Code of 1804, which will be examined subsequently.<sup>3</sup>

From Clause 6, it can be inferred that the marriage must be formally recognized under Iranian law. If solemnized abroad, the woman’s civil status must be determined and registered by the Iranian consulate in that jurisdiction, pursuant to Article 970 of the Civil Code. This requirement is grounded in Article 6, which stipulates that the personal status, including marriage, divorce, and inheritance of Iranians, even those residing abroad, is governed by Iranian law. A marriage conducted solely according to the laws of a foreign country, lacks validity under Iranian law. To attain validity, the parties must have the marriage contract executed and registered at the Iranian consulate in compliance with Iranian regulations.<sup>4</sup>

Article 986 of the Civil Code explains certain rights of foreign women who acquire Iranian nationality through marriage. It permits such a woman to renounce her Iranian nationality and revert to her former nationality following divorce or the death of her husband, provided she informs the Ministry of Foreign Affairs in writing. However, a widow with minor children from her deceased husband cannot exercise this right until her children reach the age of 18. Additionally, a woman who resumes her foreign citizenship under this article forfeits the right to own immovable property, unless such ownership is generally permitted for foreigners. If she possesses or subsequently inherits property exceeding the permissible limit for foreigners, she must alienate the excess within one year from the date of renunciation or inheritance; otherwise, the property will be auctioned under the supervision of the local public prosecutor, with the net proceeds remitted to her.

Article 976 establishes the principle of unity of nationality for spouses and stipulates that a woman’s nationality follows that of her husband. A primary consequence is the potential for dual nationality of foreign wife, if her state of origin does not necessitate the renunciation of citizenship upon marriage to a foreign national. It is critical to note that dual citizenship is not recognized under Iranian law. In addition to the issue of dual citizenship, these provisions present other complexities regarding property rights that warrant re-examination.<sup>5</sup> Some scholars argue that, notwithstanding the problem of dual citizenship, Iranian lawmakers

<sup>1</sup> Ibid., 81

<sup>2</sup> JS D Chin Kin, ‘International Marriage and Divorce with Reference to the Korean Conflict Rules’ (1979) 4 Korean Quarterly: A Korean Affairs Review 125, 127.

<sup>3</sup> Naeini (n 46) 82.

<sup>4</sup> Behshid Arfa Nia and Maryam Dashtizadeh, ‘The Impact of Iran’s Accession to the Convention on the Elimination of Discrimination against Women on Civil Law’ (2010) 11 Journal of Free Legal Research 1, 7.

<sup>5</sup> T Naeini and AW Aghzali, ‘Legal Developments Resulting from Marriage Multinationalities in the Light of Developments in Dual Citizenship, with an Approach to Iranian Citizenship Laws’ (2015) 45 Quarterly Journal of Private Law Studies 103.



prioritize family unity in matters of citizenship, deeming the resolution of conflicts between family citizenships more important than addressing conflicts of citizenship (dual citizenship) for the individual.<sup>1</sup>

#### 4.2. Marriage of an Iranian Woman to a Foreign Man

Regarding Iranian women's marriage to foreign nationals, the legislature has adopted a different approach. According to Iranian citizenship laws, an Iranian woman's marriage to a foreign man is contingent upon government authorization. Article 1060 provides that an Iranian woman's marriage to a foreign national requires special permission from the government, even absent other legal impediments. A marriage contracted without this permission, while potentially valid *religiously*, is *legally* void and produces no legal effects; it may also incur criminal penalties for the foreign man involved in this violation.

The authority to register such marriages is vested in the Ministry of Interior. Based on Article 4 of the "Regulation on the Marriage of Iranian Women to Non-Iranian Foreign Nationals" (approved 28 October 1966), this authority may be delegated to provincial and district governors and, with the agreement of the Ministry of Foreign Affairs, to certain Iranian diplomatic and consular missions abroad. These missions may issue licenses and subsequently notify the Civil Registration Office. Specifically, the registration of such marriages abroad is delegated to the head of mission (Ambassador, Consul General, Chargé d'Affaires).

According to Article 35 of the Consular Services Implementation Guidelines at Representations (regulations related to personal status and civil registration) approved in April 2020, the issuance of marriage licenses and the registration of marriages between Iranian women and nationals of India, Pakistan, Bangladesh, Sri Lanka, Iraq, and Afghanistan is contingent upon permission from the Personal Status and Civil Registration Office of the Ministry of Foreign Affairs in Tehran. Required documents include:

- A certificate from the embassy of the man's home country confirming there are no obstacles and recognizing the marriage.
- A certificate from the embassy of the man's home country confirming his marital status as single
- If previously married, a divorce decree certified by his home country's embassy.
- The woman's divorce decree, if applicable.
- A certificate of conversion to Islam from the man if the Iranian woman is Muslim.
- Permission from the woman's guardian, with their signature verified by a notary public.

The request for these documents is primarily intended to safeguard the rights of the Iranian woman.

Article 987 of the Iranian Civil Code stipulates: "An Iranian woman who marries a foreign national retains her Iranian nationality, unless her husband's country imposes his nationality upon her by virtue of the marriage. In any event, following the husband's death,

<sup>1</sup> Mohammad Javad Shariat Bagheri, 'The Superiority of International Treaties over Ordinary Law' (2010) 14 Journal of Legal Research 67.



divorce or separation, she may regain her original nationality and all attendant rights by submitting a request and relevant documents to the Ministry of Foreign Affairs.” According to note 1 of this article, “If the nationality law of the husband’s country allows the woman to choose between retaining her original nationality and acquiring her husband’s nationality, in this case, an Iranian woman may, upon demonstrating valid reasons and submitting a written application to the Ministry of Foreign Affairs, be permitted to acquire her husband’s nationality.”

The policy rationale behind Article 987 is to maintain a system of unity in family nationality, prevent dual nationality for Iranian women, and align with the principle of derivative spousal nationality.<sup>1</sup>

## 5. Marriage with a Foreign Person in Nigerian Law

Before examining the provisions governing the nationality of foreigner spouses in Nigeria, it is noteworthy to understand that despite millions of citizens being engaged with foreign partners in marriage, the concept of indigeneity has, in practice, superseded citizenship as the determinant of rights. This manifests in limitations on the rights and privileges of dual citizens in Nigeria, indigeneity of children etc. Indigeneity in Nigeria is used to specify between a Nigerian citizen who is born in a particular Nigerian state (province), as such a person is presumed entitled to certain exclusive rights and privileges in all aspect of life just by being born in that state(province), while a similar Nigerian-born citizen from a different state (province) will be denied of such rights and privileges for being an indigene of a different state (province).

It is a clear act of cultural-political discrimination among Nigerian citizens with less logical justification from the lawmakers of the states. Now, the relation to marriage, a citizen of Nigeria, especially women, when married into a place where they are not indigenes, faces discrimination, or in a more suitable term, faces some ‘limitations’ in regards to the rights and privileges rendered to citizens in that particular area.

Among the challenges they face is the inability to acquire the spouse’s indigence even post-marriage, which is in comparison to the principle of unity of family nationality, represents a violation. While, in some cases, imposition of indigence could also be the issue, which conflicts with the principle of independent nationality. It is best described as a similar issue for foreign spouses in Nigeria.

Regarding actual foreign individual marriages in Nigerian laws, the effect of marriage on the nationality of the spouses depends on the provisions of the applicable law in each case, according to *Nwogugu*.<sup>2</sup>

### 5.1. A Nigerian Man Marrying a Foreign Woman

Regarding Nigerian men marrying a foreign woman, when we examine the rules on the acquisition of Nigerian citizenship through marriage, discrimination based on the sex of the spouse is seen. Section 26 of the Nigerian Constitution permits a foreign woman married

1 Ibid., 67

2 EI Nwogugu, *Family Law in Nigeria* (Heinemann Educational Books 1974) 89.



to a Nigerian man to acquire citizenship by registration, a right not extended to a foreign man married to a Nigerian woman.<sup>1</sup> Although this process is easier than naturalization, the acquisition of citizenship by a woman based on marriage is discretionary. The applicant must satisfy the President of her good character, show the intention to remain domiciled in Nigeria, and take the oath of allegiance.

Ultimately, this means that a foreign woman does not automatically acquire Nigerian citizenship by marriage to a Nigerian citizen. But she may acquire Nigerian citizenship through a discretionary registration process.<sup>2</sup> However, contrary to Iranian provisions, any child born of this marriage, whether *jus soli* or *jus sanguinis*, is a Nigerian citizen by birth and does not face any issue or limitation when exercising his rights and privileges as a Nigerian.

Additionally, it is worth noting that there is no discrimination of gender when discussing children in Nigeria; regardless of which parent is Nigerian, the child will be considered a Nigerian by birth.<sup>3</sup>

## 5.2. A Nigerian Woman Marrying a Foreign Man

Regarding the acquisition of citizenship by a foreign husband, as noted, his sole avenue is naturalization, under the same terms as any other foreigner. According to Nwogugu, when a Nigerian woman marries a foreign national, whether or not she acquires the nationality of her husband will depend on the law of his country. However, no provision of the Nigerian law enables a Nigerian woman who acquired another nationality to retain her Nigerian citizenship.<sup>4</sup> Coincidentally, the Iranian provision on the acquisition of citizenship of a foreign man through marriage is similar.

## 5.3. Certification of Non-Statutory Marriages Involving a Foreign Spouse

Given that among the types of marriages officially recognized in Nigeria, only the statutory marriage is directly affiliated with the Ministry of Interior, thus nationally and internationally credible and recognized, the Nigerian government suggested a solution to document both shariah and customary marriage by licensing certain religious and customary figures to officiate and issue a marriage affidavit. But the question that arises here for a transnational couple who choose to go for the Islamic or customary marriage is: how certified is such a marriage in the international realm? Can the affidavit issued by the local imams and customary marriage initiators suffice for foreign authority? What proof is there to verify the certificate, which is quite different from the official one issued by the ministry?

Normally, for statutory (monogamous) marriages celebrated abroad, recognition of such Marriages in Nigeria requires a court ruling, which only occurs if the Nigerian court recognizes that it complies with the *lex loci celebrationis* regarding form, and if each party possesses the capacity to marry under the *lex domicilii ante-nuptial*.<sup>5</sup>

1 Yaser Maiwada Inuwa and Mostafa Fazaeli, 'Nationality and Citizenship in the Laws of Nigeria: Acquisition and Loss of Nigerian Citizenship with a Comparative Analysis of the Laws of Other Nations' (2024) 2 Iranian Journal of International and Comparative Law 135.

2 Constitution of the Federal Republic of Nigeria 1999, s 25(1)(a)-(c).

3 Ibid, s 25(1)(c).

4 Nwogugu (n 61) 89.

5 Ibid, 40



A marriage celebrated abroad will be treated as monogamous in Nigeria if it is recognized by the law of the place where it was contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage. The non-customary rules on matrimonial causes in Nigeria apply equally to monogamous marriages celebrated under the Marriage Act abroad.<sup>1</sup> While the statutory marriage celebrated in Nigeria wouldn't have to bear such long endurance, as a certificate will be directly issued upon its celebration by the appropriate office. Such a certificate will suffice as evidence of marriage between all individuals, foreign-Nigerian or both locals. But considering that the marriages given in this case are both non-statutory, none of these solutions apply. In answering the questions, *Kutigi-Doma* found that whereas all marriage certificates issued for non-statutory marriages, either by the mosques or courts in the form of marriage affidavits or declarations are generally accepted everywhere and for every purpose within Nigeria, the same weight is not attached to such documents abroad, and thus they are not automatically accepted as evidence of marital status for international transactions and documentation. For instance, to qualify for a marriage-based visa to join a spouse abroad, most countries would require a certificate of legal marriage. A legal marriage in this sense is officially recognized by the government in the country or state where you were married. This usually means that an official record of the marriage was made or can be obtained from some government office. Therefore, a copy of the civil marriage certificate is required, and the only way to obtain this in Nigeria is through the Marriage Registry.<sup>2</sup> This legal reality explains the prevalence of the «double-decker» marriage, whereby couples solemnize both a non-statutory and a statutory marriage to secure internationally valid documentation.

## Conclusion

The Nigerian legal system upholds the principle of independent nationality for spouses, albeit accompanied by certain discriminatory provisions that are purportedly aimed at safeguarding national interests and the welfare of citizens. In contrast, the Iranian legal system adheres to the principle of dependent nationality, a framework influenced by French legal scholarship, as much of its civil legislation is derived from France. Scholars have called for further consideration of these regulations, suggesting that they are not only discriminatory, particularly against women, but also outdated in light of contemporary international human rights standards, including those of France, where these laws were inspired by. Preferably, the Iranian legal framework would want a dedicated legislative act specifically for nationality laws, rather than relying solely on its current Civil Code.

Both Iran and Nigeria exhibit significant gender discrimination in matters of nationality, particularly regarding the acquisition of citizenship and the treatment of foreign spouses. Such discrimination is increasingly at odds with evolving global norms, as many leading nations have advanced beyond these outmoded practices. Both States would benefit from drawing inspiration from progressive nations that share similar developmental challenges

1 Ibid, 40

2 Doma-Kutigi (n 1) 33-34.



and aspirations. It is imperative to address gender discrimination both internally, through issues of indigeneity, and externally, in terms of citizenship laws.

In Nigeria, the lack of international legal recognition for non-statutory (Islamic and customary) marriages is a notable weakness in the legal framework. This shortcoming may deter couples who wish to engage internationally from solemnizing their unions, ultimately undermining the recognition of Shariah and customary marriages. The phenomenon of “double-decker marriages,” while seen as a potential solution, often results in more complications than benefits for Islamically wedded couples. It is the authors’ belief that the Nigerian legislature should consider adopting aspects of Iran’s marriage registration provisions while incorporating necessary exceptions. This could include making marriage registration mandatory through the Ministry of Interior and ensuring the availability of sufficient registry institutions for citizens, while allowing Shariah law to govern the personal status of Muslims (e.g.: inheritance) for couples who opt for a dual union (double-deckered).

Conversely, the Iranian government should draw insights from Nigeria’s approach to nationality law by transitioning from a model of unified couple nationality to one that recognizes independent nationality. Such a reform would prevent the imposition of a husband’s nationality on his wife, as is currently practiced.

In conclusion, there is a pressing need for Nigerian legal scholars to engage more substantively with international law developments and contemporary global issues. Nigeria has been represented by capable intellectuals thus far, but further emphasis on these areas will foster a robust research environment and assist the legislature in addressing contemporary legal challenges effectively.



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## TRANSPLANTATION, RELIGION AND LAW: THE EXPERIENCE OF INTERACTION IN THE ISLAMIC REPUBLIC OF IRAN

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### ABSTRACT

The present study is devoted to determining the relationship between religious and legal norms in the regulatory framework governing organ transplantation as a method of treating diseases in the Islamic Republic of Iran. It has been established that the set of normative acts regulating this field consists of the fatwas of the Supreme Leaders, as well as laws and subordinate regulatory legal acts. The author concludes that in contemporary Iran, religious norms – by legitimizing transplantation (including from unrelated donors and even from animals) – have been flexibly adapted to the needs of Iranian society. As a result of the study, the author finds that at the present stage in the Islamic Republic of Iran a balance has been achieved between the requirements of religion and legal norms in the regulation of transplantation. This balance has allowed the country to emerge as a world leader in meeting the demand for donor organs.



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The first transplantation surgery performed in Iran dates back to long before the Islamic Revolution of 1979. In 1935, in Tehran, the founder of Iran's modern ophthalmology, Dr. Shams, performed a corneal transplant.<sup>1</sup> The first kidney transplant in Iran was performed in 1968 at Namazi Hospital of Shiraz University of Medical Sciences by Professor Dr. Senadizade.<sup>2</sup> It was not only the first such operation in what would become the Islamic Republic, but also the first in the entire Middle East.

After the Islamic Revolution of 1979, which led to a change in the constitutional order and a comprehensive restructuring of the state apparatus, and against the backdrop of the war with Iraq (1980–1988), the healthcare system of the Islamic Republic of Iran (IRI) faced significant difficulties. Patients with end-stage renal failure were sent abroad. From 1979 to 1985, more than 400 people traveled outside Iran and received kidney transplants at the government's expense.<sup>3</sup> The majority of these patients were operated in the United Kingdom and received kidneys from donors who were their relatives.

In 1988, the IRI adopted a program for kidney transplantation from living unrelated donors. As a result, the number of operations performed increased significantly, and by 1999 the transplant waiting list was completely eliminated.<sup>4</sup>

It is noteworthy that after the 1979 Islamic Revolution, fatwas of the Supreme Leader initially served as the normative basis for kidney transplants in Iran. For example, on April 27, 1979 – even before the Constitution of the IRI came into force – Ayatollah Khomeini issued a fatwa in which he clarified the religious position on organ donation: “If transplantation leads to saving a person from death, then from the standpoint of Shariah there are no obstacles to performing it. Of course, if one can save a human life while guaranteeing the health of the person who gives his kidney, this is permissible and is a good deed. Therefore, if someone

<sup>1</sup> *Ehdacenter.ir*, ‘History of Organ Donation and Transplantation’ (undated) <https://ehdacenter.ir/about-donation/history-of-organ-donation/2759596> accessed 4 September 2025.

<sup>2</sup> *Iran Newspaper*, ‘The First Kidney Transplant in Iran’ (26 September 2020) <https://old.irannewspaper.ir/newspaper/item/555669/> accessed 4 September 2025.

<sup>3</sup> Ahad J Ghods, ‘The History of Organ Donation and Transplantation in Iran’ (2014) 12 (Suppl 1) Experimental and Clinical Transplantation 8.

<sup>4</sup> Ahad J Ghods and Shekoufeh Savaj, ‘Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation’ (2006) 1 Clinical Journal of the American Society of Nephrology 1136.



who has two kidneys performs this good deed and shows self-sacrifice for the sake of his sick brethren, God will reward him.”

*“If a deceased person has a kidney suitable for transplantation, then with the permission of his closest relatives it is permissible to use it to save another person’s life and transplant it into a patient who lacks a healthy kidney.”<sup>1</sup>*

There is also a fatwa in this field from the second Supreme Leader, Ayatollah Khamenei: “The use of the organs of a deceased person for transplantation to another person in order to save their life or treat a disease faces no obstacles. Making a bequest in this regard is not forbidden, except for those organs whose removal may be considered as mutilation of the body or, by common opinion, as a violation of the dignity of the deceased.”<sup>2</sup>

There is also a fatwa by Khomeini that clarifies the issue of religious purity: “Extracting an organ from a deceased non-Muslim for transplantation is not forbidden. However, the issue of ritual impurity arises due to the fact that the organ belonged to a dead body, and thus it may be an obstacle to performing prayer. But it can be said that if the organ comes to life after transplantation and becomes part of a living person’s body, then it ceases to be considered part of the dead body and is not impure (from a religious point of view). Even if an organ of an animal that is by its nature ‘impure’ is transplanted, once this organ comes to life in a human body, it loses the status of an animal organ and becomes part of the human body.”<sup>3</sup>

This fatwa perfectly illustrates the flexibility of religious norms in cases when an objective necessity makes observing them impossible or difficult. This is particularly evident in the example of the rule that it is permitted to transplant the organs or body parts of an “impure” animal.

In the author’s view, a striking example of flexibility in the interpretation of religious norms under objective necessity is a fatwa concerning the permissibility of a male surgeon performing plastic surgery if the procedure entails physical contact between unrelated individuals that is forbidden by Sharia. Thus, Ayatollah Khamenei formulated the following rule: “Plastic surgery is not considered treatment for a disease, therefore forbidden gazing and touching are not allowed in it, except in cases when the surgery is performed to treat burns and similar conditions, and the doctor is forced to touch and look in order to carry out the necessary procedures.”<sup>4</sup>

Thus, the fatwa on the one hand does not ban plastic surgery, but it points to the superfluous nature of plastic surgery as a means of altering a person’s appearance for subjective aesthetic reasons. For such purposes, the religious rules of interaction between men and women must not be violated. However, if plastic surgery – involving a formal violation of the religious

<sup>1</sup> Imam Khomeini, ‘Imam Khomeini’s Recommendation of Organ Transplant’ (24 September 2019) <http://www.imam-khomeini.ir/fa/n22273/> accessed 8 September 2025.

<sup>2</sup> Setare.com, ‘The Religious Ruling on Organ Transplantation from a Dead or Living Person’ (1 May 2022) <https://setare.com/fa/news/17770/> accessed 8 September 2025.

<sup>3</sup> IFSM, ‘Organ Donation Laws in Iran’ (24 May 2023) <https://www.ifsm.ir/news/58685/> accessed 8 September 2025.

<sup>4</sup> Hawzah News, ‘The Religious Ruling on Transplanting Animal Organs to Humans’ (19 June 2019) <https://www.hawzahnews.com/news/494751/> accessed 12 September 2025.



rules of physical contact between men and women – is required due to trauma or disease that led to disfigurement, then those circumstances, by analogy with the criminal law concept of “circumstances excluding the criminality of an act,” become circumstances that exclude the haram (religiously forbidden) nature of the act.

At present, the legal foundation for performing transplant surgeries consists of the Constitution of the IRI and the “Islamic Penal Code.” Article 29 of the Constitution enshrines the right of every Iranian citizen to proper medical care at the state’s expense.<sup>1</sup> Clause 6 of Article 158 of the Islamic Penal Code stipulates that a surgical or other medical intervention is permissible if performed with the consent of the patient or their guardians, custodians, or legal representatives, and in compliance with technical and scientific rules and state directives.<sup>2</sup> Therefore, performing transplantations outside of medical institutions that have a special license is considered a crime against human health.

Medical organizations where kidney transplants are performed must obtain a license from the Ministry of Health and Medical Education (the Ministry). The requirements for such centers are set forth in the Ministry’s Order “On Requirements for Kidney Transplant Centers in Iran.”<sup>3</sup> These requirements are categorized under several headings: medical personnel, equipment, and performance outcomes. The staff must include at least one transplant surgeon and one nephrologist, and mid-level medical personnel are required to obtain a certificate of professional training from one of the kidney transplant training centers.

Centers are forbidden from performing operations on foreign nationals, except in special cases authorized by the Ministry. Such cases are situations in which an Iranian citizen who is a donor provides an organ to a foreign relative.<sup>4</sup> Given the extremely large number of Afghan citizens in Iran (approximately 6.1 million),<sup>5</sup> exceptions are also provided for them: both the donor and the recipient are allowed to have only Afghan citizenship, and the operation must be performed in Iran.

The Ministry’s Order sets target performance indicators for kidney transplant centers. Each such center must perform no fewer than 25 operations per year, and the resulting graft survival rate must be at least 80%, while the recipient survival rate must be at least 90%. Moreover, a minimum of 20% of transplants must be performed using organs from donors diagnosed with brain death. If a center does not achieve the target indicators, the Ministry revokes its license based on the inspection results.

Part of the legal framework for transplantation is also the Law “On the Transplantation of Organs of Deceased Persons and Persons with a Confirmed Diagnosis of Brain Death”<sup>6</sup>

<sup>1</sup> Constitution of the Islamic Republic of Iran (Iran) art 29, [https://www.lu.ac.ir/uploads/123456\\_20436.pdf](https://www.lu.ac.ir/uploads/123456_20436.pdf) accessed 8 September 2025.

<sup>2</sup> Islamic Penal Code (Iran) art 158, [https://www.lu.ac.ir/uploads/123456\\_20436.pdf](https://www.lu.ac.ir/uploads/123456_20436.pdf) accessed 8 September 2025.

<sup>3</sup> Ministry of Health and Medical Education (Treatment Sector), ‘Executive Directive on the Requirements for Establishing Kidney Transplant Centers in Iran’ (4 September 2021) <https://treatment.tums.ac.ir/uploads/196/> accessed 8 September 2025.

<sup>4</sup> Iranian Students’ News Agency (ISNA), ‘Conditions for Organ Transplantation for Foreign Nationals in Iran’ (28 July 2020) <https://www.isna.ir/news/99050604342/> accessed 8 September 2025.

<sup>5</sup> Etemadonline.com, ‘Afghans in Iran’ (7 April 2025) <https://www.etemadonline.com/706655/> accessed 8 September 2025.

<sup>6</sup> Law on Organ Transplantation of Deceased Patients or Patients Whose Brain Death is Certain (Islamic Republic of Iran) art 1 <https://rc.majlis.ir/fa/law/show/93297> accessed 8 September 2025.

dated April 5, 2000. According to this law, hospitals licensed by the Ministry to perform transplants may use healthy organs of deceased patients or patients with a diagnosis of brain death (established by experts), provided there is voluntary consent given during the patient's lifetime or consent of their legal representative (relatives) following the patient's death. Removed organs may only be used for transplant in patients whose survival depends on the transplantation of an organ or organs.

Experts authorized to certify brain death are appointed by the Ministry. The diagnosis can only be made in state university hospitals equipped with the necessary equipment. Moreover, the experts who establish the diagnosis cannot be part of the transplant team.

In accordance with the Resolution of the Cabinet of Ministers of Iran "On the Implementation of the Law 'On the Transplantation of Organs of Deceased Persons and Persons with a Confirmed Diagnosis of Brain Death'"<sup>1</sup> dated May 15, 2002, "brain death" is defined as the complete and irreversible cessation of all functions of the brain, namely the cerebral cortex, subcortical structures, and brain stem. The confirmation of this diagnosis is carried out by four physicians: a neurologist, a neurosurgeon, an internist, and an anesthesiologist. Each physician conducts a separate independent examination of the patient, fills out a special form, signs it, and certifies it with a seal. If they are unanimous, the patient's brain death is deemed established.

After brain death is established, further actions are taken if the patient had left a will or with the consent of their legal representative. The legal representatives of the deceased are considered to be the adult legal heirs, who can give consent for the removal of organs for transplantation. Consent must be obtained from all the heirs.

A will can be expressed in either written or oral form. As a general rule it must be written; however, in extraordinary circumstances such as a severe sudden illness or wartime, a patient may declare their will orally in the presence of two competent witnesses. After circumstances normalize, however, such an oral will must be solemnized in writing.

If the original will is not available, then if the legal heirs confirm that the deceased indeed bequeathed their organs for transplantation, a protocol is drawn up in a form established by the Ministry.

The requirements for living donors are regulated by the Ministry's Order "On Kidney Transplantation from a Living Donor."<sup>2</sup> According to this act, a living donor is defined as a person who voluntarily agrees to donate one of their kidneys to a patient in need of a transplant. Moreover, a kidney may be donated to either a relative or a person who is not related to the recipient. The act provides for a situation of so-called paired donation. In this scenario, two donors wish to donate kidneys to their ill relatives, and if the donors' tissues are found incompatible for transplantation to their respective relatives but suitable for an unrelated recipient, an exchange takes place.

A unified registry of kidney donors and recipients is being created. Its formation is carried

<sup>1</sup> Bylaw of the Law on Organ Transplantation of Deceased Patients or Patients Whose Brain Death is Certain (Islamic Republic of Iran) <https://rc.majlis.ir/fa/law/show/121984> accessed 8 September 2025.

<sup>2</sup> *Peyvand115.ir*, 'Executive Directive for Kidney Transplantation from Living Donors' (undated) <http://peyvand115.ir/> accessed 8 September 2025.



out by authorized medical organizations. These organizations are tasked with a wide range of duties, from registering donor data in the Ministry's system, informing candidates about the donation process and providing them with the necessary educational materials on kidney transplantation, to conducting donor-recipient tissue compatibility tests and planning the surgical program. The medical organization is also obligated, at the stage of obtaining the prospective donor's voluntary informed consent, to assess their mental and psychological state, study their motivation, and check for any socio-economic problems the donor may have, in order to prevent the donation from being coerced. For the established donation system in Iran, a fundamental norm is the one formulated in a fatwa by Supreme Leader Ali Khamenei: "From a religious point of view, the donor is permitted to receive money for the donated organ."<sup>1</sup> The Iranian state pays a kidney donor up to 1,100,000,000 rials, depending on the donor's domicile.<sup>2</sup>

Based on the above, the following conclusions can be drawn. The regulation of modern medical technologies in Iran, such as transplantation, demonstrates a high degree of adaptability of religious norms to the objective requirements of contemporary society and scientific-technological progress, since religious norms in the form of fatwas of the Supreme Leaders permit the use of the products of scientific progress to help the population.

The possibility of a healthy Iranian voluntarily donating a kidney to someone who is not a relative, as well as the guaranteed monetary compensation to donors by the state – these two aspects underlie Iran's kidney transplant system, which has proven its effectiveness in that the population's needs for kidney transplant treatment have been fully met for over two decades. Given the rather long-term and quite successful application of organ transplantation technologies, it can be asserted that in the Islamic Republic of Iran a balance has been found between the requirements of religion, legal norms, and the conduct of high-tech medical procedures.

<sup>1</sup> *Hawzah News* (n 8).

<sup>2</sup> *Islamic Republic News Agency (IRNA)*, 'Reward for Kidney Donation' (18 October 2025) <https://www.irna.ir/news/85970606/> accessed 12 September 2025.



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## BOOK REVIEW: *SHARED OBLIGATIONS IN INTERNATIONAL LAW* BY NATASA NEDESKI

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| Article Info  | ABSTRACT  |
|---|---|
| <b>Article type:</b><br>Book Review   | Natasa Nedeski's <i>Shared Obligations in International Law</i> is a meticulous and conceptually ambitious monograph that addresses a conspicuous gap in contemporary international-law scholarship. It advances the discourse of "shared responsibility" onto the terrain of primary obligations. Building on the SHARES research project, the book develops a positive-law conception of "shared obligations," offers a systematic typology (most importantly: divisible vs. indivisible shared obligations), and maps the doctrinal consequences of this typology for performance, attribution and the secondary obligations of cessation and reparation. The argument is rigorously constructed, richly illustrated through instructive case studies (including Certain Phosphate Lands in Nauru, the Eurotunnel arbitration, commitments under the Kyoto Protocol, and the Marshall Islands cases), and demonstrates sustained engagement with the International Law Commission (ILC) materials and the broader architecture of the law of obligations. The book's chief value lies in its conceptual clarity: by foregrounding the structure of the primary legal duty, the author persuasively demonstrates that how a duty is shared shapes who can be held responsible, what remedies follow, and how claims should be framed in adjudication. The monograph is essential reading for scholars, adjudicators, and practitioners engaged with multilateral governance and international responsibility. |
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| <a href="https://ijicl.qom.ac.ir/article_4022.html">https://ijicl.qom.ac.ir/article_4022.html</a> |   |

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## **1. Research Question and Contribution**

The book addresses a fundamental question in international law: what does it mean for an obligation to be “shared,” and how does this shared character affect the rights and duties of the parties involved? Rather than beginning with the secondary rules of state responsibility or attempting to modify doctrines of attribution to accommodate multi-actor scenarios, Nedeski turns to the structure of primary obligations themselves. By demonstrating that the form and content of a primary obligation determine who must perform what, how breaches are assessed, and what remedial consequences follow, the book reframes several longstanding difficulties in cases involving multiple actors—ranging from environmental obligations to joint administrative regimes. This conceptual shift marks the book’s central contribution to the literature on shared responsibility.

## **2. Organisation and Methodology**

The book is structured around a clear analytical progression that guides the reader from conceptual foundations to practical implications. It begins by defining the notion of shared obligations and explaining the inadequacies of existing responsibility frameworks in addressing multi-actor duties. It then distinguishes bilateral from multilateral legal relations, develops the divisible/indivisible typology, and analyses the doctrinal consequences of this typology for attribution, cessation, and reparation. Methodologically, the work combines close doctrinal analysis with illustrative case studies and sustained engagement with ILC materials, resulting in a coherent and accessible framework well-suited for scholars, practitioners, and adjudicators.

## **3. The Concept of a Shared Obligation**

At the core of Nedeski’s argument lies a carefully constructed definition of what it means for an obligation to be “shared” in international law. She identifies three cumulative elements: (i) the presence of multiple duty-bearers; (ii) the existence of comparable or parallel obligations



binding each; and (iii) a connection between those obligations and a single constellation of facts or a common legal objective. This formulation scrupulously eschews importing normative presumptions about liability or reparations, focusing instead on the positive-law features of the obligation. Nedeski contends that many practical controversies - such as collective environmental targets, joint treaty undertakings, or shared administrative regimes - can only be resolved by first recognising that the obligation itself has a shared structure. By grounding the concept in treaty practice, case law, and ILC materials, the book convincingly argues that shared obligations are not a mere theoretical abstraction but a recurrent and salient feature of contemporary international governance.

#### 4. Divisible and Indivisible Shared Obligations

A paramount contribution of the work is its detailed development of the distinction between divisible and indivisible shared obligations, a typology that provides analytical clarity and practical guidance for interpreting multi-actor duties. Nedeski posits that an obligation is *indivisible* where its performance necessarily requires a collective effort aimed at achieving a single common result - for instance, an aggregate emissions-reduction target or a joint administrative mandate. In such instances, failure to achieve the stipulated result constitutes a breach inherently linked to all duty-bearers, irrespective of individual contributions. By contrast, *divisible* obligations impose separable duties on individual actors, even where these duties arise within a shared context. Here, responsibility for breach is assessed individually, contingent on whether each actor fulfilled its specific share or conducted required actions. The book demonstrates that this typology is not merely descriptive but entails concrete doctrinal consequences: it shapes attribution analysis, determines whether responsibility is shared or individual, and influences the form that cessation and reparation may take. Through meticulous doctrinal reasoning and well-chosen examples, Nedeski shows that understanding this distinction is indispensable for courts, treaty drafters, and practitioners dealing with multi-actor regulatory frameworks.

#### 5. Case Studies and Doctrinal Illustration

A notable strength of the book is its methodical deployment of case studies to demonstrate how the proposed typology operates in practice and where existing jurisprudence reveals conceptual gaps. Nedeski examines several emblematic situations in which shared obligations have arisen, beginning with *Certain Phosphate Lands in Nauru*, where the joint trusteeship administered by Australia, New Zealand, and the United Kingdom generated shared duties whose breach raised complex questions of attribution. The analysis then turns to the *Eurotunnel* arbitration, showing how treaty arrangements can create shared primary obligations between States and how these obligations influence the assessment of conduct and remedial duties. The joint commitments under the Kyoto Protocol serve as an instructive paradigm of indivisible obligations in the environmental domain, where achieving a collective numerical target is contingent on the aggregate performance of a group of States. Finally, the *Marshall Islands* litigation before the International Court of Justice highlights the procedural difficulties that

arise when shared obligations collide with the indispensable-party rule and jurisdictional limits. Across these examples, Nedeski's approach is analytical rather than merely descriptive; each case study tests the robustness of her typology, reveals how the structure of the primary obligation shapes the availability of remedies, and identifies unsettled doctrinal questions. The case studies thus perform an essential function: they concretise how shared obligations manifest in diverse legal settings and underscore why a clearer conceptual framework is necessary for both adjudication and treaty design.

## 6. Consequences for Attribution, Cessation, and Reparation

Building on the typology of divisible and indivisible shared obligations, Nedeski offers a detailed analysis of how the structure of the primary obligation directly informs the application of the secondary rules of State responsibility. She explains that, in cases involving indivisible obligations, a failure to achieve the common result necessarily implies a breach attributable to all duty-bearers, because the obligation, by its very nature, cannot be performed by any actor acting alone. This collective dimension does not obviate the requirement for attribution but reframes the inquiry: instead of asking which actor's conduct "caused" the breach, the relevant question becomes whether the collective performance required by the obligation has been realised. In contrast, divisible obligations allow for a more granular analysis, whereby responsibility attaches exclusively to those actors that have failed to fulfil their respective shares or conduct-based requirements. This distinction carries significant implications for cessation: where an obligation is indivisible, the cessation duty may require coordinated or joint measures, whereas divisible obligations permit differentiated compliance pathways.

Equally significant is Nedeski's discussion of reparation, particularly the extent to which it may be shared or several. She notes that where an indivisible obligation is breached, injured states may plausibly claim full reparation from any one of the co-responsible States - an outcome that resembles joint and several liability in domestic legal systems. Although international law does not explicitly codify such a principle, the book shows that several cases and scholarly positions implicitly support this understanding. For divisible obligations, by contrast, reparation must correspond to the specific share of responsibility attributable to each duty-bearer. Nedeski also highlights the underdeveloped state of rules governing contribution and recourse between co-responsible actors, observing that although the law of State responsibility accommodates such mechanisms, the precise modalities remain uncertain. Her analysis underscores the need for future doctrinal refinement while demonstrating that the structure of the primary obligation is the key determinant of how attribution, cessation, and reparation should operate in multi-actor scenarios.

## 7. Strengths of the Work

The book exhibits several notable strengths that distinguish it as a significant contribution to contemporary debates on international responsibility. First, Nedeski's conceptual precision is exemplary. By formulating a clear definition of shared obligations and articulating a workable divisible/indivisible typology, she provides scholars and practitioners with analytical tools



that reduce the ambiguities long surrounding the notion of “shared responsibility.” Second, the book demonstrates a high degree of doctrinal rigor. Rather than proposing novel theories detached from positive law, Nedeski anchors her analysis in the ILC’s Articles on State Responsibility (ASR), the Articles on the Responsibility of International Organizations (ARIO), treaty practice, and relevant jurisprudence. This fidelity to positive law enhances the book’s persuasive authority, especially for adjudicators and legal advisers who require doctrinally sound frameworks.

Third, the book’s practical orientation is a major asset. By linking the structure of primary obligations to concrete questions of attribution, remedy, and procedure, Nedeski equips litigators and negotiators with criteria that can be operationalised in real disputes and treaty drafting. The analysis is not merely theoretical; it provides actionable guidance for pleadings, interpretive arguments, and institutional design. Fourth, the work’s clarity and pedagogical **value** make it an accessible reference for advanced study and instruction. The text is organised in a manner that facilitates comprehension, and the use of tables, diagrams, and case studies aids readers navigate complex doctrinal relationships. Taken together, these strengths make *Shared Obligations in International Law* an invaluable resource for researchers, practitioners, treaty drafters, and members of international courts and tribunals.

## 8. Limitations and Areas for Further Development

While the book provides a robust conceptual and doctrinal framework, Nedeski acknowledges - and the analysis itself reveals - several areas where further research could enrich both the understanding and practical application of shared obligations. One such area concerns the empirical and political dimensions of shared commitments. Although the book insightfully explains why certain obligations are structured as divisible or indivisible, it offers limited engagement with the political incentives and negotiation dynamics that shape States’ preferences in treaty design. A fuller empirical analysis, drawing on historical case studies or practitioner interviews, could deepen the explanatory power of the typology and illuminate how shared obligations are likely to be framed in future multilateral negotiations.

A second limitation relates to the role of non-state and sub-state actors, which the book addresses only briefly. In contemporary international governance - encompassing domains from climate mitigation to corporate supply-chain regulation - non-state entities increasingly assume responsibilities that interact with, supplement, or even substitute for State obligations. Expanding the typology to account for such hybrid arrangements would enhance its relevance to emerging regulatory landscapes. Third, while Nedeski discusses the difficulties of contribution and recourse among co-responsible States, this remains an underdeveloped area of international law. A more systematic examination of comparative models, such as domestic joint tortfeasor regimes or administrative responsibility-sharing mechanisms, could yield practical guidance for resolving disputes among co-bearers of shared obligations. Finally, the book’s divisible/indivisible framework, though analytically powerful, confronts **borderline cases** - particularly hybrid obligations that combine a collective objective with

individualised performance requirements. Additional criteria or decision-making tools could assist practitioners and adjudicators in navigating these grey zones.

## 9. Comparative and Interdisciplinary Value

An important contribution of Nedeski's work lies in its capacity to open the field of shared obligations to comparative and interdisciplinary inquiry. By drawing selectively on private-law analogies - such as the distinction between joint and several liability, or the relevance of Hohfeldian correlatives - the book invites a more systematic dialogue between international law and domestic legal systems on the allocation and performance of multi-actor duties. This comparative engagement is particularly relevant because many domestic regimes have long grappled with problems analogous to those now emerging in international law, including the coordination of multiple agents, allocation of contribution, and mechanisms for internal recourse. Nedeski's framework thus establishes a valuable foundation for scholars seeking to explore how domestic practices might inform future treaty design or judicial reasoning in international law.

The book also offers opportunities for interdisciplinary research, especially in the fields of political science, institutional design, and behavioural studies. The author notes, for instance, that the acceptance of indivisible obligations in treaty regimes often turns on collective-action dynamics, bargaining power, and States' expectations regarding reciprocal compliance. These insights align with findings from collective-action theory and behavioural economics, suggesting fruitful avenues for future work that integrate legal doctrine with empirical research on state behaviour. Furthermore, federal systems' approaches to distributing regulatory or fiscal responsibilities among subnational units provide analogous models that could shed light on possible institutional arrangements for shared obligations at the international level. By signalling these possibilities, the book positions itself not only as a doctrinal intervention but also as a conceptual bridge to broader interdisciplinary conversations about how complex governance systems manage overlapping and shared responsibilities.

## 10. Overall Assessment

Nedeski's *Shared Obligations in International Law* is a valuable and timely contribution to debates on responsibility in international law. By shifting attention to the content of primary obligations, the author clarifies myriad problems that have complicated discussions on shared responsibility. The analysis is cogently structured, the examples are illustrative, and the work will prove useful to scholars, practitioners, and students seeking more precise tools for assessing multiactor legal duties.



Praise to God, Iranian Journal of International and Comparative Law was founded at the initiative of the International Law Department of University of Qom. It officially started work as a bi-annual, open access, English language and peer-reviewed law journal. The Journal is indexed in Islamic World Science Citation center (ISC) and Ministry of Science, Research and Technology of Iran. This bi-quarterly is the leading comprehensive English language journal on international and comparative law published in Iran. The journal enjoys a great editorial team and advisory board of prominent professors from different countries. In the effort to advance the knowledge of International and comparative law, the journal is committed to obtain valid international indexes in the first issue and thus submission of high quality articles by distinguished professors, scholars, thinkers and researchers in the field of international and comparative law will be mostly welcomed.



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