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QUESTIONS OF FACT IN IRANIAN AND FRENCH LAWS: A COMPARATIVE ANALYSIS

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ABSTRACT

Thera are a plethora of principles governing in civil proceedings, one of which is the "The Principle of Initiative of The Parties in Civil Proceedings", known in French as "Principe Dispositif." According to this principle, the leading role in civil proceedings is the will of the parties to the dispute, a will that can shape, perpetuate or change the course of the proceedings at will or even abruptly end it without reaching a conclusion. This role of the litigants is not contrary to the principle of independence of action and freedom of the judge in evaluating the fact presented by the parties, However, in applying this principle, the judge also faces limitations and powers. The purpose of this article was to acquaint the audience with the limits and applications of this principle in Iranian law and to present a comparative study.

INTRODUCTION

The ultimate goal of any judicial system is to uncover the facts, as the discovery of the truth by the judge and the issuance of a verdict based thereon is the utopia of the judiciary system and the legislature. In every civil procedure, there are several governing principles that are necessary for the achievement of justice, the absence of which is clearly indicative of a flawed judicial system. One of the strategic principles of the judicial system is the initiative of the parties to the facts of the dispute. This strategic principle is accepted in the law of Iran and France as well as the principles of the transnational code of civil procedure. According to this principle, the facts must be stated by the litigants in the trial and proved by themselves according to the rule of "compliance of the responsibility to prove the facts with the responsibility of their expression", yet the role of the judge as a prominent figure of the trial is not a passive one, that is, it is not the case that judge only determines the winner of the case at the end of the trial and

has no role in proving the facts. otherwise, a fair trial based on justice will not be served. To achieve this goal, the Iranian and French judicial systems, as well as the principles of transnational civil procedure, developed by the Rome Law Institute and the American Law Institute to bring the world's legal systems closer together, are examined to provide a suitable background for cooperation between the litigants and litigation in connection with the proof and evaluation of the fact. This article examines Iranian Code of Civil Procedure and while comparatively studies the French Code of Civil Procedure and the principles of transnational proceedings to determine the role and position of the judge in proving and evaluating the facts presented by the parties of disputes.

1. Question of fact

A legal relationship between the parties to dispute is initially formed in the proceedings when one of the litigants brings the dispute before the court. Any civil lawsuit holds several facts that proving them concluded the lawsuit. The settlement of lawsuits by the judge and the issuance of a verdict is first of all subject to the separation of the precedents of the lawsuit (facts and laws) from each other, and hence correct inference therefrom (Ishraqi Arani et al., 2010, 276). A question of fact, or simply, a fact, refers to any event that has an effect. This event can be physical or mechanical, collective or individual, or in other words, any event regardless of its effect on laws and regulations or legal principles, so in this sense it is a notion referring the substantive facts as opposed to laws and regulations. Of course, there are other definitions offered for factm such as: “in a general sense, a fact or event is opposite of a law, which can indicate the material, economic, social or personal facts, from their description or legal consequences, including raw events and facts related to the judicial system” (Portahmasbi Fard et al., 2005, 56-57). A question of fact is a question whose answer concerns the investigation of a fact or event, or its verdict, regardless of the description of that event and finding the rule of law applicable to it. Accordingly, Questions and issues about a rule or verdict arising from the law are called questions of law

2. The legal basis for the judge's involvement in assessing the subject matter

In Iranian law, examining some articles of the Code of Civil Procedure reveals that the Iranian legal system has recognized the role of litigation in identifying and evaluating facts. Article 255 of the Code of Civil Procedure provides for the evaluation of the proceedings of the presumptions that “Information obtained from the investigations and examinations is considered presumptions, which may give the judge knowledge or confidence or contribute to it.” According to the semantic weight of the term “may” in the aforementioned article, it can be said that in our law, presumptions derive their credibility from the judge, and it is the judge who, by identifying them, may employ evidences such as local investigation and examination, or reasonably reject them. Nevertheless, it should be borne in mind that the judge's disregard for a given evidence must be justified reason-based and cannot be merely a matter of taste. Article 265 of the Code of Civil Procedure states that “If the opinion of the

expert is in clear contrast to conditions for which the expert is called upon, the court can dismiss the opinion." Article 265 demonstrates the judge's authority in identifying the validity of an expert opinion, which is one of the most specialized matters of the proceedings, and emphasizes his/her defining role in evaluating the evidence presented.

According to the Article 7.2 of the new French Code of Civil Procedure, which states that "The court may, among the elements presented before the court, even pay attention to fact which the parties have not explicitly referred to in support of their claims", it can be said that the trial has the initiative in identifying and evaluating the facts raised by the parties to the dispute.

Furthermore, Article 3.2.22 of the Principles of Transnational Procedure stipulates in a fashion similar to the French Code of Civil Procedure, the court may "Rely upon a legal theory or an interpretation of the facts of the evidence that has not been advanced by a party"

3. Intervention of the judge in the evaluation of facts

3.1. Before the start of the legal procedure

One of the features of the accusatory system, which is the oldest judicial system and hence the etymology, is that each person pursues his own accused, and the so-called litigation belongs to the parties. According to the Principle of Private Initiative, the initiative to proceedings in this system is on the claimant, and as such, the litigants have the right to initiate a dispute. Article 2 of the Code of Civil Procedure recognizes this principle, further providing that "no court may hear a case unless the person or persons concerned, or their lawyer or deputy or legal representative, have requested that the case be heard in accordance with the law." The privateness of civil litigation has given rise to the fact that a legal relationship between the parties only shapes when one of the parties takes the initiative and initiates the proceedings. These are the parties to dispute who initiate litigation according to their own motives, and essentially, the judge cannot initiate a legal relationship. The provision in Article 189, which states "If the court finds that the parties are not willing to compromise, it will instruct them to file a lawsuit, should not be considered an exception, because even in such instances, the judge does not initiate proceedings.

Article 1 of the French Code of Civil Procedure also provides that "only litigants shall commence proceedings, unless the law provides otherwise." Some legal articles, which are very limited in number, violate this principle and provide for cases in which a judge can initiate proceedings directly. In this regard, Article 375, paragraph 1 of a French Civil Law, which deals with educational assistance measures is noteworthy. It should be borne in mind that in the case that the prosecutor acts as the main intervention, that is, the subject of Articles 422 and 423 of the new French Code of Judicial Procedure, it is in no way a violation of the principle that the judge cannot initiate proceedings directly. In fact, judges of lower courts are not in the same bracket as judges of the higher courts (Gerard Kooshe et al., 2010, p. 183).

Paragraph one of Principle 10 of the Transnational Principles also refers to the principle of initiative. According to this principle, "the

proceeding should be initiated through the claim or claims of the plaintiff, not by the court on its own motion." Therefore, it is accepted in all advanced legal systems of the world to take the lead in initiating litigation.

3.2. During the trial

3.2.1. In questions and answers from litigants and witnesses

Article 92 of the Code of Civil Procedure of Iran states that "each of the parties to a dispute may nominate a lawyer to the court instead of themselves, but in cases where the judge deems the presence of the plaintiff or the defendant or both necessary, this is explicitly stated in the notice sheet. In such case, the called parties are obliged to personally attend."

Under French law, a French judge may, at any time in his or her discretion, summon the parties to a dispute for an explanation which he or she deems necessary for the progression of the dispute. Article 8 of the French Code of Civil Procedure provides in this regard that "the judge may summon the parties to give an explanation on a matter which he deems necessary for the settlement of the dispute."

In Iranian law, referring to the testimony of witnesses is the right of the litigants, and the judge has some authority in dealing with this evidence and in the process of proving the litigation. Having witnesses swear and questioning them is the responsibility of the judge in Iran. According to Article 238 of the Code of Civil Procedure, none of the litigants shall interrupt the testimony of the witness, but after the testimony has been given, the court may ask the witness questions related to the litigation. At the same time, the time to summon witnesses is chosen by one of the parties with the court, and the judge, according to Article 242 of the Code of Civil Procedure, "may summon witnesses at the request of one of the litigants, as well as if he/she deems appropriate." The limits and intervention of the judge in hearing the testimony of witnesses do not go beyond the extent as to the slenderest of his/her bias against or towards one of the litigants comes to mind. Moreover, according to Article 239 of the Code of Civil Procedure, the court cannot persuade or forbid the witness in testifying or assist him/her in the expression, as it only states the subject of the testimony, allows him/her to freely express the statements.

In French law, it is the court that conducts the hearing of witnesses and directs its questions to the witnesses. The litigants do not have the right to interrupt witnesses or to question them directly, the philosophy for which is to avoid parties in influencing the witnesses and steering the content of their testimony. If the need arises and the litigants rise questions that the judge deems important, he or she will personally ask the questions (Article 214 of the French Code of Judicial Procedure).

Clause 19. 3 of the principles of transnational proceedings stipulates that "the court shall determine the procedure and manner of offering the testimony of parties. In general, statements of litigants and witnesses are provided orally and expert reports are provided in writing. However, the court may, after consulting with the litigants, order that the contents of the testimony be submitted in writing first so that the litigants are informed before the hearing."

3.2.2. Command to submit the document

The second paragraph of Article 210 of the Iranian Code of Civil Procedure stipulates the obligation to disclose documents such that "No business may refuse to disclose or provide its books on the grounds that it does not have a book unless it proves that it is grossly lost or inaccessible. If the trader whose books are referred to refuses to disclose it and cannot prove the loss or lack of access thereto, the court can consider it as a positive evidence for the opposing party." Also, Article 220 of the same law obliges the person to whom the forgery of the document has been referred to, to submit the original document to the court office within ten days from the date of notification, and if the owner of the document refuses or fails to submit it to the office within the prescribed time, the document is excluded from the evidences he/she is allowed to refer to. As a result, if a trader fails to submit an organized book or does not provide it at the request of a party, he may be helpless against any kind of false defense and be deprived of his right, which is deemed a misuse of the legal provision in Article 210. Prior to the amendment of Article 210 in 2000, Article 302 of the Code of Civil Procedure of 1939 provided that the non-presentation of commercial books was a positive evidence, and the courts also used the phrase that they should consider it as an evidence of payment and have no authority to evaluate this evidence. "Only a few courts stood up against this injustice and used their discretion to evaluate such evidences in order to pay attention to the external reality against reputation-based assumptions and to clean the face of justice from these contaminations" (Katouzian, 2003, p. 338). Also, according to the Article 210 of the Code of Civil Procedure, the judge in principle must hold the businessman guilty of not presenting the commercial books, and the opposite, that is, the lack of right of the plaintiff, is something that must be proven.

Articles 132 to 142 of the French Code of Judicial Procedure provide for the possible imposition of a fine for delay in submitting the cited document from the refusing parties (Mohseni, 2016, 124).

Paragraph 3 of Article 21 of the Principles of Transnational Procedure states that "When it appears that a party has possession or control of relevant evidence that it declines without justification to produce, the court may draw adverse inferences with the respect to the issues for which the evidence is probative." The second paragraph of Article 16 from the same body states that "at the request of one of the parties to legal disputes, the court shall issue an order to disclose the evidences that are possessed by the other party or at its disposal. If reasonably necessary, the court shall issue the same order regarding the evidence that are in the possession of third parties or at their disposal. The evidences that are the subject of this court order must be relevant to the litigation, not confidential and secret, and it must be established that the aforementioned evidences are possessed by the other party and third parties or at their disposal. The opposing party or a third party who has been obliged by a court order to disclose the evidence available to them, may not object to this court order on the grounds that the said action is detrimental to their interests ..." The principle of the right of access to an evidence or document also has exceptions, one of which is stated in paragraph 1 of Article 18 of the Transnational Principles, that is, "The obligation of litigants and third parties to disclose evidence and other information does not include confidential or secret

evidences and information and other matters that are protected from disclosure." The observance of this exception in Iranian law is stated in Article 211 and to some extent Article 212 of the Code of Civil Procedure. Article 211 stipulates that "If it is not possible to present the document in court, or if expressing all or parts of it or publicly stating its contents in court would be contrary to public order or decency, public interest or the reputation of litigants or others, the presiding judge or the office manager as delegated by the judge pre-writes in the presence of the parties what is necessary and relevant to the dispute." Article 212 also stipulates that "... unless the expression of the document is contrary to the political interests of the country and to public order, in which case it must be notified to the court with the necessary explanation. If the court agrees, permission will be issued not to express the document ...."

3.2.3. In referring to an expert

Since the evaluation of facts is the responsibility of the court, it shall determine whether the judge has the specialized knowledge or not, and takes the necessary action, without priorly requiring the request of any of the litigants, just as their silence does not preclude a referral to an expert. So, the court may reroute to referral to an expert, if deems so logically necessary. Since the assessment of a judge's judicial knowledge is law-based, and not hence personal, the technical and professional knowledge of the trial judge cannot be decisive in non-legal areas, as the judge issues verdict based on law and not as expert of other discipline (Shams, 2007: Vol. 3, pp. 319-320). Regarding the application of the expert's opinion, Article 295 of the Code of Civil Procedure states that "if the expert's opinion is in stark contrast to the circumstances for which the expert is referred to, the court may dismiss the comment made thereby." This article demonstrates the judge's authority in identifying the validity of an expert opinion, which is one of the most specialized matters of the proceedings, and emphasizes his/her prominent role in evaluating the evidence presented.

According to the Article 293 of the French Code of Judicial Procedure "expert review is ordered only when examination of matters or advices are not sufficient for the judge." Also, pursuant to the Article 7.2 of the French Code of Judicial Procedure, the judge holds as the initiative to identify and evaluate the facts raised by the litigants.

According to Article 22.4 of the Principles of Transnational Procedure, "the court may appoint an expert to give evidence on any relevant issue which expert testimony is appropriate, including foreign law." According to the latter article, the court has the power to refer the matter directly to the relevant expert in cases where an expert opinion is appropriate. Moreover, Article 16.4 of the Principles of Transnational Procedure provides that ".... eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum" but there is no provision in the Principles as to how the expert opinion should be acted upon.

3.2.4. Consulting with third parties

Inquiries from informed third parties are now emphasized as one of the legitimate ways for the court to be aware of the truth. There is no legal article in the Iranian Code of Judicial Procedure in this regard.

Article 199 of the French Code of Judicial Procedure provides for consultation with third parties that "when the evidence for the testimony is admissible, the judge may hear declarations from third parties who are qualified from explaining the events in question and of whom they are personally aware. These announcements, whether written or oral, are based on written testimony or questioning of witnesses" (Mohseni, 2016, vol. 1, p. 136).

Article 13 of the Principles of Transnational Procedure also states that "Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third person with the consent of court, upon consultation with the parties. The court may invite such a submission. The parties must have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court." As can be seen, contrary to French law, the third party in the Principles of Transnational Procedure is more than only a person is aware of the facts that are useful for consideration (Ghamami and Mohseni, 2007, p. 113).

4. Cases in which the judge is prohibited from interfering in the proof of a civil lawsuit

4.1 Prohibition in determining the framework of the proceedings and giving evidence

One of the strategic principles of litigation is "The Principle of Initiative of The Parties in Civil Proceedings". According to this principle, which is one of the characteristics of the prosecution system, "the parties have control over the facts to the dispute and have the power to determine the elements of evidence" (Portahmasebi et al., ibid., 55, 56). Paragraphs 3, 4, 5 and 6 of the Code of Civil Procedure oblige the plaintiff to state his/her facts according to his/her purpose of appearing in court.

In French law, this principle is known as the is "Principe Dispositif", and is one of the strategic principles in litigation, and Article 6 of the French Code of Judicial Code provides for the right of litigation for the parties to the dispute, while Article 7 states that judges cannot base their decision on a matter that has not been negotiated.

The aforementioned principle is set out in paragraphs 3 and 4 of Article 10 of the Principles of Transnational Procedure. Paragraph 3 states that "the scope of proceeding is determined by the claims and defenses of the parties in the pleading, including amendments. Paragraph 4 also states that "A party, upon showing good cause, has a right to amend its claims and defenses upon notice to other parties, and when doing so does not unreasonably delay the proceeding or otherwise in injustice" It can be seen that in these two paragraphs, the issues of litigation, which include claims and defenses, are at the discretion of the parties, either at the beginning of the claim in the lawsuit or between the defenses in the claims.

4.2. Prohibition of obtaining evidence

Pursuant to Article 358 of the former Code of Civil Procedure (adopted in 1349), the court was prohibited from obtaining evidence for the parties to the dispute. With the enactment of Article 199 of the current Code of Judicial Procedure (adopted in 2000), the court's prohibition on obtaining

evidence for litigants has not been specified and may supposition that abrogation of Article 358 of the former law is a permission for the court to obtain evidence for litigants. Yet the more correct interpretation of Article 199 seems to be that the judge can initiatively employ legal evidence and there is no need to prior requests of parties to the dispute. Prior to enactment of Article 199 of the current Code of Civil Procedure, a judge could not have acted if one of the parties had not requested an expert opinion. However, after the approval of Article 199, the judge can refer to an expert or take the initiative in arranging for examination.

In French law, although according to Article 9 of the French Code of Judicial Procedure, each party to the dispute usually proves the things necessary to win their case, but in some cases under Article 10, if this proof requires one or more investigations, the judge can directly order this investigation. That is, in French law, in the absence of a request for investigative action by the parties, the court uses its jurisdiction to examine the usefulness of the investigative action. Accordingly, the French judge has wide discretion in his/her personal assessment of facts raised by litigants, as stated in Article 170 of the French Code of Judicial Procedure, and can, pursuant to Article 218 of the same code, request the hearing of the words of any person who, in his opinion, is effective in clarifying the truth. What has been said should not lead the reader to think that in French law the judge is allowed to obtain evidence which the litigants have not documented. Such a conclusion is certainly contrary to the principle of the dispositive and to the spirit of the French Code of Judicial Procedure, and is in particular inconsistent with its initial articles, which deal with the strategic principles of the proceedings. Article 7 of the new French Code of Judicial Procedure explicitly does not allow such an interpretation of the aforementioned materials. This article prohibits the judge against any encroachment on what the parties have provided as raw evidences for the proceedings. To compromise between this article and other provisions of French law that allow the judge to conduct the necessary investigations, it must be said that the court can only investigate the evidence within the data of the litigants with the purpose of clarifying their documents and assessing the accuracy and soundness of these arguments, meaning that it does not have the permission to obtain a new evidence that was not intended by any of the litigants.

Paragraph 2. 2. 22 of the Principles of Transnational Procedure allows the reviewing authority to “administer an evidence that has not been previously referred to by either party” Therefore, according to this paragraph, the investigating authority does not have the right to obtain a new evidence.

4.3. Prohibition of the judge from interfering in the description of the parties

It has already been mentioned that announcing the facts of the dispute is highly important, but it does not need to be described. For example, a plaintiff who is taking legal action under a contract does not have to describe the contract, which means declaring a legal relationship, for example, a lease, a mortgage, a deposit, a loss, a waiver or termination among others. In Iranian law, according to the judicial procedure, it is

enough for the plaintiff to claim a case and prove it, and the court, according to the legal regulations, will describe the facts if requested to do so, if necessary, and will have the necessary legal effects thereon.

"In French Law, according to Article 12 of the Code of Civil Procedure (paragraph 2), the judge must accurately describe the nature and actions in dispute or return the exact description to the nature and actions without referring to, by name, the litigants" (Shams, 2005, 28).

Pursuant to Article 3.2.2 of the Transnational Principles, the investigating authority may "rely on a legal theory or interpretation of facts or evidences not previously proposed by either party." The phrase " interpretation " therein implies that judges are not required to describe the parties.

CONCLUSION

1. In all litigation systems studied, in civil litigation, litigants play the key role. Proving the facts is a right and duty that the law recognizes for the parties to the dispute. The judge will rule on what he is asked to do, taking into account the evidence at his/her disposal and that have been proven by the parties. The court has no right to seek the evidences beyond the documents presented by the parties.

2. The judge is highly permitted to review the evidences that are admissible in principle. The role of the judge is essentially the evaluation of the evidence and facts expressed by the litigants and does hold the function of obtaining independent evidence.

3. Inquiry from an informed third party is now emphasized as one of the legitimate solutions to be aware of the truth by the French procedure and the principles of transnational procedure, and therefore the provision of such a solution is proposed in the Iranian procedure.

4. The legislature sought to increase the role of the judge in the field of evidence in 2000 amendments, but due to the lack of clear legal provisions for the strict implementation of Article 199, our legal system needs to be clarified in response to the increasing role of the judge in civil proceedings.

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