



Abusive Terms of Use (ToU): A Comparative Study of Common Law and Iranian Law

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Abstract

This general principle that past wrongdoings of persons in matters related to the dispute may result in the deprivation of their right to be heard is accepted in both common law legal systems as well as transnational soft laws, such as transnational commercial law and international arbitration law. According to continental European law, this principle is known as the principle of prohibition of invoking one's illegal acts, while according to common law, which is the origin of the legal rules related to this principle, it is known as the theory of clean hands. The theory of clean hands has received limited attention from legal philosophers, despite its moral aspect. The common law is well known for the famous expression, "whoever comes to the [court of] equity must come with clean hands". This theory needs to be justified in terms of its normative foundations, since denying the right to be heard is an unusual and strange reaction in law. Even if the claimant has committed wrongdoing, immorality or unconscionability in the past, the law generally respects the right of the claimant to be heard; further, legal actions are decided on the basis of the substantive and formal elements of the case and not on the claimant's past actions. The question that arises in this regard is why in some cases the claimant is denied his right to be heard for his past wrongdoings? When previous actions are related or similar to the subject of the current lawsuit, how can they be used to negate the claimant's right to be heard? This legal principle prohibits wrongdoers from bringing lawsuits that relate to or are based on their prior wrongdoings, and is not unique to the common law system. In Iranian law and Islamic jurisprudence, the prohibition of invoking one's own unlawful act has recently been brought up, and its basis has been justified. Thus, this study focuses only on the normative and philosophical foundations of this principle and does not address the legal conditions and effects associated with its application in a particular legal system.

This study attempts to answer the mentioned questions using a comparative study and analytical-library methodology, while also considering the philosophical foundations of the subject. The theories of "preserving the court's integrity" and "Tu Quoque" as moral foundations for the theory of clean hands are presented and analyzed based on that.



In contrast to what most authors believe, the theory of clean hands is not fully compatible with the concept of court integrity. This theory may in fact work against the moral integrity of the court in some cases. The defense of clean hands contributes to the preservation and promotion of the moral integrity of the court in many cases, however, the moral integrity of the court cannot be described as the main norm that underlies this theory. Accordingly, the norm of "maintaining the moral integrity of the court" is of little value, except in two exceptional cases: In cases where the moral integrity of the court is accompanied by the integrity of the judges, as well as when the moral integrity of the court directly impacts the people associated with and affected by the legal system.

Alternatively, "Tu Quoque" can be viewed as the basis for the theory of clean hands. In the field of law, the theory of clean hands represents the manifestation of the norm of "Tu Quoque". The norm voids the statements of their illocutory meanings. Consequently, expressions and statements lose their ability to create normative meaning as a result of the operation of this norm. Accordingly, it is possible that what the claimant says is normatively consistent with reality in such cases, and the counterparty has committed immoral behavior, and should also be blamed and protested against for it, but due to the fact that claimant himself has also committed similar wrongdoing, his expressions and statements cannot create normative meaning that can be attributed. The defense of clean hands encapsulates the legal principle that hypocrites are not permitted to place blame on others.

As part of the normative structure of the theory of clean hands, punishment also plays a significant role. According to the philosophy of punishment, the wrongdoers should be punished for their actions. The two norms (Tu Quoque and punishment) are present in all cases of clean hands. The normative theory of clean hands is based on these two norms. As the theory of clean hands is in harmony with the requirements of punishment and the Tu Quoque (as moral norms), it promotes the positive perception of the people of society regarding the courts and their legitimacy. One of the positive normative results of the clean hands theory is its positive effect on the reliability and integrity of the judicial system. It is important to take into account the deterrent effect of this theory (on potential future wrongdoers) when listing its effects. These results, which follow the theory of clean hands, can be seen as an answer to the question of what the theory's normative objectives are.

Keywords: Abusive Terms of Use, Conclusion of Terms of Use, Counteracting of Abusive Terms of Use, E-Services, Terms of Use.



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