

Will of Persons without Heir in the Iranian Law and Imamiyya Jurisprudence

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Abstract

One of the topics that its fate is not specified explicitly in civil law is the situation of persons dying without heir. This is a controversial debate among jurists and lawyers, but three theories can be drawn and investigated out of these controversies. The first group of jurists holds that the person without heir, like other people, is entitled to dispose up to one third of his property by will and no one, even Imam, has enforcement authority over the excess of one-third. The second group believes that in the case where a person dies without heir his property belongs to the state, but if he has disposed more than one-third of his property exclusively for charity his will is correct, but he has no right to do so in cases other than charity. The third category believes that a person without heir is completely free to dispose all of his property to whoever he wishes by will. It seems that with respect to the philosophy of one-third to preserve the rights of heirs, the current law, in the case of absence of such an obstacle, should take the third view as correct. The context of the civil law in the cases pertaining to the permission of the heirs to enforce the will in excess of one-third of the heritage also supports this claim.

Keywords: Person without Heir, Last Will, One Third of Legacy, Enforcement.

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The Purposes of the Shari'a and Its Position in the Inference of Legal Ruling

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Abstract

The purposes of Shari'a law are the goals pursuit by legislator to draw the benefits and to prevent the harms of His servants. The Purposes of shari'a are divided into the validity of importance, necessities, Hajiyat , and admirations. The preservation of religion, life, intellect, generation, and the properties of creatures are considered as the essential benefits. The jurisprudant, relying on the verses of the Quran, authentic hadiths, intellect and the conduct of the wise, infers the lawfulness of the purposes of shari'a. The Purposes identified in resources influence understanding and interpretation of legal ruling. Perhaps, the reason comprising the purposes can be used to prevent the absoluteness or generality of reasons underlying the judgment, or to reject the authenticity of some traditions contrary to the purposes.

Keywords: Purposes, Shari'a, Sharia Purposes, Wisdom, Cause of Ruling, Inference of Legal Ruling.

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Ziman and Civil Liability for Authenticated and Unauthorized Electronic Funds Transfer

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Abstract

An authenticated and unauthorized funds transfer is one of the most important risks in electronic banking. When an authenticated and unauthorized payment instruction is issued and the bank has no knowledge of the instruction being unauthorized, if that payment instruction has been recognized and confirmed in accordance with security procedures agreed upon with customer, the bank considers the instruction to be authentic and transfer the funds. Under such circumstances, does the bank or another person bear Ziman and civil liability? Depending on the payment method used for issuance of the payment instruction and whether the issuance of such instruction was due to the customer's fault or the bank's or neither, Ziman and liability for damages lies with the bank or the customer or both. This article reviews the concepts of authenticated and unauthorized payments, various categories of payment instructions based on authorization and authenticity, the legal basis of civil liability and consequences of breach of duty under the Iranian law and the U.C.C. The authors believe that in the case of authenticated and unauthorized payments, in principle when the customer has proven the unauthorized characteristic of the transfer, the bank shall bear the risk, unless it proves the customer's fault. Of course the customer should prove unauthorized transfer of the fund.

Keywords: attorneyship, delegation, legal basis, parliament membership, typology.

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Conflict of Testimonies to Prove Homicide

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Abstract

Testimony by two just men is an evidence to prove homicide. Therefore, there might be a complete or partial conflict of testimonies. First, when the contents of testimonies are in conflict with each other in which case the probative value of each is turned to the value of judicial circumstantial evidence. Second, when in proving the charge of murder, two legal testimonies reject the contents of each other. In fact, because such conflicts are not resolved, judicial courts are challenged by their negative social consequences. It is because of the fact that in Islamic Penal Code of Iran, the ruling of each imaginable case of conflict of testimonies to prove homicide or to identify the murderer has not been stipulated by legislator. Therefore, to remove this challenge thorough comparison of each case of conflict with different fundamental conflicts, general solutions might be provided to remove the conflict between two testimonies using the rules of conflict solving in the science of principles of jurisprudence. But since the judge is entrusted with the task of comparison of each solution with the different instances of conflict, he may choose and finally exercise an appropriate solution according to each instance of conflict in the light of the investigations of the present research which has been performed using a descriptive-analytical method of research. Therefore, the present article deals with jurisprudential, theological and legal principles of the aforesaid subjects regarding the evidences of conflict of two testimonies and how it is solved.

Keywords: Testimony, Conflict, Homicide, Evidences, Mutual Nullity.

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The Legal Process of Mortgage-Backed Securities (MBS) Issuance in Imamiyya Jurisprudence and Iranian Law

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Abstract

Mortgage-backed securities as an example of Sukuk have a special and unique place among Islamic financial instruments and they are highly welcomed due to their desirable features such as fixed profit, possibility to perform in cash and credit transactions, possibility of further sales because of its low risk and considerable efficiency in supplying the housing sector. One of the most essential measures for actualization and implementation of this financial instrument is understanding the quality of relationships formed in these securities. So, the main question of this article is that: "how are the judicial and legal relations between the elements involved in the issuance of mortgage-backed securities?" Thus, the present article, after giving a definition and history of mortgage-backed securities, mentions the elements involved in the process of converting bank assets into mortgage-backed securities and expresses hierarchical relations and interactions between them in order to answer the main question of this research through taking a judicial and legal approach after discussing these issues. It can be said briefly that the process of issuance of mortgage-backed securities is a combination of cash sale, credit sale, agency, debt sale, discount, and indefinite contracts which are interminglingly established between facilities recipient, originator, issuer (intermediate), sale agent, paying agent, bond holders (investors) and other agents.

Keywords: Converting Bank Assets into Mortgage-Backed Securities, Mortgage-Backed Securities, Installment Sale, Credit Sale, Discount.

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A Reflection on Gharar in Dowry with an Approach to End Al-Esteta'ah Condition

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Abstract

The experts take two different approaches to the nature of marriage contract. Some of the experts insist that the marriage contract is among commutative contracts and consider dowry in exchange for sexual intercourse that necessitate all conditions of commutative contracts including denial of *gharar*. In contrast, some of the experts, with respect to the divine nature of the family institute and the importance of intimacy and proximity between couples, reject it and believe that it is negligence to consider marriage contract a mere commutative contract. Therefore, the dowry is not considered in exchange for sexual intercourse and establishment of *gharar* makes no problem. Scholars like Ibn Barraj, providing concrete examples of dowry like teaching a *sura* of the Quran, insisted on the fact that the same (little) amount of *gharar* in dowry is not accepted and the name of the *sura* also should be mentioned. Therefore, it can be said that restriction of dowry by the condition that whenever man can afford (*End Al-Esteta'ah*) strengthen the doubt of *gharar* in such a dowry. The present article reviews *gharar* in dowry and asserts that even if *End Al-Esteta'ah* dowry is not challenged by the problem of *gharar*, actually it has no result except imposing administrative burden on the wife that is followed by administrative and social challenges for her.

Keywords: Marriage Contract, Dowry, Gharar (An Unknown or Uncertain Item of a Contract), End Al-Esteta'ah.

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Jurisprudential Investigation of Contentious Litigation in Non-Islamic Courts

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Abstract

In the case of authority and the possibility of referring to the righteous Muslim judge, arbitration and litigation against the unjust judge and non-Islamic court are not permissible. In this regard, several evidences including verses of the Quran, Islamic narrations, consensus and intellect have been relied on. But the main point arises where there is no possibility to refer to the righteous Muslim judge. In this case, is it permissible to suit arbitration or litigation process in unjust judges and international arbitration institutions? And in the case where a non-Muslim judge gives judgment in favor of a Muslim is it permissible for the Muslim to commit to that judgment? Jurisprudents have different views in this regard. Some of them consider it permissible to refer to international non-Islamic courts in the case of secondary situations like emergency, harm, and hardship. The present paper, taking use of descriptive-analytical method of research, investigates different views of the jurisprudents and the evidences for litigation in non-Islamic tribunals and studies four possible cases for obtaining the judgment by these courts.

Keywords: Lawsuit, Litigation, Arbitration, Unjust Judge, Non-Islamic Courts.

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The Provisions of Retaliation in Imamiyya Jurisprudence

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Abstract

According to the principles of jurisprudence, retaliation is a way of attaining financial rights. After the revolution of Islamic Republic of Iran, legislator did not pay much attention to retaliation. While, adhering to the jurisprudence, retaliation has been considered in many cases as a justifiable factor by judicial procedure. The legislator's inattention is due to the lawyers' concern about chaos being caused by establishment of retaliation institution. But a review of the conditions of retaliation will make it clear that this institution does not have a wide and irregular territory and it depends on the fulfillment of some conditions created according to the needs and requirements of the society and public order. For this reason, prohibition of crime is a condition of retaliation, thus causing any loss through retaliation is not accepted. The present article, using an analytical-descriptive method of research, studies and analyzes the provisions of retaliation in jurisprudence.

Keywords: Retaliation, Debtor, Attaining the Right, Ownership.

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A Review of the Jurisprudential Rule of Abandonment

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Abstract

This article aimed at improving and promoting substantive law to provide more financial security in society. Making a comparison between the opinions of different Shi'a jurists and the current views in the laws of other countries, the article studies the legal nature of abandonment rule and the fate of the property of the person who has abandoned it based on rational and traditional evidences as well as jurisprudential and legal methods. Only in the case where the owner possesses a trivial and unimportant property and there are sufficient indications that the owner will not return to his property and he has permanently abandoned it, his abandonment leads to the disconnection of the owner and his property. This theory can moderate excessive application of this rule in the society or the possibility thereof and protect the people's properties from irrelevant possession of the governments with the excuse and the claim of abandonment. The article also investigates the fate of abandoned property in the case of the owner's withdrawing from abandonment and the difference between desolated and abandoned property. In addition, it discusses the position of abandonment rule in the Iranian legal system and other legal systems and analyzes the arguments of current theories in this regard and makes judgments about them.

Keywords: Abandonment, Property, Rule, Ownership, Jurisprudence, possession.

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The Jurisprudential Ruling of Abuse of Urgency and Its Effect on the Contract

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Abstract

Contracts under the abuse of urgency have not been discussed in Jurisprudence as an independent subject. The jurists have discussed this issue in the book of foods and drinks, following the discussion on the permissibility of consuming (eating) another's property when in an emergency; five different theories are available about the ruling of the contract between the person in distress and the owner of the food. The theory of Detailed Adjustment of the Contract has been accepted and chosen with respect to jurisprudential evidences. To make the theories more clear, firstly the literal and jurisprudential concepts of duress and urgency will be presented. Next, five theories drawn from jurisprudential books will be discussed. Finally, by referring to related Hadiths, the chosen theory will be expressed, criticized, and explained with regard to jurisprudential foundations.

Keywords: Abuse of Urgency, Urgency, Duress, Contract of the Person under Distress, Contract under Duress.

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