

Evaluation of the Preference of Disagreement with Sunnis to Resolve Disputed Traditions (Case Study: Impurity of Wine)

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Abstract

Mediation of disagreement with Sunnis as one of preferred attributes of the disputed texts is sensible in many disputed rules. A group of jurists, tending to prefer disagreement with Sunnis and ascribing traditions in agreement with Sunnis to precautionary concealment, has found a way to resolve disputed texts. Purity and impurity of wine is among disputed matters that in spite of the traditions that indicate the purity of wine, the judgments of the majority of jurists have organized around the impurity of wine due to ascribing to precautionary concealment. This paper aims at evaluating the justifiability of using the preference of disagreement with Sunnis on the matter of impurity of wine and has followed up the position of this preferred attribute to resolve the disputed traditions about purity or impurity of wine. Nonconformity of criteria for disputed traditions in applying the preferred attributes specifically disagreement with Sunnis and disorganized thoughts in the matter of impurity of wine is the achievement of this research after wide investigation of the opinions of the jurists.

Keywords: Ascribing to Precautionary Concealment, Ascribing to Precautionary Concealment of the Traditions about the Purity of Wine, Traditions about the Purity of Wine, Disagreement with Sunnis, Impurity of Wine.

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Principles and Fundamental Rules of Jurisprudence Governing Negotiation

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Abstract

One of the recurrent issues within Islamic government is the resolution of international conflicts via negotiation. Explanation of the scope of negotiations with non-Muslim governments and commitment and adherence to that based on the principles and rules of jurisprudence is the missing area of research. Using a descriptive-analytical method, this study aims at explaining the nature and the effects of rules and principles of jurisprudence governing negotiation relying on the duty-oriented perspective. The findings show that the institution of negotiation is a necessary primary concept but not a secondary emergency one within the Shi'a jurisprudence. The jurisprudential principles and fundamental rules of negotiation including no-domination rule, fitness of behavior rule, the principles of honor, wisdom, and rational expediency indicate active but not passive negotiation. Active negotiation is rooted in duty-oriented perspective. According to this jurisprudential view, to fulfill the duties within critical conditions of negotiation with enemies, the Islamic negotiators should adopt soft and flexible tactics in the process of negotiation in order that non-Muslim governments cannot impose limitations and sanctions through situational planning.

Keywords: Negotiation Rules, Duty-Orientation, Diplomacy, Rules of Jurisprudence, Negotiation.

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Analyzing the Jurisprudential and Literal Position of the Letter *vāv* in the Verse 121 of the Chapter An'am

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Abstract

The Grammarians have considered three possibilities for the meaning of the letter “*vāv*” in the verse “*lā ta'kulū mim mā lam yudkar ismullahi 'alayhi va innahū lafisq*” (The Quran, 6:121): case, resumption, or conjunctive. Of course, the difference among these ideas has challenged the spiritual specification of the verse. Accordingly, this paper, using a descriptive-analytical method, has analyzed specifically the meaning of “*vāv*” in this holy verse. It was concluded that the pronoun in the sentence “*va innahū la fisq*” refers to “*akl*” derived from “*lā ta'kulū*” or to “no mentioning of” derived from “*lam yudkar*”. So, the holy verse does not aim to forbid eating of the *slaughtered* animal (*dhabīḥa*) known as *fisq*, but it aims to specify one example of vice. In this verse, vice means the *slaughtered* animal (*dhabīḥa*) is not lawful. In fact, the words “*va innahū lafisq*” explains the reason for unlawfulness of the *slaughtered* animal (*dhabīḥa*) that has been butchered without saying the name of God; because it is a vicious act and disobeying God. This meaning is matched only with conjunctive or resumption but not the case.

Keywords: *āyāt al-ahkām* (Legal Injunctions of the Quran), the Letter “*vāv*”, *Mojtahedin*, Semantics, the Word “Vice”.

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Jurisprudential and Legal Nature of Mother's Right of Representation in the Process of the Alimony Request According to the Family Protection Act (Approved, 2012)

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Abstract

One of the fabrications of Article 6 of family protection act approved 2012 is granting the right of representation to the mother in the process of asking for the alimony of the minor or incompetent child in a lawsuit. There are two different views regarding the interpretation of the article 6: some regard it as the creation of mandatory guardianship and some believe that the Article 6 means granting a kind of representation to the mother just like that of institution of the attorneyship or guardianship. Each of the views has different legal effects in the realm of the mother's responsibilities and authorities. The current paper, using a descriptive-analytical method, explains the nature and the principles of the mother's guardianship for seeking the child's alimony. The result of the paper indicates that the Iranian legislator does not confer the right of guardianship to the mother in order to prove the natural guardianship for the mother, but according to the jurisprudential rules and principles, including the principle of concomitance of the permission for object with the permission for its necessities, the current judicial practice, observation of the child's expediency and interest, it aims only to give the right of representation and the right to make lawsuit. One of the most important outcomes of this theory is that the legal effects of mandatory guardianship, including the guardian's right of seizure over the properties of the child, the right of guardianship being imperishable and immovable, do not affect this type of representation.

Keywords: Right to Make a Lawsuit, Family Protection Act 2012, Alimony of the Child, Mother's Right of Representation, Guardianship of the Mother.

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Comparative Study of Giving Gift to Judge in the Jurisprudence of the Five Islamic Schools of Thought

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Abstract

There is no disagreement about the recommendatory nature of giving gift. Now the question arises here as to whether it is permissible to give a gift to the judge considering his sensitive position. The present article, using a library and descriptive-analytical method, has established that the Islamic jurists are disagree on this matter: some of the latest Shi'a jurists hold that it is absolutely lawful. They believe that the narrations stating the unlawfulness of giving gift are weak and cannot be argued upon. In contrast, most of Maleki jurists have regarded it absolutely unlawful for the prohibition of what may lead to committing sin. Some other like Abu-Hanifah and his pupils hold that it is abominated; in their opinion, prevention stated in the Clear texts express abomination but not prohibition. Most of the earlier Shi'ite jurists, nearly all of the Shafe'i and Hanbali jurists, some of the Hanafi and Maleki jurists hold that it needs explanation and believe that giving gift to the judge in different conditions have different verdicts. It seems that this opinion is superior, and the criteria for explanation are the intention of the gift giver and the judge, the existence of former relationship between the judge and the gift giver, the gift giver's having a case before the judge, the existence of former history of giving gift to the judge by the gift giver, and the amount of the gift paid to the judge before and after being appointed as judge.

Keywords: Bribe, Jurisprudence, Judge, Five Islamic Schools of Thought (*al-madahib khamsah*), Gift.

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Philosophical Foundations of Waiver of Right in Islamic Jurisprudence and Western Law

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Abstract

The matter of waiver of right is raised in most of the legal disciplines. In order to assess and judge the accuracy or nullity of this legal act, different measures have been proposed like autonomy, efficiency (usefulness) and expediency. The root of these criteria must be explored in the discourse of "the philosophy of right". Therefore, it is necessary to deal with the philosophical foundations of waiver. This paper, reviewing the ideas proposed regarding the right in Islamic jurisprudence from one hand and the theories presented by philosophers and western jurists on the other hand, will identify and compare the criteria for the assessment of waiver of right. The Islamic jurisprudence reviews the matter within the issues pertaining to the right and judgment. The right in Islamic thought is analyzed and judged in the form of expediency. The theorists in the west have proposed different theories of right among which two theories of will and profit are more popular. According to the theory of will, the sovereignty of beneficiary over the subject of the right is the most fundamental attribute of a right. The theory of profit, by reducing the right to utility, makes the utility as the main reason for the right. From the viewpoint of Utilitarianists, the right is a means of public good and if the welfare of the community as a whole is required, then it will be permissible to sacrifice personal rights. Thus, in the waiver of right, the will of beneficiary is secondary. The study showed that the opinions of some jurists are consistent with the theory of will but the prevailing attitude in Islamic jurisprudence depends on the expediency that have some similarities with the theory of profit. The main difference is that the expediency in Islamic thinking has an inter-religion aspect but in the Western thought it has a humanitarian aspect.

Keywords: Waiver, Right and Judgment, Expediency, Theory of Selection, Theory of Utility.

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The Proviso of Succession in the Electronic Agreements

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Abstract

One of the issues and problems discussed in the electronic agreements is the proviso of succession between necessitating and acceptance. Because, according to some legal articles and jurisprudential viewpoints, the succession between necessitating and acceptance is necessary. On the other hand, it seems, at the first glance, that there is a gap between necessitating and acceptance and the proviso cannot be observed. This article, after studying the elementary basis for the necessity of succession and its background, collecting and analyzing all the reasons of this proviso and comparing them with the electronic agreement, and also after studying the existence of succession and the possibility of observing it in such agreements, has reached to this legal conclusion that, first, the succession between necessitating and acceptance is not necessary due to the insufficiency of the reasons of the proviso. Second, if the mentioned reasons are enough it does not include the electronic and written agreements. Third, in electronic agreement, even in Off-line form, there is a succession between necessitating and acceptance or it is possible to make succession. Therefore, according to all jurisprudential viewpoints, the electronic agreement is either totally correct or there is a possibility to contract such an agreement by observing succession.

Keywords: Electronic Business, Succession of Necessitating and Acceptance, Electronic Agreement, Succession in Contract.

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A Survey around the Primacy of *Hajj* Incumbency or *Nazr* (Vow) Incumbency in the Case of Their Conflict in Time (*Tazahom*)

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Abstract

One of the preferences in the matter of conflicting in time between two obligations is time primacy. An instance for this is the case of a person's religious vow to make a pilgrimage to Karbala in *Arafa*, before he can afford to go to *Hajj* pilgrimage, and after the vow, he becomes capable of doing so. Now, the question arises here as to whether he should make a pilgrimage to Karbala in *Arafa* or have a pilgrimage to Mecca and fulfill the *Hajj* obligation. Some jurists believe in vow primacy and rely on some reasons like the inability to fulfill *Hajj* in the case of vow, institutional agreement, the primacy of vow over *Hajj*, and Halabi's narration (*Sahiha*). Most of the jurists have judged on the *Hajj* primacy, although they have proposed different views; some of them believe in the nullification of vow, others believe that the subject is irrelevant, and others have judged on the primacy of *Hajj* based on the primacy of conditional obligation with innate rational ability over the conditional obligation with religious ability. Analyzing the two groups' reasons, this article approved the primacy of *Hajj* based on three reasons: (vow's accompaniment with God disobedience, necessity of permission for the vow, absence of religious permission for vow, and some *hadiths* about *Hajj*). The neglected point is that the "time primacy" is valid when there is no other characteristic, which leads to the preference of the later. Here, given the acceptance of the conflict and placing *Hajj* in the later position, due to other characteristics that makes *Hajj* more important, it should have priority over vow, because merely the time priority could not strengthen incumbency.

Keywords: Conflicting in Time, Primacy, *Hajj*, Pilgrimage, Time Priority, Preferable, Vow (*Nazr*).

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Criticism of Jurisprudential Verdict of Burial Night (*Horror Prayer*) in the Thoughts of Fourth Period (*Mota'akhhher Al-Mota'akhhherin*) and Contemporary Jurisprudents

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Abstract

Human being, who is terrified with any resonant voice, is suddenly confronted with thousands of unfamiliar phenomena upon his arrival to hereafter. In the narratives, this is interpreted as the first night of the grave. Prophet Muhammad (peace be upon him) solved the problems of dead person in this scary step of human life; he recommended that the survivors should give alms on behalf of the departed, while poor survivors are recommended to hold a prayer called “horror prayer” for the dead person. The principle of this issue does not exist in the second-period jurisprudence (known as “*motaqaddemin* jurisprudence” that lasted from 329 to 543 Hijri), and third-period jurisprudence (known as “*mota'khkherin* jurisprudence” that lasted from 543 to 940 Hijri) and it has been incompletely raised in fourth-period jurisprudence (known as “*mota'akhhher al-mota'akhhherin* jurisprudence” lasted from 940 to 1205 Hijri). Therefore, both poor and rich people are recommended to hold a “*horror prayer*” for the departed, so having or not having wealth is completely ignored. Hence, not only all righteous people, but also all jurisprudential books written in third and fourth periods, as well as all Islamic law books (*Taudhih Al-Masa'il*) written in the contemporary period consider the horror prayer as the only recommended deed for burial night. While studying historical-jurisprudential origins of this issue and analyzing the narratives and quotes by means of *ijtihad*, the current paper tries to examine the original tradition of Islam that is related to this sensitive step of human life. I hope that my paper is accepted by jurisprudential community, so the Islamic law books (*Taudhih Al-Masa'il*), speech of Islamic missionaries and deeds of righteous people can be reviewed also in this regard.

Keywords: Alms, Burial Night, Horror Prayer, Prayer for the Dead.

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