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(Maghalat va Barrasiha)

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The Jurisprudential Investigation of Safe Custody Consideration and Owner Supervision

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(Received: July 26, 2014, Accepted: April 18, 2016)

Abstract

Safe custody consideration and owner supervision are one of the very important issues in larceny and theft. If there is known to be safe custody consideration of the commodity supervised by the owner, the thief will be subjected to *ḥadd* punishment because of larceny. In contrast, if there is not known to be safe custody consideration and owner supervision, the thief will not be subjected to *ḥadd* punishment because there is no evidence to prove that larceny or theft perpetrated by breaking into safe custody. In view of the authors, since the criteria of understanding the safe custody is convention, the safe custody consideration and owner supervision will be considered as safe custody if the owner takes good care of his/her commodity.

Keywords: larceny, safe custody, owner supervision.

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This study has been extracted from postdoctoral criminal law research project approved by the Research Council of Mazandaran University. (Case study: Prostitution, Theft/ Larceny, *Muḥārebeh*, the crime of *Ḥirabah*, (a crime in Islamic law) or the perpetrator of *Ḥirabah*, Spreading Corruption, Murder.)

Comparative Analysis of Commercial Goodwill of the Landlord and Tenant Act 1376 with the Jurisprudence Theories

Ali Reza Bariklou¹

(Received: February 16, 2015, Accepted: June 19, 2016)

Abstract

Although in the Iranian statutory law the “commercial goodwill” is recognized in the landlord and tenant Act 1339 as “The right to business and profession and or the trade” and protected more in the landlord and tenant Act 1356 as “The right to business or profession or trade”, Islamic law experts’ renounced legitimacy of aforementioned right for the reason of non-compliance of this right’s conditions with the rules of Islamic law, specially, the principle of prohibition to take possession of other’s property without the owner’s consent. Therefore, the Guardian Council announced it as lacking the religious title. However, in the landlord and tenant Act 1376, the title of “The right to business or profession or trade” changed to the title of “commercial goodwill” and its legitimacy has apparently received attention; although legal aspects of this right and its conditions and the legal management of the relationships of the landlord and the possessor of the right have not undergone any discussions.

Keywords: right, commercial goodwill, tenant, landlord.

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Reputation and Compensation of Weak Hadith: A Glance at Wahīd Behbahānī's Point of View

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(Received: December 27, 2014, Accepted: June 19, 2016)

Abstract

Imāmī jurisprudence in its history has always faced with the fact that jurists have sometimes issued a *fatwa* relying on a weak *hadith* or acted based on such kind of *hadiths*. This discussion has been always followed by an argumentative challenge among them as to whether the reputation can compensate for the weak *sanad* (chain of transmission) of a *hadith*. All Imāmī jurists are not of the same opinion about it; according to some, "reputation" can compensate for a weak *hadith* and validate it. According to these jurists the companions' (*aṣḥāb*) refusal to act as per a *hadith*, would be effective in its invalidity, even if it had a reliable *sanad*. In contrast, those jurists who have not accepted the authority of the reputation or some of its branches have opposed the principle of "compensation of weak *hadith* by reputation". Wahīd Behbahānī is one the great jurists who has resorted to some forms of compensation of weak *hadith*. He has accepted practical reputation – on the condition of conformity with the general and indisputable principles – and popularity of *fatwa*, although adopted from the *fatwas* of contemporary jurists, as compensation of weak *sanad*, but he does not regard mere reputation a factor for compensation of weak *sanad*. He also believes that as the practical approval of companions compensates the weakness of a hadith and validates it, so also refusal of a hadith by the companions would cause its weakness. Reviewing the various groups of jurists on the question of "reputation" and the possibility of compensation for the weak *hadith* according to the reputation, this paper attempts to present Behbahānī's views on this issue in details.

Keywords: weak *hadith*, weak *sanad*, reputation, compensation of weak *hadith*, Wahīd Behbahānī.

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Fadak in the Mirror of Islamic Jurisprudence

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Abstract

The issue of confiscated Fadak is one of the important issues affecting political events and issues related to Islam and the Islamic rule that can be studied from different aspects. In this paper, the proof of legal issues related to the ownership of Fadak by Fatima Zahra (S.A.) has been touched upon. We use the principle of possession (*yad*) and based on the verses, hadiths and authentic documents, contemplated documentation in the parties, and according to the legal arguments of Fatima Zahra (S.A.) about Fadak and comparing them with the Islamic laws, prove that it cannot be based on the "*lā nūrath*" hadith which has lost its validity for its conflict with the Qur'an and the *sūra* of the prophets, Fatima Zahra was deprived of her right. This government's decision conflicts with the Scripture and tradition. Moreover, according to the available documentation from Fadak folder, the first caliph had no evidence as per claiming its ownership and the judgment is wrong in different aspects.

Keywords: *lā nūrath* hadith, Fatima, Fadak, principle of possession, ownership.

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A Research on Sources, Methods of Argument and Merits and Demerits of the Hanafite School of *Uṣūl*

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Abstract

The school of jurists or the Hanafites is one of the most famous schools especially among the Hanafites. In this school, questions and principles are derived from juridical minutiae deductively. Perhaps the tendency of these scholars to this school was the lack of reliable source from Hanafite scholars. The dawn of this school can be traced back to the third century. The most notable features of this school are: confirmation of the principles based on the minutiae transmitted from schools' leaders, the obligation to school in deduction, versatility and novelty of examples, deducing principles from juridical minutiae or altering them because of contradictory minutiae, making principles practical, and complexity of study. Weakness in method of deduction of principles in this school has caused this approach somehow to begin to become obsolete.

Keywords: the Hanafites, principles of jurisprudence, school.

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Relationship of Legal Patterns of Raising a Family with the Financial Rights of Couples

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Abstract

This article tries to analyze the course of legislation in this field in Iran, based on responses to patterns of legal relationship with the legal system governing financial relationships between couples. According to the authors, the financial rights of married couples in actual authority in the household targets parties and reflects the status of the couples in the power structure in the family.

The systems of financial responsibilities imposed on the financial autonomy of couples and families insist on even more to model systems of leadership in Family and share the couple's property and the division of financial responsibilities. With respect to financial rules in Iran in the past years, although Iranian legislator's conscious purpose of this provision apparently violated the social support systems of women in the country, it has willingly or unwillingly taken steps towards strengthening the role of permanent marriage prefecture.

Keywords: Couples financial rights, legal model of family management, model of family Department, participation model of family department.

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Indexes and Legal Rules Related to Human Personality

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Abstract

Human personality and law governing it is the subject of today's most jurisprudential and legal researches.

Due to personal rights of human personality, some people consider it as specific as possible. Therefore they believe in inherency of the said rights and consider no more transfer of rights as the primary rule while it is really necessary to have a review in relevant rules and specifications. This is because of any additional separation and accepting permanent conditions of them including: *human dignity, privacy, personal rights in relation to intellectual innovations, benefiting right from lineage, social status, obedience right* and so on.

While conforming different characteristics of "right" in the rights related to personality and given the type of relation of these rights to human personality, it was tried in the present study to believe in relinquishability or transferability in many of these rights.

Keywords: Personality, right, the right related to personality.

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Analysis of Indemnity (*Arsh*) Based on the Seller's Exchange Liability toward the Safety of Goods

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Abstract

Exchange liability is the liability and undertaking of both parties in fulfillment of the contract. As all parts of goods are at exchange liability of the seller, so the safety description of goods should be guaranteed by him, too. But the safety description is a secondary obligation that plays no role in conclusion of the contract and the contract will not be cancelled by it; instead, it changes the seller guarantee to pay for *arsh* (indemnity). As the buyer and seller undertake all subsidiary commitments, changing of an obligation will not be confined in the safety description of goods, but it can change the other obligations too. It can also explain the contractual obligation to repair the defective goods and expand the *arsh* into the other selling.

Keywords: *arsh*, goods repair, subsidiary undertaking, reduced price, exchange liability, damage, safety description.

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Review of the Concept of Intention and Consent Based on Jurisprudential Developments

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Abstract

Intention and consent is one of the most important legal debates in contract law. Since the era of Shaykh Anṣārī, the opinion of the majority of jurists was to distinguish consent from intention which has been followed by Iranian civil law and legal writers. But this separation has created some ambiguities in the law and jurisprudence. This study, after reviewing the history of change in the two concepts of consent and intention, and comparing juridical opinions, and preferring the viewpoint which believes consent includes transfer of ownership, challenges the distinction between consent from intention as is customary in the law and jurisprudence literature, and finally, shows that, according to the conventional view in the earlier jurists, civil law can be better understood and interpreted. If consent is considered as intention to create the nature of the contract, the contract would be valid if there was an intention to express the offer and acceptance, even though there was not any intention to transfer the ownership.

Keywords: contract, intention, consent.

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The Relationship between Human's Appropriateness of Appearance and his Justice in Shi'ite Jurisprudence

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Abstract

The role of appropriateness of appearance in discovering human's justice is one of the controversial issues among Shi'ite jurists. Some believe that human's appropriateness appearance is sufficient for his justice and we needn't search and survey about his interior attributes. Some of them believe that appropriateness of appearance does not reveal human's justice. While reappraising the jurists words and studying the proofs, this paper has proved that the evidences dealing the appropriateness of appearance including some traditions are of reasonable authority and well documented. Whereas, the opponent's proofs fail to be agreed upon, since designation of the tradition is not acceptable and the principle claimed is not valid. Therefore, one's appropriateness of appearance is sufficient for proving justice. Appropriateness of appearance that is arrived at after some accuracy and survey, in some ways distinguishes deceitful from non-deceitful.

Keywords: appropriateness of appearance, appropriateness of appearance and justice, justice.

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Liability Resulting from Damages for Loss of Profits in Vahid Behbahani's Jurisprudence Theory

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Abstract

Liability resulting from damages for loss of profits is a controversial issue in Islamic jurisprudence. The current consensus of opinion among contemporary jurists is based upon "lack of liability", because it is not true to name it damages or, if true, there is no need to compensate for any damages. Some Imāmī jurists, however, consider damages for loss of profits as an instance of "damage", supported by minor premise. They also include liability arguments which necessitate compensation, supported by major premise. Vahid Behbahani believes that "No Damage" principle, together with principles of waste, causality and Civil liability, is not only a separate basis for liability and civil liability, but this hadith can be independently cited in liability literature. This authentic hadith denotes that any losses, including the loss of profit, must be compensated.

Keywords: damages for loss of profit, liability, civil liability, contractual liability

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