

The precept of fear from enemy`s treachery in cease - fire (mohadana) with the comparative jurisprudence approach and its possibility of expanding

Mohammad Rasul Ahangaran
Mahdi Noruzi

Abstract

Fulfillment of an commitment and contracts is one of the vital principles in the Islamic jurisprudence. The question is that if there is fear about the treachery of an obligor in the contracts, can an obligee conceal them? The famous Shiite and Sunni scholars state that in the conditions of cease-fire which means a temporary compromise between the Islamic government and the infidels, with regard to verse 58 of anfal chapter, the Islamic governor can conceal the convention based on a pre-announcement when the unbelievers` treachery was frighten. But according to the chosen theory of this research, based on the existing stipulations in the mentioned holy verse, there is no permission of terminating the treaty; so when an Islamic state is frighten by the treachery of the enemy, it will throw the treaty against them, and pretend to conceal the convention which frighten them and also compel them undertake a permanent commitment or make them appear the practical break of their treaty. If the enemy knows this precept and Muslims` practice, the use of this enterprise will prevent the opposite party to terminate treaty without any knowledge and certainty and give an opportunity to them to secure the convention. In the end, the possibility of expanding the chosen theory to the all contracts and treaties of an Islamic state has been reviewed.

Key words: fear of treachery, cease - fire, conventions of Islamic state, treaties.



Restudying the requirements of marriage contract in terms of Shiite and Sunni jurisprudence and Iranian civil law

Reza Deghan

Sayyed Sajjad Mohammadi

Hassan Pourlotfollah

Abstract

Each contract has some different effects which one of them is inseparable and basic impact of a contract; the jurists and lawyers interpret it as essence of inherent contract. Since regarding the marriage contract whether permanent or temporary, in addition to its contractual aspect, also its ritual aspect is under consideration, recognize and identifying its nature is ambiguous, and has led profound differences among Imamiya and Sunni jurists and lawyers. Summarily, there are three famous theories in this regard; some Imami jurists and majority of Sunni jurists believe that sexual intercourse in its special meaning, is the essence of marriage contract; according to one part of the lawyers, establishing family is its nature. In contrast, some other Imami jurists have believed that the marriage ties are to be regarded as the essence of the marriage which it is inferable from the appearance of Civil Code, articles 1035 and 1102. Now based on past reviewing and researching the foundations of presented theories and exploiting the other documents, it seems that the third viewpoint has the strong grounds and more defensible in this regard.

Key words: essence of the marriage, essence of absolute of marriage, sexual exploitation, marriage ties, establishing family



The necessity of returning the statute of failure to maintain to the jurisprudence

Ismail Aghababaei

Abstract

The civil code and lots of the jurisprudential opinions have indicated the civil sanctions about the failure to maintain. Nevertheless, according to some other jurisprudential opinions, on the one hand, the criminal approach to failure to maintain have led the legislator to follow the policy of the aggravating punishment during the recent years, and on the other hand, bring to an end the punishment provided the consent of the complainant. This is while that the aggravating punishment for failure to maintain is unjustified in comparison with the other similar financial offences. Similarly, although based on the possibility of discretionary punishment for committing a prohibited act, the discretionary punishment for failure to maintain can be justified, in the jurisprudential precepts, with regard to evidence of preventing the vice (nahy 'an al-monkar), the period of permissibility of discretionary punishment is as long as the convicted person pays the maintenance rather than the time of announcing the claimant his consent. The apparent break of the jurisprudential precepts has led the statute to endanger the firmness of the family, meanwhile providing the grounds of abuse. Therefore, following the jurisprudential opinions, it is desirable that imprisonment punishment is to be terminated by the legislator.

key words: financial offences, criminal sanctions, failure to maintain, family law, forgivable offences.



An New Opinion on the Jurisprudential Precept of Usury in the informal Sale (Bay` Mo`atati)

**Mohammad Kaykha
Somayyeh Noori
Sayed Hosein Altaha**

Abstract

The process of the usury in the informal sale requires considering the different opinions of the jurists. Based on the content of some jurists' viewpoints, the usury is processed in the formal sale not in informal one as a bay` mo`atati). In contrast, another group have chosen the process of usury in the all exchanges including sale, compromise, and so on. In this paper, the answer to the basic question depends on reviewing the nature of sale against the exchange; similarly, according to a descriptive - analytical method, the issued opinions will be discussed and the argumentations are assessed. As a result of this evaluation, it can be distinguished as follows: during the transaction, if the parties' intention is that one of the two goods is going to be the price of another, this type of exchange can be regarded as a sale; whether in word or not, the title of the second one will be as an informal sale, and otherwise, the mentioned transaction will be titled as an exchange. Therefore, the cited evidences of the followers of processing usury in the all exchanges (whether verse 275, chapter Baqara, and the traditions indicating the prohibition of usury and so on) absolutely include formal sale and additionally, informal sale. Meanwhile, there is usury in the exchanges in which the conditions of usury are processed.

Key words: usury, sale, moatat, exchange.



Compensation of Loss of Prospective Profits Caused by Payment Delay in the Banking System

Sayyed Amr Allah Hoseini

Abstract

One of the banking system's problems is the delay of customers' repaying the installments of facilities at due date which causes to increase the bulk of the non current claims and the damages caused by this problem. In Iran's banking system, the penalty clause is the only basis of the compensation. This theory is faced by the usurious problem. In seeking an alternative tactic, the researchers have given some suggestions. Based on the evidence of "no injury and no loss", the liability of loss of prospective profits is one of these tactics; because, due to the delay of repaying the debt, the banks will lose their opportunity to using the capital, and acquiring its probable benefits. This issue needs to be proven by two subjects: the first is the positive role of no injury and no loss, and the other is to be loss of lack of profit; because whether the rule "no loss" is including the loss originated by the lack of profit, there is disagreement. Similarly, on the assumption of proof of this fact, whether the lack of profit is considered as the loss or not, is a serious disagreement of the jurisprudents.

With passing these two theoretical obstacles, this paper has tried to take a step towards the plan of the problem; specially, it is with due attention to the particular situation of the banking system in which the loss of profits acquired by the delay payment is very considerable, and the mentioned solution is not faced by the usurious problem too.

Key words: Hadith "no loss", loss of prospective profits, damage of delay payment, Islamic banking system.

A New Pattern for Studying the Structure of Jurisprudence (Fiqh)

Mohammad Hadi Yaqubnejad

Abstract

For its external strength and reconstruction, Islamic jurisprudence or fiqh is depended on some elements and requirements that one of them is its logical structure and organized categorization: a structure that is able to organize a science with such an extent, clarify the position of any problem, make gaining its discussions easier and facilitate understanding its subjects, accept previous and past legal propositions of fiqh with its extendable network, and similarly, operate to various saves and searches and do specially the functional topic and network searches according to the development of the new instruments.

The main question is that what is the suitable tactic of a organized morphology and logical categorization of fiqh?

In this paper, morphology of fiqh based on an formulating the terms, and its effect on representing the logical structure of fiqh as an essential strategy is considered. Also, with an review of the current classifying the fiqh for its deviation, a model is suggested.

Key words: knowledge of jurisprudence, classification, structure of fiqh, system of terms, Thesaurus.

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