

Abstracts

Factoring in Islamic Banking System

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Today, factoring is one of the sources for financing in banking law. After entering in the legal literature of banking system, it has had a special importance. Factoring is a contract which the debt is bought less or more than its nominal value from creditors by the debtor or third party. There is a great disagreement about its legal status in Shia jurisprudential literature which the attitudes of the well-known Shia jurists which have been considered by the legislator as a source is the validity of the factoring contract in most cases and types. The factoring contract can be applied in many cases in banking operations without usury: credit contracts which contain the most majority banking operation in these days and in the form of factoring, they can be made completely. Bank cards, bank deposits and bank loans can be realized by factoring in banking operations without usury as it does not face any legal and divine law (shariah) problems. Letter of credit discounting and forfaiting are those of are those of sources for financing for business men which they can be realized.

Keywords: *Banking law & regulation, Credit contracts, Bank loans, Bank cards, Factoring.*

The Reinvestigation of the Evidences of the Lawlessness of Inclusion of Khiyar al-Shart or Stipulated Option in Unilateral (One Sided) Contracts

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Many of Islamic jurists (fuqahā') think the lack of lawfulness in the process of khiyar al-

shart or stipulated option in unilateral contracts and for proving this, they have established aspects which all of them contain blemish (weaknesses). Their most important reason is ijmae (consensus) which proving and extending it to all unilateral contracts faces doubt. Therefore, these reasons cannot prevent the impact of the general exigency of stipulated option; the lawfulness of what it is not prohibited by the intellect and Islamic law. The principle of ibaha (permissibility), the principle of validity of contracts (the presumption of law is that all contracts are valid unless proved otherwise) and autonomy which are the lawfulness (authorization) of inclusion Khiyar al-Shart or Stipulated Option in Unilateral (One Sided) Contracts. Therefore, it is proved to leave these reasons rationally, conventionally and Islamic jurisprudence law (Islamic religious beliefs). Of course, khiyar al-shart or stipulated option does not proceed in some unilateral contracts because of the obstacles. Therefore, neither from the point of proving or absence of it, the universality of the process of khiyar al-shart or stipulated option in unilateral contracts is not valid (true). But the criterion in this issue is the harmony of the reality of unilateral contracts and its effects with the process of khiyar al-shart on it.

Keywords: *Khiyar al-shart or stipulated option, Unilateral contracts, The generality of stipulated evidences, The legality of avoidance.*

The Nature and Position of Nikah (Marriage) Contract in Onerous and Gratuitous Contracts

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Contracts divide in to onerous contracts and gratuitous contracts from one aspect. Every of them have its specific effects which it cannot be necessarily extended to other one. However, some contracts have exclusive and unique characteristics and aspects which make their role in onerous and gratuitous contracts face ambiguity. The present paper with regarding the special position of nikah (marriage) contract is going to study the nature and effects of this contract in circle of inclusion of onerous and gratuitous contracts. What cause doubtfulness on relationship between marriage contracts with onerous contracts are the extension of some legal acts such as dowry, alimony, lien in marriage and the separation of

the temporary marriage and permanent marriage. The doubts which are established about this, it cannot be completely adduced to be the marriage contract onerous. To analyze the nature and effects of it, it should be surveyed scrupulously and its important aspects should be studied. Because of these doubts about the quiddity of the marriage contract from the point of being onerous and gratuitous, it is possible to explore another type which has been discussed in this note.

Keywords: *Onerous contracts, Gratuitous contracts, Nikah (marriage), Dowry, Alimony, Lien in marriage, Article 1082, 1092 of Civil Code of Iran.*

The Analysis of Transit Problems of the Prohibited Commodities (Items) to Non-Muslims (Infidel) in Imami Jurisprudence

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After presenting the importance of the transit industry in international business and its profits for countries, this paper has paid attention to two Islamic jurisprudential and scholastic (theological) principles; the liability of infidels to the ten Ancillaries of the Faith (*furūḥ ad-dīn*) and the prohibition of help in sin as the important problems for business and transit of the prohibited items to non-Muslims. In the belief of the integrity of the first principle, the transit of the prohibited commodities (items) in Islam to non-Muslims can be a proof of help in sin and it is prohibition consequently. Firstly, in this paper, it has been in doubt and uncertainty the integrity of the first principle and has been reinforced the theory of the absence of *taklif* (a legal charge or obligation) to perform the ten Ancillaries of the Faith (*furūḥ ad-dīn*) and secondly, if the acceptance of the attitude of the well-known jurists about non-Muslims' *taklif* (a legal charge or obligation), it is thought that the effectiveness of Islamic ordinances and duties is impossible to them. Then with adding the approved texts, the issue of help in sin in transiting prohibited commodities is invalid. Consequently, help in sin cannot be counted as a problem for transit of prohibited commodities.

Keywords: *Business, Transit, Prohibited commodities, Non-Muslims' taklif (A legal charge or obligation), Help in sin.*

The Islamic Jurisprudential Assessment of Lawfulness of Issuing Writ in Condition of Evidences

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One of the provisional remedies is writ which is one of precautions policies to avoid infringing on the rights of quarreling parties. In the civil procedure of Iran, based on writ and for guaranteeing the right of Plaintiffs, the defendants' property itself or equal to it has been seized and avoided to transfer. In the criminal procedure, after informing the accused and the enough evidences for protecting the possibility rights of one of quarreling parties, the writ is issued during the procedure. Forfeiture of recognizance, bail and imprisonment of defendant are those of its cases. In the texts of Islamic jurisprudence of Kitab al-Qada' (the Book of Judgment), it has been pointed to the obligation of surety and imprisonment of defendant in the condition of evidences which it should be stated as the Islamic jurisprudential principle of writ. In the civil procedure, one of the provisions for issuing writ is that the claim (a legal demand) should be definite and absolute. According to this, the question is asked if it is lawful (permitted) or not for judge to issue writ during lawsuits and preparing witness and during presenting Muslim witness till the righteousness of them. This research with analytic and descriptive way has presented this theory that if the witness is absence, the primary law is lawlessness of issuing writ. But in the rational fear of plaintiff's loss, the primary law is set aside and the issuance of writ is lawful and perhaps necessary. In the condition of the ignorance to the justice of witnesses, the issue is the case of interference of rights and should be issued writ to be considered less loss for both quarreling parties.

Keywords: *Writ, The obligation of surety, The absence of evidence, The righteousness of evidence.*

The Islamic Jurisprudential and Legal Examination of the Executive Guarantee of the Violation of the Negative Condition

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Clauses in contracts is one of the most important issue of the law of the contracts and in reality, it is an emergence (form) of autonomy (the ability of the person to make his or her

own decisions) in the contracts. One of these clauses is the condition about performance of an act which is determined in two forms: from one side, positive and negative and from the other side, material and legal in the contracts. In the Civil Code of Iran, the legislator has specified on the condition of positive and negative act in Articles 234 and 237 but it has not specified on the condition of material and legal act. It has also stated the violation of the negative and positive condition in the Civil Code of Iran in Articles 237 and 239 which determines that there are no differences between the executive guarantee of them in apparent. This article is going to answer this question that if the executive guarantee of the violation of negative condition is the same as the executive guarantee of the violation of positive condition which has determined in Articles 237-239 or it should be looked in the other executive guarantee. For answering to the mentioned question, it has tried to see the issue from the view of the legislator with considering the instances of the violation of the negative condition in the civil code of Iran and it has been studied from the point of the Islamic jurists and law scholars and Precedent (judicial precedent) and lastly, the intended idea and its reasons which are the right of the revocation of the person to him the promise is to be made and the legal right to claim compensation has been implied which it differs from the executive guarantee of the violation of positive condition.

Keywords: *Null (Invalid), Condition about performance of an act, Positive condition, Obligation, The right of the revocation, To claim compensation.*

Studying the Effects and the Ordinances of the Revocable Divorce (Raj'i) with Considering the Legal Status of the Divorced Woman

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After the revocable divorce (raj'i), until the husband has the right to take back the wife, the woman and man have a special legal status from the legal point. From one side, the divorce has established but it seems that this divorce has no effect in the relationship between husband and wife and both have rights and duties toward each other. From the other side, if man does not use his right to take back the wife and the period of it comes to end, the divorce has put its impact and results separation. In Islamic holy law and consequently in the positive law of Iran, during this time which man can take back to his wife, man and

woman have rights and duties toward each other. Because of these duties and rights, some Islamic jurists think that the divorced woman is considered as the wife for the man and there are no differences between the divorced woman and wife. Therefore, all effects and ordinances related to the wife are for her. Some other jurists believe that she is his wife but some rights and duties of wife extend to her. Each of these attitudes has its special consequences for the divorced woman. After studying, investigating and thinking and with regarding faults for each ideas, in spite of being accepted by the law of Iran and with paying attention to articles 1120, Article 8, clause 2 of the non-litigious jurisdiction act and Article 38 of Iran's Family Protection Law codified 1392, it seems that the legislator has accepted the attitude of the divorced woman being the real wife based on ruling. But the divorced woman being the real wife is close to reality and expediency in both effects and the reasoning of such ordinance from the view of the holy law giver which are the coherence and disruption family system.

Keywords: *The religious ordinances, Effects, Legal status, The divorced woman who the man can take back to, The real wife, Wife based on ruling.*

Criteria for Evaluation of Damages Due to the Breach of Capital Investment Contract in Islamic Jurisprudence and International Arbitration Precedent

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The standard of compensation of damages has an important role in the evaluation of damages and its remedy in the field of international capital investment contracts. An important question in the case of the breach of international obligations or breach of contracts from the part of country in which the investment is done, is whether it should pay the damages thoroughly or partially? In another word, for the evaluation of the damages there are two methods. One is that the foreign country should be supposed in the situation that the contract was not broken and the benefit which would be obtained is counted. The other way is that only the losses that really it faces is regarded? Up to now, courts of arbitration have not accepted a single standard to asses the losses and many accepted the

same norm which is the standard to evaluate the damages in the case of dispossession. That is in the case of breach of the investment obligations perfect compensation and in the case of breach of the investment contract partial one should be done. It looks as if Muslim Jurists mainly accepted payment of partial damages.

Keywords: *Compensation, Damages, Standard of evaluation, Arbitration, Investment.*