Abstracts

Jurisprudential Principles of Article 23 of the Family Protection Law through Comparative Jurisprudence

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According to Article 23 of the Family Protection Law of 2012 (1391 in the Solar Hijri calendar), couples must provide the necessary certificates for infectious and dangerous diseases before marriage while undergoing medical tests. In the jurisprudence of Islamic religions, there is a difference of opinion among jurists regarding the jurisprudential ruling of such experiments. Some hold to the reasons such as the traditions narrated from Imams, the rule of prohibition of detriment, the necessity of obedience to the laws of the

Islamic government, logical and consistent usages (usages of the wise) and so on. On the other hand, others by rejecting the above view and holding to the prohibition of the marriage contract and the conditions for its validity, and some narrations have preferred the non-obligatory of it. Based on the findings of the present article, which is done in an analytical-descriptive manner, it can be concluded that although due to lack of explicit text, the necessity of such experiments cannot be accepted as the primary rule and if there is a need for dangerous diseases such as AIDS and… which causes the infection and destruction of the person and the health of the people of the society, performing these tests in suspicious cases, in order to observe social interests, is obligatory due to the secondary rule, but in other cases, although testing is preferable, but not legally obligatory.

Keywords: *Marriage, Medical Tests, Dangerous Diseases, Infectious Diseases, Article 23 of the Family Protection Law.*

Terms and Conditions of Transfer of Lease Agreement to New Tenant in Iranian Jurisprudence and Law

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The position of the contract that is obtained for the parties to the contract is transferable in some cases, so that one of the parties to the contract leaves his position to a third party and withdraws from

the contract, which means that the transferee replaces the contracting party and has (enjoy) all the rights and obligations arising from the contract for the contracting party. One of the contracts in which the legislature has provided for the transfer of the contract is the lease. When the tenant transfers the lease to a non-tenant, the rights and obligations arising from the contract are transferred to the transferee (new tenant) and the new tenant replaced by the first tenant. Regarding the transfer of the contract; The Law on Landlord-Tenant Relations, enacted in 1997 (tenant and the landlord act Relations of 1376 in the Solar Hijri calendar), has a similar view in accordance with the Civil Code, but the Landlord-Tenant Relations Act, enacted in 1956 (1356 in the Solar Hijri calendar) has provisions considered by legislator which are contrary to the provisions of the Civil Code, in such a way that considers the transfer of a lease to a new tenant is subject to the stipulation of this right in the contract and the permission of the owner and the contractual silence is not permissible to do so. The jurists believe that if the tenant has not been explicitly permit to transfer or deliver the benefits to the tenant and we doubt whether the tenant can transfer the leased interest to a non-transferee, the fact that the condition for obtaining a benefit (executing an interest) has not been conditioned is seemingly that there is no argue for the permit of transfer. The most important effect of the transfer of the lease is the right of the replacement of transferee, in which case the rights and obligations of the original lease are granted to the new transferee. Therefore, two important effects of a lease contract are the transfer of rights and authority and the other are the obligations arising

from the lease. The present article examines the conditions and the effects that this transfer has on the relationship between the landlord (lessor), the tenant and the new tenant, and considers this to be possible on the basis of the contractual position and considers an independent legal nature for it.

Keywords: *Rental Contract Transfer, Contractual Position, Effects, The Replacement of the New Tenant.*

The Concept and Basis of Arsh's (Compensation Specified) General Theory in Contracts with Emphasis on Its Economic Analysis with Comparative Study

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Guarantee of legal performance is one of the important issues of contract law. In explaining this guarantee of contractual performance, economic analysis can have a definitive role. One of these guarantees of performances, which has been presented as a branch in Imamiyyah jurisprudence, is the "Arsh" (compensation specified) institution. It seems that Arsh (compensation specified) can be proposed as a general theory. In this article, we have tried to analyze it economically in addition to proving Arsh's (compensation specified) general theory. It has also been comparatively compared and analyzed -with a bit of tolerance- under the heading of the same obligation or claim for damages in American law. The research

method is also library and has been referred to internal and external sources with emphasis on jurisprudential sources. The results of this study are that the general theory of Arsh (compensation specified) was refined on the basis of classical and modern economic theories. In fact, it can be said that Arash's general theory can be a combination of Pareto's ethical theory of efficiency and the priority of compensation for doing the same obligation (as an almost moral theory) and the objective theory that is in the field of contractual ethics.

Keywords: *Arsh (Compensation Specified) General Theory, Arash Economic Analysis, Pareto Efficiency, Compensation.*

A Jurisprudential and Legal Study of the Effect of Termination Compared to Previous Contracts

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Traditionally, one of the distinguishing features of termination and annulment of a contract is considered to be that annulment makes the contract ineffective from the beginning, and termination has no effect on the past and makes the contract ineffective for the future; but the problem is that in Imamiyyah jurisprudence and current law, the issue of the ineffectiveness of the contract is a rule compared to the past and can be cited in many cases or not? And if there is such a rule, what are the exceptions to that rule? The present jurisprudential and legal article shows that contrary to the law of countries such as France and Egypt, in which termination has a regressive effect, in our legal system, as a rule, it can be said that the termination term refers to

the future and is ineffectual to the previous contracts; however, this rule, like many other rules, is not immune from particularization, and in many cases, such as subordinate contracts, secondary contracts, some businessmen transactions after the conclusion of the composition contract, as well as transactions following the conditional (optional) sale, the termination of the main contract compared to contracts which concluded after the main contract and before termination have an effect and, as the case may be, cause the dissolution, invalidity or annulment of the mentioned contracts.

Keywords: *Termination, Annulment, Regression Effect, Imamiyyah Jurisprudence.*

Rental Transaction by Conduct (without Using Words) from The Perspective of Iranian Jurisprudence and Law

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The rental contract in jurisprudence and legal regulations is an ownership (proprietary) nature, so in rental transaction by conduct (without using words), the conduction of such a nature is discussed with external acts. Most jurists do not consider a transaction by conduct (without using words) to have an ownership (proprietary) effect, and as a result, they do not consider the sale and rental transaction by Conduct (without using words) which cause the transfer of benefits and the object of sale. In the lease of objects, according to Article 468 of the Islamic Penal Code, it seems difficult to accept the

rental transaction by conduct (without using words), and it can be said, according to Article 494 of the Islamic Penal Code that rental transaction by conduct (without using words) has not been accepted. In the Law on Landlord-Tenant (tenant and the landlord act) Relations of 1997 (1376 in the Solar Hijri calendar), the method of writing legal articles is such that it should be ruled that the rental transaction by conduct (without using words) not valid. Although, in other cases, the rental transaction by conduct (without using words) has not been explicitly accepted, based on the absoluteness of indications, and according to the various theories that have been proposed and raised regarding the absoluteness of the contract form, it is possible to rule on the validity of the rental transaction by conduct (without using words) in doubtful cases.

Keywords: *Rental Transaction by Conduct (Without Using Words), Lease (Hiring) of Objects, Rent of Persons, Doubt in Rental Transaction by Conduct (Without Using Words).*

A Reflection on the Theory of Adequate Cause with Emphasis on Iranian and Common Law

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The criterion for determining the responsible cause is different in different perspectives. The actus (material) view identifies the responsible cause solely on the basis of criteria such as the time of creation of the cause; In contrast, conventional causal perspectives provide normative criteria for identifying the responsible cause. The

cause, in proportion to the criterion of the predictability of the damage, explains the responsible cause in such a way that there is an appropriateness between the cause of the damage and the type of damage. Shortcomings The ability to predict damage is a criterion which is also used in the position of guilt detection and is also used to limit the level of responsibility in terms of some fair (equity and impartiality) considerations; Thus, it is necessary to explain the functions of this criterion in different positions. The approach of the Islamic Penal Code, enactment of 2013 (1392 in the Solar Hijri calendar), as the latest indicator of the will of the legislator, includes the obvious features of the appropriate cause. Criticisms of this approach are like the criticisms that have been made in Common Law, the realists have objected of appropriateness cause. It cannot be the cause in the legal world as an abstractive subject of merely mechanically, therefore the set of factors which cause the identifying of responsible cause has material and immaterial aspects. According to this study, the criterion of the ability to predict the damage is considered as an immaterial aspects of legal cause.

Keywords: *Appropriateness Cause, Possibility of the Prediction of Damage, Legal Realists, Guilt.*

Determining the Scope of the Principle of Contractual Freedom in the Light of the Theory of Rule and Right

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The limiting factors of the principle of contractual freedom include the laws of mandatory, public order, good morals, and persons cannot compromise unlike them. According to the jurisprudential principles and legal circumstantial legal evidence such as Article 1295 of the Civil Code, public order and good morals must also be found in the laws. Principally, it is not mentioned in the law whether or not the law is complementary (supplementary) or mandatory, and the interpretive opinions of jurists are often not helpful. From the jurisprudential point of view, the nature of the limiting factors of the principle of contractual freedom can be analyzed by the rule and the nature of the supplementary rules with the right. It is not always enough to refer to jurisprudence to determine the right or ruling of the issues agreed upon by individuals. Certainly, the jurists have come up with solutions for recognizing the right and ruling in mistaken cases. According to the jurists in mistaken cases, the principle is neither about the truth of the doubtful case nor its verdict, and according to the principle of non-existence, the existential effects of truth and ruling should be taken away from it and the transportation, transfer, extinctive and agreement against it should be nullified. In this case, due to the similarity of the right and the verdict, if the person wants to have an obligation for the application or omission of the mistaken case, which is their common feature; must consider certainty case; which is the necessary conditions for commitment to the principle of permission and authorization. The result of the execution of the principle and the mentioned way of agreeing on the mistaken case is not the principle of complementary (supplementary) or mandatory but

rather indicating the matter between the two things that are doubtful.

Keywords: *Right, Verdict, Free Will Principle, Principle of Freedom of Contracts, Principle of Voluntarism.*

A Comparative Study of Refusal to Accept Rights in Iranian Law, Imamiyyah Jurisprudence and Principles of European Contract Law

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The refusal of the acceptance a right occurs when one party or a third party in a contractual or non-contractual relationship wants to surrender the right to the other party but the other party refuses to accept it except in legal cases, so legislators to protect the other party, that confronted with the refusal of the other party, offering solutions to compensate for his/her losses (damages). In this study, we consider the solutions presented against the refusal to accept the right in Imamiyyah jurisprudence, the Iranian legal system and the principles of European contract law, and by explaining these issues, the similarities and differences of the solutions presented in these three legal systems are studied. The examination of the rules provided for in these three legal systems shows that Imamiyyah jurisprudence and the principles of European contract law tend to apply to self-help sales (non-judicial) institutions, but in the Iranian legal system, reference to the judiciary is accepted as a principle.

Keywords: *Refusal, Right Acceptance, Handing Over or Maintaining of Refused Property, Self-Help Sales.*

Critical Reading of the Rule of Obligation (Pacta Sunt Servanda, Eghdam or Necessity Rule)

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The rule of obligation (Eghdam or Necessity Rule), according to one of the relatively common readings (for example: Al-Ḥillī 1384 AH and Mostafavi 1412 AH) is responsible for regulating the relations of Shiites with non-Shiite Muslims (and according to a quote; all non-Shiites, both Muslims and non-Muslims) in cases where they believe a ruling opposes Shiite view and that ruling is in the interest of the Shiite, which in this case Shiite oblige that person to his/her non-Shiite view. This article, while examining the definition, scope and arguments of the jurisprudential rule of necessity (Eghdam), according to two elements: “non-Shiite side” and “benefit of the Shiite side” from the point of view of this famous reading, criticizes the arguments of this rule and with fundamental uncertainty in it, express some considerations including, the inference (conclusive) of multiple and unequal legal systems in domestic law, the separation of nationals to each other in private international law and incompatibility with the spirit of international custom and treaties in public international law. Although this reading of the rule is also opposed by contemporary jurists, the fundamental legal reasons presented in this article in criticizing this reading of the rule are different from those oppositions and are completely new. It goes without saying that some jurists, such as Mohammad Javad Fazel 2013 (1392 in the Solar Hijri calendar), have another reading of the obligatory rule that is more compatible

with the rule of confirmatory and can seriously avoid the famous reading which is criticized in this article. The rule of obligation (Eghdam or Necessity Rule), as its name implies, requires, according to this famous reading, others (whether non-Shiites or non-Muslims) to adhere to the more difficult rules of their religion or sect. However, the rule of confirmatory is only the responsibility of approving or confirming different rulings of other religions or denominations, and it does not mention the obligation and element of harm or hardship for others.

Keywords: *Rule of Obligation (Pacta Sunt Servanda, Eghdam or Necessity Rule), International Customs, International Law, Shia, Rule of Confirmatory.*

Reflection on
Option for Delayed Payment of the Price

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Option is one of the most important causes of dissolution of contracts, which has various types in the jurisprudence of Islamic religions and legal systems of the world. The option for delayed payment of the price is one of the types of options that are mentioned only in Imamiyyah jurisprudence and are believed by most Imamiyyah jurists and consequently it is mentioned in the civil law of the Islamic Republic of Iran and is existed in articles 402 to 409. Imamiyyah jurists have held to reports, consensus, the rule of negation of harm (prohibition of detriment) and presumption of continuity (Istishab) for proving the option of delay. This research by using a descriptive-analytical method

based on the library method, tries while reviewing and criticizing the mentioned arguments to show that the incorrect option for delayed payment of the price and misusing it causes unfair income and wants to prove about delayed payment of the price which the sale is basically null and in fact the receipt in three days is the condition of the validity of the sale. Accordingly, a revision of Articles 402 to 409 of the Civil Code seems necessary.

Keywords: *Sale, Delayed Payment, Essentiality, Option, Nullity.*

Legal Jurisprudential Analysis of Some Causes of Exemption from Civil Liability in the Qur'an

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On the basis of respect for the dignity of persons, any invasion on the body (physical) integrity, psychological (moral) status and property and abandoning of persons is prohibited, and in principle, any kind of damage, both (physical) integrity and psychological (moral), in the realm of property and persons is subject to a state of guarantee. No one has the right to damage others, and in case of damage, the person is obliged to compensate the damage. At the same time, there are cases in which, if occurred, the civil liability of the doer of damage is removed and the person is exempted from compensation for damages, which may be due to the justifiable causes (lawful excuse) of the harmful act or the causations of exemption from

civil liability. There are several titles in the Qur'an that indicate exemption from responsibility. These include lawful defense, the applicable of the right, the proof of the right and litigation, bona fide (good faith), and the application of punishment. Based on the analysis of the relevant verses, it seems that the decline of the element of respect in each of the above-mentioned titles (directly or indirectly) and the disruption of the occurrence of the "subject of guarantee" is the justifying factor of the harmful act and the cause for exemption from civil liability and the majority of cases, as a particularized from the terms of the guarantee, agree with the legal analysis.

Keywords: *Guarantee, Action (Eghdam), Respect (Sanctity), Applications of Right, Ehsan (Bona Fide or Good Faith), Justifications of Criminal Punishments, Lawful Excuses, Civil Liability.*

The Validity of the Condition of Payment of Certain Property in the Liability Contract

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Under the guarantee contract, the guarantor's obligation is indebted to the person whom a guarantee is given (creditor), and the right of the creditor is granted to the guarantor's obligation, the creditor does not have any objective (tangible) right to the guarantor's property. The guarantor, in the releasement of the obligation of his or her own, determines the property of his/her property and pays it to the to the person whom a guarantee is given (creditor). The creditor is free to choose (disjunctive) any example of

his/her property. Now, if during the guarantee contract, it is provisioned that the guarantor pays a certain amount of money to the creditor, what is the condition of such a provision in terms of validity and nullity? In this matter, there is a difference of opinion among the jurists. One group absolutely considers the condition to be valid, and another group has ruled that it is invalid, and another group considers the issue to be detailed way (including all particulars). In the present article, the author, using the library method and based on the analytical-descriptive method, has come to the conclusion that the condition of payment from a certain property, whenever it is foreseen as a condition in the proviso of guarantee contract (condition as an integral part of contract); the condition and contract are correct, but if they are as a qualification (provision) of contract, both the contract and the condition are null (void). Furthermore, if the condition of payment from a certain property is given to the same object from the very beginning so that the guarantor is not engaged as a result of the guarantee contract, then both the contract and the condition will be void.

Keywords: *Condition, Contract of Guarantee, Condition of Payment from a Certain Property, Guarantor Liability (Obligation).*