

## **Abstracts**

### **The Process of Options (Khiyarat) in the Termination of Contract by Mutual Consent (Iqala)**

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The present research is going to study the process of options (khiyarat) in the termination (or cancellation) of the contract by mutual consent (iqala). According to article 283 of the civil code of Iran, after transactions (dealings), the contracting parties can terminate or cancel the contract with mutual consent. As it is clear the term tafasokh (breaking up by sides of contract), the result of iqala is the annulment or cancellation of the former contract. It means that with mutual consent of contracting parties to cancel or terminate the contract, the mentioned contract is broken up (annulled). But there is a question if the done (exercised or performed) iqala itself can be annulled. In other words, are options (khiyarat) extended to (run into) iqala? To answer this stated question, the most well-known imami

jurists and majority of law scholars believe that the cancelation of iqala is impossible. But studying the subject in the discourses of law and Islamic jurisprudential authors and examining the famous dependent evidences (on the basis of the famous proofs), with considering the nature of the contracting iqala, this result is achieved the process of options does not face the legal obstacle. Because the principle of no harm (la zarar) and the principle of autonomy (Party autonomy) and the necessity of considering the opinion of contracting parties, being (existence) of options is justified. Therefore, according to the principle, it can be stated that iqala is revocable (capable of being revoked or cancelled) unless the will of both sides implicitly or directly is contrary to it.

**Keywords:** *The termination (or cancellation) of the contract by mutual consent (iqala), Contract, Annulment or cancellation, The will of both sides of contract, No harm inflicted (lā zarar).*

## **The Analysis of Legal Status of Transactions (Dealings) with Unlawful Motive (Intent) in Imāmī Fiqh (Jurisprudence) with Comparative Study in the Positive Law of Iran and Egypt**

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The legal status of transaction with unlawful motive (intent) is one of the issues which the fiqh scholars and legal (law) scholars have constantly put forward arguments. In Imāmī Shī'a jurisprudence, the

positive law of Iran and Egypt, it is separated the case which the unlawful motive enters into the spectrum of the agreement of contracting parties from the case which the unlawful motive is merely inner and personal aspect for one the contracting parties and from the case which the other side of the contracting parties has knowledge of it. The present note is dedicated to the third case i.e. where an unlawful intent does not enter to the agreement of the contracting parties but the other side has knowledge. There is disagreement between the fiqh scholars and legal (law) scholars of Iran and Egypt about the legal authority of the latter transaction. The well-known Islamic jurists (Fuqaha) and law Jurists believe that the existence of knowledge does not solely cause the voidance of such transaction. But infamous scholars think the voidance of such transaction. The Civil legislature in article 217 following the well-known Imāmī Shī'a jurists (Fuqaha) accepts the validity of the mentioned transaction. This research with descriptive-analytic method has analyzed the presented opinions which are clarified by the fiqh scholars and legal (law) scholars. This paper with criticizing the opinions of the well-known fiqh scholars and legal (law) scholars has accepted the opinion of the infamous jurists who believe the voidance of the mentioned contract and also believed that it is more stable from the view of the deductive fiqh and law of Iran and it is compatible with social benefits and public order and the philosophy of article 217 of the civil law of Iran and it has suggested the amendment of the mentioned article.

**Keywords:** *Unlawful motive (intent), Transaction, Imāmī Shī'a jurisprudence, The positive law of Iran, The law of Egypt.*

# **The Basis of the Continuity of the Legal Personality of Man after His Passing away in the Five Schools of Islamic Thought and Positive Law of Iran**

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According to the jurisprudential and legal principles (rules), everyone from the beginning of his life has legal personality and can be considered the subject of rights and duties (obligations). He can practice the execution of his rights and carry out his duties. But what change will occur (appear) in his legal personality and personal capacity with occurring death? There are different opinions in the Islamic schools and positive law whereas most of the Islamic jurists (fuqaha) and law scholars believe that the death is the end of human capacity but with considering debates over this issue and stable bases of the opinion which believe death is the end of the capacity to exercise rights and still standing the capacity of acquiring rights, it feels the necessity of reinvestigating this subject which is the basis of many jurisprudential and legal attitudes. This note with analytic-descriptive method and with using library (research) sources has been adopted and aiming to prove the continuity of personality and human capacity after passing away, meanwhile criticizing the attitudes of opponents, with presenting evidences to the continuity of the liability of the dead, the heirs are substitute for the dead for asking many rights which they cannot be asked with the basis of well-known scholars

which is based on the discontinuity of capacity of the dead or because of the rights of the dead are not asked. These opinions will advance the limit of asking financial liabilities and non-financial liabilities of the dead.

**Keywords:** *The continuity of the legal personality, Liability, Capacity, The dead (deceased person).*

## **The Position of Induction (Istiqra') in Deducing an Islamic Law Verdict and Legal Doctrine**

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In the term of science of law and fiqh (Islamic jurisprudence), induction (Istiqra') is a reasoning that the mind (consciousness) of faqih (Islamic jurist) and law jurist have deduce the common attributions (features) of all ahkam (ordinances) and laws with considering a lot of ahkam (ordinances), laws and regulations (statutes) which the legislature and divine legislator (shar') have made and enacted for some cases, and they present them as a general Islamic jurisprudential ordinance (verdict) or legal doctrine and the manner (practice) of wise men, the unity of criterion with the validity of meaningfully recurrent, innate multiplying of knowledge, the unity of criterion with the validity of Suspicion in the particular instances have been counted of the validity of the induction (Istiqra') in deducing general jurisprudential ahkam or ordinances and legal doctrines. The legal liability of ownership of the object of sale and price in the defective contract, the excusal of maker (originator), the principle of

No harm, no harassment in Islam, the principle of tazir (punishment for crime not measuring up to the strict requirements of hadd punishment) according to the recognition of the governor (Al-Ta'zir Bema Yarah al-Hakim) are of many general Islamic jurisprudential ordinances or legal doctrines which are obtained by the mechanism of induction (Istiqra'). The Islamic jurist (faqih) for deducing a general Islamic jurisprudential ordinances and law scholar for finding a legal doctrine use (step) two stages; First, they collect cases and evidences which are the same and similar and in the second step, with a careful look to the matches and equals in hukm (legal doctrine) and subject of hukm, they achieve a proposition which contains a general Islamic jurisprudential ordinance or legal doctrine and obtain its scope and area.

**Keywords:** *Induction (Istiqra'), Fiqh, The law (legal code), Deducing a general Islamic jurisprudential ordinance, A legal doctrine, Islamic jurisprudential principle, Islamic jurisprudential theory, Legal theory.*

## **The Islamic Jurisprudential and Legal Examination of the Companies of Labour (Bodies or Abdan), Negotiation (Mufawadha) and Reputations (Wujooh)**

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The well-known Imāmī Shī'a jurists (Fuqaha) believe the voidance of the companies of Labour (Bodies or Abdan), Negotiation (Mufawadha) and Reputations (Wujooh). There are no absolute proofs

or evidences to prove the voidance of these partnerships in the Holy Quran, Islamic traditions and intellectual judgment but only proofs such as ijmae (consensus), the possession of the nonexistent, the absence of proofs for validity and risky (gharar) of such transactions (Muḥāmalāt) has been cited. The Imāmī Shī'a jurists (Fuqaha) believe that the validity of these transactions (Muḥāmalāt) are proved by Sulh (peace) and Wakalah (Agency) contracts or other mechanism (solutions). The legislature has not mentioned these partnerships and legal authorities (decrees). With analyzing the evidences of the well-known Imāmī Shī'a jurists (Fuqaha) sayings and after evaluating its criterion, the author has reached to this result that the clarified proofs are not sufficient to prove their claim. But these contracts have been and are of the accepted and conventional legal acts among people and there is no certain reason for the voidance (annulment) of these companies and because of its generality (currency) of these transactions among individuals, the Imāmī Shī'a jurists (Fuqaha) should inevitably seek a consideration (deliberation) for the validity of these contracts. Although the attitude of the validity of these contracts is contrary to the saying of the well-known Imāmī Shī'a jurists (Fuqaha), but some of the contemporary Imāmī Shī'a jurists (Fuqaha) are proponents of this saying. From the view of the civil code of Iran, article 10 which determines the principle of freedom of contract or Liberty of Contract can strengthen or encourage the attitude of validity of such transactions.

**Keywords:** *The company of labour (bodies or abdan), The company reputations (wujooḥ), The company of negotiation (mufawadha), Risky (gharar), Ijmae*

*(consensus), The possession of the nonexistent.*

## **The Closing of the Gate of Creative Legal Reasoning (Insidad Bab al-Ijtihad) and the Possibility of Opening up (Infitah) in the Jurisprudential Thoughts of Sunni School**

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The issue of closing of the gate and opening up of ijtihad' (insidad and infitah bab al-ijtihad) is of the important issues in the Sunni jurisprudence (fiqh). This matter is of the long time and vast issue which has been continued during the period of history and both attitudes have their special proponents. Some of the prior and recent Islamic Sunni jurists (fuqaha) have accepted closing of the gate and opening up of ijtihad' (insidad) and also the most of the contemporary Islamic sunni have accepted this attitude and they believe that the stipulations of ijtihad in the contemporary time (present time) is impossible. The insidad proponents do not have the same (identical) opinion (a consensus view) about the concept of insidad and time limit. The examination of the prior and contemporary Sunni scholars of the principles of jurisprudence (usul al-fiqh) shows that the backgrounds (bases) of closing of the gate of ijtihad' (insidad) are: 1. liar/ false ijtihad claimants 2. the birth of different parties and isms 3. the emergence of the branches and divisions among Mujtahidin (expert scholars) 4. Political factors 5. the discipline of ijtihad



methods and attitudes 6. concealment of religious opinions, dissemblance of one's faith or dissimulation (Taqiya) in ijihad declaration 7. tendency to Taqlīd. They have also mentioned proofs for insidad which they can be categorized to six groups: 1. Sadd al Dharai (Blocking the means) 2. the propagation and codification of the four Sunni schools 3. researchers' consensus (ijma) 4. the impossibility of occurrence of ijihad conditions for the Later Islamic Scholars 5. the impossibility of hadith correction at the time of the later Islamic Scholars 6. the problem of the absence of mujtahid at the present time. The issue of insidad has not been accepted by some of the former and later Islamic jurists and they have commented the authorization and even obligation of ijihad for those who have the stipulations and the possibility of its occurrence. Among this, the most attempts have been done by the later Islamic scholars in recent centuries for proving infitah. The present paper is going to analyze the process of opinions and thoughts through the comparative study and with analyzing and criticizing them it has achieved that among the mentioned attitudes what is more logical and correct is opening up of ijihad and possibility to happen its conditions.

**Keywords:** *Contemporary ijihad', The Islamic jurisprudence of Sunni school (the Sunni jurisprudence), Closing (insidad), Opening up (infatih).*

## **Islamic Jurisprudential and Legal Examination of Waiving All Options (Khiyarat)**

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Option (khiyar) is a financial right and the owner of option can waive it. What has been propounded is that it is possible to establish a stipulation (condition) under the title “waiver of all options” in sales and purchase agreement and official documents. Mostly contracting parties (parties of sale) sign the documents without any change or remark. Sometimes they sign the documents with knowledge (consciousness) of that condition which it causes or follows no problem. But sometimes they are ignorant due to that condition i.e. they do not read the documents or do not notice the concept of the condition or stipulation but they sign them. Therefore, this paper with analytic-deductive reasoning method has studied this issue and has proved that firstly, the condition of waiver of all options from the Islamic jurisprudential and legal perspective is valid and legitimate. But with considering to the stipulation of waiver of some options (khiyarat) such as the option of violation of the desired description (khiyar al-wasf) and fraud option (khiyar al-tadles) confronts obstacles, the above condition to the mentioned options (khiyarat) has been specified (particularized). Secondly, if a person claims (proclaims) ignorance to the concept of the mentioned document or ignorance to the content of the document which contains (includes) this condition if it is possible that he is under ignorance, his claim with taking an oath will stand and is proved but if this ignorance is not possible due to him, his claim is not proved unless he proves his claim by the testimony of witnesses (bayyina).

**Keywords:** *Waiver of all options, Option of viewing or option of sight (khiyar al-ru'yah), Ignorance to the content of the document.*

# **The Civil Nature of Drawing the Regular Cheque (Check) in the Law of Iran**

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The regular cheque (check) is the most common usefulness of cheque types specially when it is made out payable (drawn) in favour of a payee. There is disagreement between law scholars about the nature of this type of cheque. Some believe (have counted) that it is as alternation of debt or obligation (novation) and some others think it is the transfer of ownership and a draft (bill of exchange) and some others think it is the cession (transfer) of claims. Cheques are included all situations of those contracts in all three attitudes (views); such as the liability or obligation of debtor is acquainted or released (from) to the base liability or obligation and owing (indebted) due to the new obligation originated from the cheque. This research is going to study and analyze these three main views. This note with regarding the disappointment of many of the law scholars to the prior natures, cheques are considered as an independent contract (agreement) that the legislature has stated its specific conditions. Based on this, cheques are a contract with the name of payee, formal, liable, accessory and in some cases are conditional which if this obligation is breached or violated by the drawers, it is possible to be put forward the contractual obligations and annulment of the contract by the payee.

**Keywords:** *Cheque (check), Alternation of debt or obligation (novation), Transfer of ownership and a draft (bill of exchange), The cession (transfer) of claims, An independent contract (agreement).*