

## Comparative Study of the Principles of Intellectual Property in Law and Imamiyya Jurisprudence

*Ali Beigzadeh<sup>1</sup>, Ja'far Kousha<sup>2\*</sup>, Seyyed Baqer Mir'abbasi<sup>3</sup>*

1. Ph.D Student of Criminal Law and Criminology, Islamic Azad University, United Arabic Emirates Branch
2. Professor, Department of Law, Shahid Beheshti University, Tehran, Iran
3. Professor, Department of Law, University of Tehran, Tehran, Iran

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### Abstract

The foundations of intellectual property are one of the most challenging issues of legal knowledge in the present time. Accordingly, the role and the place of intellectual property in economic and commercial exchanges have led to a conflict between philosophers of law and contemporary jurists. The article aims at examining the theories at this area of legal knowledge that develops the foundations of intellectual property. The article concludes that considering the rules governing this property and assuming that the property is an accessory of intellectual property, so, relying on no-harm rule and the practice of the wise, the views of the proponents of the legitimacy of intellectual property in the positive law in the current circumstances is justifiable.

**Keywords:** Intellectual Property, Imamiyya Jurisprudence, Positive Law, Natural Law.

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\* Corresponding Author, Email: jafarkoosha1335@gmail.com

## A Reflection on the Theory of Determinative Right of *Qisas* in Retaliation for Murder

*Seyyed Hashem Ale Taha*<sup>1</sup>, *Ahmad Haji Dehabadi*<sup>2\*</sup>

1. Ph.D Student of Criminal Law and Criminology, Islamic Azad University, Qom Branch, Iran

2. Associate Professor, Faculty of Law, College of Farabi, University of Tehran, Iran

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### Abstract

According to the theory of determinative right of retaliation, the avenger of blood in the case of murder has only the right of retaliation and demanding the blood money depends on the murderer's satisfaction. But, according to the alternative theory of the right of retaliation, the avenger of blood is free to choose between retaliation and blood money and the murderer is obliged to do whatever the avenger chooses. Although, the theory of determinative right of retaliation is well-known in *Imamiyya* jurisprudence, its reasons and arguments lack sufficient integrity and sometimes it faces practical challenges like wasting the blood of victim and not respecting the interests of the avengers of blood. Although the legislator has deviated from the Islamic Penal Code 2013 and has complied with the dual criteria in order to solve a number of problems, it has not been able to solve all the problems and the negative consequences of this theory; while it could act harmoniously and systematically through complying completely with the alternative theory.

**Keywords:** Retaliation, Blood Money, Determinative Theory, Alternative Theory, Avenger of Blood.

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\* Corresponding Author, Email: [adehabadi@ut.ac.ir](mailto:adehabadi@ut.ac.ir)

## Feasibility of Legal Entity Endowment Ownership of the Endowed with an Approach to Imam Khomeini's View

*Seyyed Mohammad Taqi Ghabouli Dorafshan<sup>1\*</sup>, Mas'oud Jahandoust  
Dalenjan<sup>2</sup>, Meisam Sho'aib<sup>3</sup>*

1. Associate Professor, Department of Jurisprudence and Principles of Islamic Law, Ferdowsi University, Mashhad, Iran
2. Ph.D Student of Jurisprudence and Principles of Islamic Law, University of Tehran, Iran
3. Ph.D Student of Jurisprudence and Principles of Islamic Law, Ferdowsi University, Mashhad, Iran

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### Abstract

According to Article 3 of the establishment and authorities of *Haji*, Endowments and Charity Affairs Organization, endowed property does not cease to the beneficiaries, but after the dedication it is the legal entity of the endowed property that is considered the owner and the beneficiaries of the endowed property have only the right to exploit it. This new theory provided by legislator is derived from a number of scholars' belief that the ownership of the endowed property is only transferable to God and some others including Imam Khomeini has chosen the belief that the endowed property becomes free from ownership. These two viewpoints have provided the scene for the formation of the aforementioned theory. The present study aims at investigating the grounds of this theory, and scrutinizing the requirements for proving this theory, and its barriers. The authors believe that not only the two viewpoints are improbable as the grounds for the establishment of the theory of the ownership of the legal entity, but also given the acceptance of the theory, it has two obstacles: first, in spite of the fact that Imam Khomeini's oppositions to reject the famous theory of scholars indicating the transfer of ownership to endowed property are acceptable, there are other arguments that can be taken into consideration to approve the dominant doctrine. Second, it is not possible to accept the wording formula according to the theory of the endowed property contract.

**Keywords:** Devolution of the Endowed Property, Legal Entity, Property Release, Endowed Property Ownership, Beneficiaries' Property, Endowment.

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\* Corresponding Author, Email: ghabooli@um.ac.ir

## Weapons of Mass Destruction as a Means of Retaliation in the View of Islamic Jurisprudence

*Mojtaba Elahian<sup>1\*</sup>, Mohammad Ebrahim Elahian<sup>2</sup>, Seyyed Ali Mohammad Yasrebi<sup>1</sup>*

1. Associate Professor, College of Farabi, University of Tehran, Qom, Iran

2. Ph.D, Islamic Azad University, Saveh Branch, Iran

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### Abstract

Weapons of mass destruction include nuclear, biological, and microbiological weapons. The important features of these weapons are their very high destruction power and inseparability of the goals. To state the primary rule, jurists have unanimously ruled on the prohibition of production and use of these weapons. A secondary title that changes this rule is the principle of retaliation. Another secondary title is the principle of necessity by creation of which the legally competent person is removed from the related duty. As a result, it is allowed to commit an unlawful act. It is understood from the religious and Islamic principles that the use of weapons of mass destruction is not permitted also under the titles of secondary rules. If the purpose of the war is to submit the enemy through fighting with its military forces, damaging those who do not participate in the war, makes the innocent people upset. This is a useless, unnecessary, and inhumane act and will not be consistent with the military necessity. What is obvious from the application of weapons of mass destruction is killing of defenseless people and destruction of public property that are far from the battle scene and are under the protection of Islamic law; since the principle of separation of the goals is a self-evident principle governing the holy war in Islam on which the Islamic jurists agree. The article aims at explaining the view of Imamiyya jurisprudence on the application of weapons of mass destruction under the secondary titles and in the light of the principles of necessity and retaliation in order to both fill the knowledge gap in this subject and make the position of Islam clear in this regard and to prevent from baseless statements.

**Keywords:** Retaliation, Holy War, Civilians, Necessity, Weapons of Mass Destruction.

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\* Corresponding Author, Email: elahian@ut.ac.ir

## The Jurisprudential and Legal Analysis of the Relationship between Issuer and Special Purpose Vehicle (SPV) in Mortgage-Backed Securities

*Ali Akbar Ja'fari Nadoushan<sup>1\*</sup>, Asghar Zirak Barouqi<sup>2</sup>*

1. Assistant Professor, Department of Law and Political Science, Yazd University
2. Assistant Professor, Department of Law, Shahid Madani University of Azerbaijan

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### Abstract

The mortgage-backed securities as an important financial instrument for banks and credit institutions need to be explained in terms of jurisprudential and legal relations of the parties. Since issuer and Special Purpose Vehicle (SPV) are the main parties involved, the relation between them is of utmost importance. The relation is adaptable to the legal institutes of “debt sale”, “novation”, and “transfer of claim”. Adhering to debt sale due to the opposition of a number of jurists with some of its assumptions is difficult. Considering novation, since nullification of the former obligation and creation of the following obligation are interdependent, in addition to not transferring of the guarantees and the problems of the former obligation to the SPV, other problems may arise as to the substantial nature and form. Since there is no need to satisfy the consumers of bank loans and the debt is wholly transferred to the SPV with its all guaranties and the related emolument and because of the fact that the SPV can make use of all defenses and oppositions of the issuer against the consumers of the bank loans, the transfer of claim is more justifiable and adaptable to the mortgage-backed securities.

**Keyword:** Government-Bond Securities, Mortgage Loan, Mortgage-Backed Securities, Debt Sale, Novation, Transfer of Claim.

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\* Corresponding Author, Email: jafarinadoushan@yazd.ac.ir

## A Critique of the Famous Jurisprudents' View on the Rejection of Voluntary (*Tabarru' i*) Testimony According to the Islamic Jurisprudence

Mahdieh Ghanizadeh<sup>1</sup>, Mohammad Reza Keykha<sup>2\*</sup>

1. Ph.D Student of Jurisprudence and Principles of Islamic Law, University of Sistan and Balouchestan, Zahedan, Iran
2. Assistant Professor, Faculty of Theology, University of Sistan and Balouchestan, Zahedan, Iran

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### Abstract

Considering the voluntary (*Tabarru' i*) and unpardoned testimony, if it seeks to prove public right, the acceptance of that position is contrary to the jurisprudents. Famous jurisprudents have absolutely rejected this testimony. Considering that testimony is one of the most practical proofs, and that most frequently the witness is ignorant of the proceeding and may bear a witness voluntarily, ignoring the testimony just because of *tabarru' i* is in most cases against the judicial justice and is a reason to strengthen the right of the claimant. Therefore, the present study, using a descriptive-analytical method of research, aims at criticizing and reviewing the famous arguments for rejection of voluntary testimony and adapting this matter with the views of the jurisprudents of other Islamic religions and the case law. The findings show that the famous arguments are not qualified to prove their claims. On the one hand, the absolute rejection of voluntary testimony has no reason, and on the other hand, the absolute acceptance of voluntary testimony faces some obstacles including breaching the proceeding and violating the limits of claimant as the rightful person. As a result, according to the right doctrine, *tabarru' i* can be considered as a transient barrier to the acceptance of the testimony.

**Keywords:** Voluntary (*tabarru' i*) Testimony, Jurisprudents, Public Rights, Proof of the Dispute.

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\* Corresponding Author, Email: Kaykha@hamoon.usb.ac.ir

## Comparative Study of Legal Representation and Delegation in Divorce in *Imamiyya* and Sunni Jurisprudence (with a View to the Iranian Legal System)

*Ehsan Aliakbari Babokani\**

Assistant Professor, University of Esfahan, Esfahan, Iran

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### Abstract

In the present article the authors seek to review the perspective of the *Imamiyya* jurisprudents and to study the position of Iranian legal system to give answer to the questions as to whether the divorce, as a unique right of the couples, is a completely personal matter in a way that the stewardship of the couple is a condition of that and no one except the couples are authorized to do that and whether the delegation and deputation in divorce is permitted in the view of Iranian jurisprudential and legal system. What are the approvals for the permission of deputation in divorce? In response to these questions, the famous *Imamiyya* jurisprudents believe that although the divorce has been left to the couples by the legislator, this is a matter of representation and the husband can leave it to the third party or the wife herself; as it has also been accepted by the civil code. In contrast, the famous *Imamiyya* jurisprudents and consequently the Iranian civil code believe that the permission for divorce should not be given to the wife and in the case of choosing the divorce by the wife it will not take place. While, there is no disagreement among Sunni jurisprudents on accepting the principle of delegation and happening of divorce. The authors of this article seek to prove the validity of the two institutions in the jurisprudential and legal system of Iran.

**Keywords:** Choosing the Divorce, Deputation in Divorce, Delegation of Divorce.

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\* **Email:** e.aliakbari@ahl.ui.ac.ir

## The Companionship of the Hearts (*Ta'lif Qulub*) in *Imamiyya* Jurisprudence and Quality of Its Execution in Hidden Age

Seyyed Mohammad Hashem Pourmola<sup>1\*</sup>, Reyhaneh Taheri<sup>2</sup>

1. Assistant Professor, University of Shiraz, Shiraz, Iran

2. M.A, University of Shiraz, Shiraz, Iran

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### Abstract

This article is explaining on the one hand the principle of "Companionship of Hearts" (*Ta'lif Qulub*) by which unbelievers or the weak belief Muslims are kindly treated in order to be recruited in holy war (*Jihad*) or to be attracted in Islam and Muslims, or to create unity among Muslims and to preserve Islamic government. Studying this rule, on the other hand, in the time of absence of imam and mentioning of the arguments of the jurists in this matter, it concludes that this rule is executable both considering the possibility of happening of the holy war (*Jihad*) and in spite of the expansion of Islam and also given the lack of formation of Islamic government. Therefore, this article has argued the scope of exercising this principle in different cases of Islamic jurisprudence and has mentioned several examples of the jurists' citation to its content. The principle under discussion is applied in many important jurisprudential cases including tithes (*Zakat*), devotion, toleration, dissimulation, and safety contract. This study uses descriptive-analytical method of research.

**Keywords:** Companionship of hearts (*Ta'lif Qulub*), *Zakat*, Unbeliever, Muslim.

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\* Corresponding Author, Email: pourmola@shirazu.ac.ir