An Introduction to the Concept and Principles of Customary Constitutional Law

Kheirollah Parvin[*]

Associate Professor, Public Law Department, University of Tehran, Iran

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Abstract

Customary constitutional law is one of the most important fields for completion and removal of extant gaps in statutory constitutional law, and despite some initial opposition, today there's no doubt about its effective position and significant role. Important aspects of customary constitutional law are subordinated to the general theory governing the function of the customary law. The jointly played role of material and spiritual elements in its development and effectiveness can be referred to as supporting evidence to this fact. The degree of effectiveness of customary constitutional law and the extent of its effect on the available legal texts, has laid the ground for the presentation of a well-known division of this concept by which the three functions of interpretive, complementary, and modulatory custom have been differentiated. In the meantime, according to some similarities among development process and effectiveness of judicial procedures and customary constitutional law, they can be considered as the theoretical bases of the jurisdiction development of constitutional courts and a key factor for paving the way for the effective fulfillment of the role of these courts.

Keywords: constitutional law, custom, generality, interpretation, spiritual element.

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* khparvin@ut.ac.ir

Whether Article 167 of Constitutional Law Rules Penal Cases or not? With a Look into the Islamic Penal Code 1392/2013

*Ahmad Hajidehabadi**

Associate Professor, University of Tehran, Iran

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Abstract

According to the Article 167 of the Constitution, the judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatwa. There is no dispute over the fact that the judge can (and even has to) refer to authoritative Islamic sources. In penal cases, however, some people agree and some others disagree. Those who agree make reference to the above Article and those who disagree refer to the Article 36 of the Constitution. Because of certain problems in referring to *fiqh* (Islamic jurisprudence) some scholars think that this principle does not rule penal cases; and, where there is no law, they insist on the presumption of innocence [of the charged]. In the present article, attempts are made to explain exactly the subject of dispute, then, the author goes to judge between proponents and opponents. In this regard, the Islamic punishment Code 1392/2013 has been discussed and emphasis has been put on the point that in penal cases, *fiqh* can be referred to; though, in this regard, there are certain points which should be taken into account.

Keywords: Article 167 of Constitution, legal crimes, presumption of innocence, principle of legality of punishment (no Crime nor Punishment without Law), principle of no punishment without explanation, principle of 'Rule of Law', ruling and entering judgment.

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* adehabadi@ut.ac.ir

Exercising Independent Reasoning on Discretionary Punishments: Principles of Exercising “Freedom Restrictive Punishments” in Criminal Jurisprudence

Mohammad Hadi Sadeqi[1], *Javad Riahi*[2*]

1. Associate Professor, University of Shiraz, Iran

2. Assistant Professor, University of Ayatollah ol-'Ozma Borujerdi, Iran

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Abstract

An examination of the sources of Islamic jurisprudence demonstrates that determination of discretionary punishment has been left to the discretion of the judge. The evaluation of the performance of the judge and determination of the limits of his authority in choosing a discretionary punishment, undoubtedly, is one of the important matters by which the position of freedom restrictive punishments is determined in Islamic penal policy. The present study, using a descriptive–analytic method, has examined the above-mentioned matter and drawn the conclusion that the judge should exercise his independent reasoning (*Ijtehad*) on the quality and quantity of discretionary punishment based on specific criteria and norms, and sometimes he may find freedom restrictive punishment as the most influential and appropriate reaction with regard to those criteria and norms. Therefore, exercising independent reasoning by the judge is an indicative of the necessity of exercising freedom restrictive punishments. But the conditions and requirements of that have not been prepared in the penal policy of our country yet.

Keywords: criminal jurisprudence, discretionary punishment, freedom restrictive punishment, independent juristic reasoning, judgment.

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*. **Corresponding Author:** Riahijavad@yahoo.com

Analysis of Criterion of Validity of Accepting the View of Experts in Imamite Jurisprudence

Habibollah Taheri[1], *Mohammad Hakim*[2*]

1. Associate Professor, Chollege of Farabi, University of Tehran, Iran

2. M.A. in Jurisprudence and Principals of Islamic Law, College of Farabi, University of Tehran, Iran

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Abstract

The wide range and the great influence of specialized view of experts in various branches of jurisprudence, especially contemplation of the increasing influence of specialization speed of sciences and skills on juridical and legal inference are indicative of the importance of expert view. In the juridical and essential sources of Imamites, the legal reason of the view of experts is based on the practice of the wise confirmed by the legislator. Different propositions like absolute expertise, judgment of intellect, confidence and consequently cancellation of the possibility of contradiction and also cancellation of quality and discovery of the general validity have been discussed as the bases and criteria of the wise in the course of this conduct. Explaining and studying the aforementioned bases, we have accepted the cancellation of the possibility of contradiction and validity and self-confidence acquisition as the principal criteria of practice. And after analyzing some conditions like justice and plurality, confidence acquisition, inference and deduction from assumed premises, being the most learned, life, and so forth as the conditions of the validity of expert view, the above-mentioned basis is regarded as the only criterion for evaluating the authenticity of expert view. Accordingly, explaining the criterion of the practice of the wise for exercising the expert view and the difference between oral testimony and expert view, the acquisition of confidence- with the exception of cases dismissed based on specific reasons- is accepted as the only condition of validity.

Keywords: confidence, expert view, experts, oral testimony, practice of wise.

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*. Corresponding Author: khak_mohammad@yahoo.com

The Philosophy of Juridical Rules

Abolqasem Alidoost[*]

Associate Professor, Institute of Islamic Culture and Thought, Iran

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Abstract

Juridical rules are one of the issues of jurisprudence which can be studied from two aspects: the first aspect is to restudy the available rules or to research some new rules and the second one is to have an outside look at juridical rules themselves and to codify the philosophy of juridical rules. An important challenge in the second aspect is as to what issues should be discussed from this viewpoint. Relying on the sources of Islamic juridical rules and the principles of Islamic jurisprudence and using their methods, the present article tries primarily to compile a collection of important issues of the "philosophy of juridical rules" and secondly, as the narrow domain of article allows, to make an effort to investigate the issues briefly and to discuss the proposed hypothesis about those issues and at the same time to prove the hypotheses considering the conditions of the content of the article into account.

Keywords: definition and division of juridical rules, juridical rules, legalism and analogism, specification of juridical rules.

* salsabeal@gmx.com

Distinction and Dependency: A Reasonable Solution for Dialogue of Jurisprudence and Ethics

Moslem Mohammadi[*]

Professor, College of Farabi, University of Tehran, Iran

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Abstract

Sometimes, there are some contradictory and distinct theories about the nature of relationship between jurisprudence and ethics in the interrelated interaction of the Islamic sciences. The whole theories can be divided into four groups of unity, conflict and inconsistency, ethics' interference with jurisprudence, and distinction and dependency which can be evaluated and criticized. Using comparative-analytic method and taking the view of not undermining one to the favor of the other, the present study will choose distinction theory with consistency and dependency approach after examining each of the four aforementioned approaches with the purpose of improving the functionality of both religious sciences, specifically the new field of ethics, i.e. practical ethics. The main purpose of the study is to identify the distinctive features of the 8 cardinal principles of jurisprudence and ethics which will be discussed from different aspects in a case study. Status, cognitive identity, subject, predicaments system, realization conditions, goal, scope, and method are the main distinctive features of these two Islamic sciences that will be discussed later. Discussing the asymmetrical and agonizing development of ethics in its historical and intellectual origin compared to its old companion, i.e. jurisprudence, and explaining some of their basic similarities are other related and effective issues of the article.

Keywords: correlation between jurisprudence and ethics, dependency, distinction, ethics, practical ethics.

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* mo.mohammadi@ut.ac.ir

Analysis of Concept of Siblings (*Kalala*) in Verses of Quran and Islamic Traditions

Seyyed Hossain Noori[*]

Professor,of College of Farabi, University of Tehran, Iran

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Abstract

Only two verses of the Quran speak about inheritance of siblings (*Kalala*): one is the verse 12 of Surah al-Nisa and the other is the verse 176 of the same Surah. In this context, two issues may be discussed: Firstly, there is disagreement between the first and the second caliphs in the concept of siblings. The first caliph says: sibling (*Kalala*) is "the one who has no father and no child", while the latter caliph says that: sibling (*Kalala*) is "the one who has no father" and he has also another judicial decree (*fatwa)* that is *tawaguf* which means to stop giving *fatwa* (Fakhr Razi, 1420 Lunar year, Vol. 9; p. 221). But it is clear that the judicial decree of the second caliph is not perfect because in the case there are children who are the first–level heirs there is no turn for the second-level heirs (which include brothers and sisters). Secondly, these two verses speak about two different decrees which show that they are contradictory. According to the narrations of the Ahl ol-Bayt (AS) this conflict can be resolved by suggesting that the verse 12 is about siblings from mother's side and the verse 176 is about siblings from father's side.

Keywords: second-level heirs, siblings (*Kalala*), siblings from father's side, siblings from mother's side, share of Inherence.

* hajseyedhossain128@gmail.com

Proving "Validity of Lexicologist's Statement" Relying on Lexical History of Arab

Mohammad Maleki Nahavandi[*]

Assistant Professor, University of Religions and Denominations, Qom, Iran

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Abstract

Proving "the validity of lexicologist's statement" is an important matter in the Principles of Islamic Jurisprudence which has not been considered yet in the perspective of the realities of the lexical history. The word "lexicologist" also has not been defined yet. Both of them will be defined in detail in the present text. The history of lexicography indicates that the Arabic words have been communicated to us properly and completely. The history is significantly confidence-building and although in some cases a number of scholars of the Principles of Islamic Jurisprudence have been working efficiently to prove "lexicologist's statement" in different ways like lexicologist's proficiency, *Insidād e-Ṣaghīr*, the practice of the wise people, and *Ijmā̒* (unanimous consensus of *Mujtaḥidīn*), it is not sufficient. Historical investigations of the Arab lexicography make it clear that "the clear history of Arab lexicography, the proper communication of the words, the Arab's original explanations" and "lexicologist's proficiency"- of course in a new explanation- are two major evidences to prove the validity of the lexicologist's statement.

Keywords: history of lexicography, lexicologist, lexicologist's statement, proficiency, validity.

* mmaleki@noornet.net