

3. The poor texts of the provisions and rules of replacement as these texts have only addressed a general theory of replacement or in rem replacement without considering the nature of replaced estates, be they housing, farming or industrial estates. This does not cope with economical developments.
4. The approval of replacement based on benefit and interest is difficult to give without certain rules and measures for the estimation of interest.
5. There should be special guarantees for the execution of the endowment founder's condition of replacement so that if the execution of the condition is rejected, necessary justifications should be given.



condition contained in the endowment deed executed by the endowment founder.

Through the present study, I tried to shed light on the legal guarantees of replacement through reviewing, analyzing and criticizing various legal rules and provisions governed by the rules related to objective guarantees or formal guarantees. It has been found that the legal provisions contained in the Jordanian Civil Law, though keen on regulating endowment provisions, are of limited scope that does not suit with the importance of endowment in general and the danger of replacement in particular.

The author concludes the following:

1. The replacement of endowment is one of the most important an serious actions that affect the endowed property. The risk reflect in that the replacement is a form of transfer of ownership that contradicts the principle contrast on which endowment is based.
2. The legal provisions and juristic rules which relate to the replacement of endowments are old, and hence they should be updated in order to realize sufficient protection vis-à-vis risky replacement and resulting consequences. Therefore, the protection of endowments is only realized through the control of the cases in which replacement is resorted to.

These factors, which expose the endowed property to the perils of extinction, are considered sufficient reason for finding the best means for protecting it and keeping it useful. Therefore, replacement of the endowed property is the investment formula to maintain the endowed property and keep it effective within the national economy. The replacement of the endowed property means the replacement of the endowed property with a new one by selling the endowed property because it is no longer useful, accruing poor revenues or damage.

It is not strange to give this importance to the issue of legal guarantees for the replacement of endowed property especially that endowments have become part of the real estate wealth that influences the economic policies of the state. The endowment founder's decision to endow his property is an economical one that contributes in realizing the economic benefit and development, let alone the philosophical grounds on which it is built with a view to realizing social solidarity.

The present study sheds light on the legal guarantees in accordance with the civil law and the rules and regulations applicable within the scope of the Saudi endowment law. The study also tries to reveal the role of the judiciary in the execution of the conditions of replacement through active control of the benefit and interest realized through this replacement. It also reveals the criteria of controlling benefits and interests as a basic guarantee for the application of the

Refereed Study Legal Guarantees for the Replacement of Property Endowment in the Jordanian Civil law and Saudi Law

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Abstract

Replacement of endowments realizes a number of goals and objectives, the most important of which are the protection of the endowed property against any aggression or damage in order to maintain its uses and realize social solidarity. It is original based on maintaining the property and continuing the use of it for the longest possible period. The endowed property is limited in exchange and disposal. It does not accept sale, withholding or any form of actions whether these actions are taken by the endowment founder or other persons. This may exposed it to several types of dangers which may lead to damage or poor revenues with the passage of time or it not respond to economic requirements, especially if we consider the time period during which the endowment is created through the decision of the endowment founder to assign the ownership of the endowed property, the duration of the extinction of the persons endowed for. This leads to the freezing of the endowed property which leaves a negative effect on its revenues and consequently its extinction.

- executed from the third in order to protect the rights of the heirs in the estate.
8. If the ill person is indebted with an amount that covers all his property, he may not donate any part of his property unless he obtains permission from the creditors.
 9. If the third part of the ill person is sufficient to meet all the donations of the stator, all of them are executed without the permission of heirs.
 10. If the third part of the estate is insufficient to cover the donations made by the ill person, they are divided between the persons donated for if they do not include any freeing of slaves.
 11. If the donations during illness include freeing slave but the donator has no property other than the one he has, one of them is chosen for freeing and the others left as slaves.
 12. The donations of the patient shall be executed after the death of the stator but they are owned the time they are donated.
 13. Donations of an ill person are given preference to his bequest.

The present study sheds light on the case when the third is insufficient to meet the donations of the ill stator.

The most important conclusions of the study can be summed up in the following:

1. Muslims are exhorted to donate part of their property in charities for the sake of reward.
2. The donations made by a person with an illness are similar to the bequest; therefore, they cannot be made for an heir nor more than the third part of the estate if made to a non-heir.
3. The person with an illness leading to death may not be prevented from disposing with his property through sale, purchase and other types of compensation based transactions including declaration of debts, payment of his debts and the like because these actions are not donations.
4. The illness leading to death or the illness feared to lead to death is the illness that commonly leads to death.
5. The reference for identifying the illness leading to death is physicians.
6. Illnesses similar to the illness leading to death include conditions similar to the condition of the person with an illness leading to death like the person sentenced to death, the passenger on a ship at the time of turmoil, the pregnant woman at the time of labour and the like.
7. Donations promised during the illness leading to death like freeing slaves, gifts, endowment, charity and the like are

Refereed Study

Insufficiency of the Third for the Donations Bequeathed during the Illness Leading to Death

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Abstract

All types of donation, be it a property, a usufruct or any other type, have been exhorted by Islam and several texts have been revealed encouraging Muslims to donate their property.

The Muslim has the right to donate his property in the form of gift, freeing of slaves, charities and all other types of donations in order to receive reward after his death. This is acceptable while the donating person is in good health.

However, if the person is in a state of illness leading to death, jurists opine that he should not be allowed to donate more than the third part of his property. This is meant to protect the rights of the heirs in the estate of the heritor. The heirs have their rights in the estate left by the deceased person.

Ibn Taymiyah writes, “The heirs have the right to incapacitate the ill heritor if they doubt that he has donated more than the third of his estate.”

Therefore, if the ill person donates the third part of his property but this third is insufficient for the donations he made, what should be done?

or any part of it in the electronic sources of information that makes the researcher dispense with referring to the original publication or the abstracted portion of the original publication requires the prior permission of the author; otherwise, it is considered an infringement of the financial rights of the author.

6. Publishing the full text of the protected publication of a specific part of it in the electronic sources of information requires a prior approval from the author; otherwise, it is considered an infringement of the financial rights of the author.
7. Utilization of publications within the scope of the electronic sources of information is done though entering or removing the publication of any of its protected elements into or from the electronic sources of information.
8. Entering the publication into the electronic information source by copying it on a platform is considered an ordinary copying operation that does not differ from the traditional copying operation of the publication which makes it conditional on the prior approval of the author; otherwise, it is considered an infringement of the financial rights of the author.
9. The permanent saving of the publication or any of its elements on the computer requires the prior permission of the author; otherwise, it is considered unlawful and an infringement of the financial rights of the author.
10. The temporary saving operation of the publication or any of its protected elements originally requires prior permission from the author; otherwise, it is considered an unlawful operation and an infringement of the financial rights of the author with the exception of temporary saving for personal uses.

the electronic sources of information. The legal provisions of the Author Rights Protection Law has a high degree of flexibility that guarantees activation of the financial rights of the author within the electronic sources of information.

The most important conclusions of the study include the following:

1. The Saudi legislator's position on the regulation of the financial rights of the author matches with the regulation of the financial rights of the author in Bern Convention on the Protection of Literary and Art Publications.
2. The legal provisions on the utilization of publications or any of their protected elements to meet the needs of the clients of electronic information sources differ depending on the type the element used in the electronic information source.
3. The utilization and publication of bibliographic information, if done within the electronic information source without a prior permission from the author, is not considered an infringement of the financial right of the author. These provisions extend to cover the utilization and publication of the title of the publication within the electronic information source provided that suspected manipulation and creation of confusion in the minds of the public to benefit from a previous success of the title do not exist.
4. The publishing an abstract of the publication in the electronic sources of information does not need the prior permission of the author and is not considered an infringement of the financial rights of the author provided that the said abstract is not adequate to make the researcher dispense with referring to the original publication.
5. Publishing an adequate abstract of the protected publication

Refereed Study Activation of the Financial Rights of the Author within the Scope of Electronic Information Sources

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Abstract

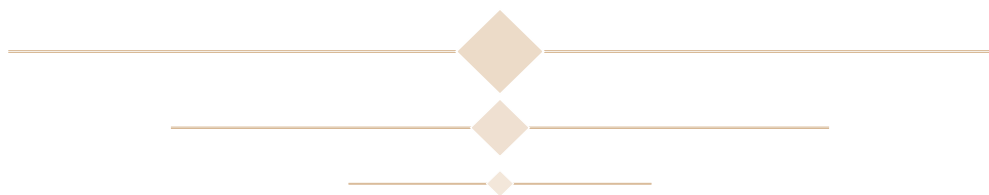
The present study aims at determining the possibility of maintaining the financial rights of the author when utilizing the protected publication or any of its elements within the electronic sources of information under the legal provisions of the Saudi Author Rights Protection Law. It shows the homogeneity between the legal regulations of the financial rights of the author in the Saudi Author Rights Protection Law and Bern Convention on the Protection of Literary and Art Publications. The present study mainly provides answers for the following questions: Can the financial rights of the author be activated when utilizing the protected publication nor any of its elements within the electronic sources of information? Also, are the provisions of the Author Rights Protection Law has a high degree of flexibility that guarantees protection of the financial rights of the author within the electronic sources of information?

The most important conclusions of the study state that not any utilization of the publication of any of its elements is considered an infringement of the financial rights of the author except in some specific cases in which the activation of the financial rights of the author when utilizing the publication or any of its elements within

through traditional medical techniques.

In vitro fertilization treats several matrimonial problems that occur immediately after the marriage due to infertility as a result of congenital defects that impede or even prevent sexual intercourse or other sexual disorders. Some countries use in vitro fertilization to improve offspring, control the sex of fetuses and treatment of genetic disorders which transmit from one generation to another. However, in vitro fertilization, as a modern means for the treatment of infertility, should be regulated through a group of legal measures and procedures that guarantee prevention of mixing of lineages and regulate freezing of fertilized eggs in order to protect the interests of society.

The present study concisely discusses the provisions related to IVF babies or in vitro fertilization in the light of the new Algerian family Law as a model.



Refereed Study ***Sharee'ah*, Legal and Ethical Principles** **Governing In Vitro Fertilization (IVF) in the** **Light of the New Algerian Family Law and** **Comparative Law**

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Abstract

Article 45 repeated of the Algerian Family Law added by order No. 05/02 dated 27.2.2005 states that both spouses may resort to In Vitro Fertilization under the following conditions:

1. The marriage should be Sharee'ah compliant;
2. The fertilization operation should be carried out with the consent of both spouses;
3. The fertilization operation should be done during the lifetime of both spouses;
4. The fertilization operation should be done with the semen of the husband and the egg of the wife; and
5. The fertilization operation should not be done using a surrogate mother.

This new article added to the Algerian Family Law, as per the recent amendment made to the law, forms an important step worthy of interest, study and consideration of the in vitro fertilization between the spouses inside and outside the uterine through IVF fertilization for the treatment of infertility which is not possible

1. *Ightisaab* (Arabic for rape) generally means taking something from somebody through aggression and unjust treatment, be it a usurpation of a property or an honour. It is normally used to mean taking any property unlawfully.
2. Contemporary Muslim jurists, especially the Maalikites, limit the meaning of rape or homosexuality, since both are acts of coercive sexual mistreatment.
3. The rape crime is equal to adultery or homosexuality in Islamic *Sharee'ah* and is subject to all the rulings applicable to adultery and homosexuality.
4. The woman's acceptance to have sexual intercourse with someone other than her husband is not considered a crime under the secular law unless it is committed on the bed of matrimony. This is contrary to the ruling set forth by the Islamic *Sharee'ah* which does not consider acceptance as permitting the act, and hence does not impede punishment.
5. All human communities with all their beliefs and values agree on rejecting rape and consider it a punishable crime. Rape is a flagrant aggression against the personal freedom of the victim; it is a double or a multi effect aggression.
6. Rape is prohibited in all religions. It has been proved prohibited in the Holy Qur'an, the Prophet's *Sunnah*, the consensus of scholars and intellectual reasoning.

A Refereed Study Rulings on Rape in Islamic *Sharee'ah* and Secular Law (Comparative Study)

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Abstract

As the sexual instinct is naturally created in the human body and as human beings are naturally disposed to enjoy sex, Allah has shown man the right path to satisfy this instinct and other human desires.

Moreover, the human sexual instinct is not left unlimited. Islam has laid certain rules and controls to regulate and direct it taking into account the right of human beings to satisfy their sexual desires on the one hand, protect human honour against any aggression, preserve lineages against loss and mixing and maintain human honour and dignity uncorrupted.

Rape, as a general concept, is criminalized by all religions, laws and regulations in the past and the present because it usurps freedoms and degrades human dignity.

There is no doubt that it is not easy to cover this broad issue in a short study. Therefore, I will limit my research to the Islamic *Sharee'ah* rulings on rape and adultery under coercion compared with the provisions of secular laws on the same issue.

In the light of the above, the following can be concluded:

means that protects the subject judge against any error in judging the case or in pronouncing the judgment.

Therefore, our judges should give due consideration and attention to the rules of formulating judgments on cases and technically produce them in a manner that observes the principles of writing down justifications and reasons of the judgments they issue on cases and disputes. They should also take into consideration the rules of judging on cases so that they are consistent with the principle of justice and so that these judicial rules become an established science that guides specialists and assures litigants because they are the ones who receive these judgments. The forms of these judgments should provide necessary tools towards convincing litigants of the reasons of these judgments.

A well-structured judgment written in an eloquent language and clear terms is the one that convinces both litigants that they are dealing with fair and well organized judicial facilities and well versed judges. The judgments issued by judges represent the natural unit of interaction between litigants and the judiciary. It aims at realizing communication with the litigants. The form of the judgment should inform the reader of the content and justifications. It should be easily understood by readers in order for them to accept them with satisfaction.

A Refereed Study How to Formulate the Cassation Judgment Towards an Attempt to Invest Fundamentals of Jurisprudence, Language, Logic and Argumentation in the Shaping of Cassation Judgment Linguistics

Dr. Hassan bin Ahmad Al-Hammaadee

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Abstract

One of the most visible facets of civilized and modern societies and the most important manifestations of civil renaissance and development is to have an independent judicial system that is well organized and respected. Justice is the elixir of life if trusted by people and feel rest assured that it is stable and balanced and that when they are sure that their legal positions are protected if anyone tries to transgress against them.

However, respect of this public facility will not be attained unless concerned people review the reasons of judicial judgments, their argumentations and logical justifications in order to appreciate the eloquence of these judgments being the recipients of these judicial products and debating speech.

As logic is the technical tool that protects the minds of concerned people against error, bring them closer to the truth and give them the power to distinguish between sound and corrupt argumentations, sort out facts and analyze relevant rules, the reasoning of judgments and writing them down with necessary justifications is the practical

Allah syas, “None like an expert may advise you.” Qur’an commentators like Al-Baghawee comment, “This verse refers to Allah who knows everything and is expert with his creatures. No one is more expert with his creatures than Allah.”

Aishah (may Allah be pleased with her) narrated that the Prophet (peace and blessings be upon him) entered her room and happily said, “O Aishah, Mujazzaz Al-Mudlijee visited me and saw Usaamah and Zayd covering their heads with a piece of cloth while their feet were exposed. He said, ‘These feet belong to each other.’” This is a clear proof that experience is given full credit in the Islamic *Sharee’ah*.

Narrations from the Prophet’s companions report that Umar bin Al-Khattab (may Allah be pleased with him) consulted experts and specialists concerning the dispute between Az-Zabriqaan bin Badr and Al-Hutay’a. Umar consulted Hassan bin Thaabit and accepted his viewpoint on the dispute. He also consulted his daughter Hafza about the period a woman can tolerate far from her husband. She advised that the husband should not keep far from his wife for more than four to six months.

All the above proofs indicate that it is legitimate to consult experts on different cases they have specialized knowledge in.

It should be noted that the Saudi Law of Procedure before Sharee’ah Courts and Law of Criminal Procedure permit consulting experts. General Security Law considers it a must to consult experts in technical matters like physicians, trace finders and midwives.

The Executive Regulations motion of the General Investigation and Prosecution Law provides for consulting experts under a separate chapter (articles 91-98) which discusses assignment of experts, cases of differences between experts on specific matters, the right to replace an expert and the like.

A Refereed Study Experts in the Judicial Process

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Abstract

Experience meant to be discussed in the present study is the judicial one. For judicial experience is the means of substantiation offered by an expert in a special field of knowledge or specialization upon the request of the judge. The expert carries a set of procedures and searches to reveal the reality of the disputed matter. If two or more persons differ about the lineage of a child, the judge requests the laboratory test officer to carry out DNA tests of the child and the two persons disputing about his paternity or maternity.

The expert is every person having a special knowledge of a matter to whom the judge resorts if the lawsuit includes a special case that needs specific knowledge to solve it, especially if the judge is not sure to have the technical knowledge to decide on like the reason of death, the composition of a substance suspected to have been adulterated or poisonous or the text of a document claimed to be forged.

During investigation, specialized experts may be consulted on the subject of the case like the forensic doctor, fingerprint expert, criminal photography expert, weapons expert, criminal tools and equipment expert, medical or chemical examinations expert, fire expert, trace finding expert, computer expert, credit card forging expert, mechanical expert, financial or accounting expert, genetic expert and experts of other new techniques used for uncovering certain crime.

While the principle of original innocence governs all stages of criminal procedures, whether the person is suspected or accused, and finds utmost importance, especially in the preliminary stages of criminal procedures, whether during the period preceding the criminal procedure, called the stage of collection of evidence, or the stage when the lawsuit starts through proceeding to investigation, taking into account that both of them form the first nucleus for searching for the perpetrator. These are the stages when suspicion is attached to suspects and the accused, exposing personal rights and freedoms to danger. However, the final decision is in the hands of the judiciary to respect or neglect this principle. The period of trial is the umpire with regard to determining the legal position of the accused, either keeping the original innocence or dropping this principle and exposing the rights of the accused to major risks. Therefore, some men of law contend that the principle of original innocence establishes full strength during the trial stage.

At the level of the Saudi law, while the criminal law of procedure does not use the term “just or fair trial”, its provisions implicitly embrace these concepts as is clear in article 3 which states that no penalty may be impose on any person unless he commits a prohibited and punishable act after he is finally convicted pursuant to a final judgment resulting from a trial held in a legal way. The expression “in a legal manner” agrees with the theme of justice and fairness which the Qur’an exhorts judges to adopt when judging between people. Allah says, “If you judge among people, judge with fairness.” This is the theme that the actual practice of the companions of the Prophet adopted in judging among people. It suffices as a proof to mention the judiciary document sent by Umar bin Al-Khattaab (may Allah be pleased with him) to Abu Mousa Al-Ash’aree (may Allah be pleased with him).

grounds or are not activated, to the dictatorship of the state and degradation of the sovereignty of the law.

The respect of procedural legality is one of the most important elements that the state should guarantee while regulating criminal procedures. According to some men of law, this is not justified by the fact that the procedural legality is a tool for regulating freedoms and protecting human right and a guarantee for striking balance between the effectiveness of criminal justice and respect of personal freedom.

There is no doubt that the most important pillar on which the procedural legality is built is the respect of the principal of original innocence of the accused person or what is termed as the presumption of innocence in every procedure taken before it since the time of starting collection of preliminary proofs until the time of exhausting ways of objection to judgments with the aim of guaranteeing personal freedom. This is the second of intermediate pillar of criminal legality.

While it is agreed that the procedural legality is the pillar of procedural structure at the criminal law in the state, the principle of original innocence is definitely the strong pillar of this legality. As described by a jurist, it is the golden thread in the fabric of criminal law.

Here appears the value of discussing different problems related to the principle of original innocence which is one of the pillars of procedural legality, especially that this principle, though it agrees with the sound human logic without the need to discuss its justifications, has become subject to some weakness.

Refereed Study **Problems of Supporting the Principle of** **Original Innocence during the Period of Trial** **(Comparative Study)**

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Abstract

There is no doubt that the goal of regulating criminal procedures in any country governed by the law is to strike some sort of balance between the interests of society by protecting it against crime and the interests of individuals by protecting their rights; namely to create some consistency between security and freedom. Since the punishment of the convicted perpetrator is the top goal of any community interested in the security of its subjects, the same community should, with the same amount of interest, work towards protecting innocent people against punishment. As soon as this balance is attained, it can be said that the conflict between the right of the state to punishment and the right of the accused person to individual freedom has become an apparent one and reflects the double face of the coin taking into account that the punishment of the offender is a confirmation of the individual freedom of the innocent person.

It is a caveat that the regulation of criminal procedures is based on assumptions and pillars without which the legal structure of the state cannot be described as legitimate. For it deteriorates, in case these assumptions and pillars are denied necessary

This agrees with the provisions of the Islamic jurisprudence as the rights of human beings transfer to offspring through inheritance.

Comparative criminal procedural laws state that the right to the complaint does not transfer to heirs after the death of the victim. However, this does not impede the heirs from filing a civil lawsuit claiming compensation for the harms they incurred as a result of his acts.

As the complaint is not required to be filed in a specific form, the waiver is also not required to be submitted in a specific form.

The Saudi Law of Criminal Procedure does not state a specific time for waiver of the complaint contrary to the comparative criminal procedural laws which state that the one who files the complaint may waive it at any time before a final judgment is issued on the lawsuit.

Comparative criminal procedural laws state that waiver does not transfer to heirs which is contrary to the provisions of the Islamic jurisprudence because it is the right of humans which transfers through inheritance. As the heir has the right to complain, he equally has the right to waive the complaint.

The effect of the waiver of the complaint reflects in the termination of the criminal lawsuit and the drop of the public right. Most of the criminal procedural laws state that the general prosecutor is bound to do so and has no option whatsoever.

The effect of waiver of the complaint reflects on the criminal lawsuit only and not the civil lawsuit resulting from the same crime.

criminal lawsuit unless two conditions are met:

- a. The complaint is related to the rights of humans or the major part of it relates to the rights of humans, and
- b. The crime is a minor one which involves a private right greater than a public right or the harm is limited to the victim and does not involve the public order.

If the complaint is filed by the victim or his representative, the subsequent effect is that the investigation authority or the general prosecutor is relieved from the constraint against its discrete authority to file the criminal lawsuit.

The Saudi Law of Criminal Procedure has not provided for the cases in which the right to the complaint terminates; it rather provides for the cases in which the private lawsuit terminates in general. These cases include:

- Issuing a final judgment, and Pardoning the offender by the victim or his heir.
- Comparative criminal procedural laws provide the cases in which the right to the complaint terminates as follows:
 - a. Death,
 - b. Waiver, and
 - c. Lapse of time

The Saudi Law of Criminal Procedure states that the right to the complaint transfers to the heirs of the victim whether the victim submits it during his lifetime or he dies before submitting it.

- For the complaint to be valid, it should be submitted to the authority specified in the law. This authority includes:
 - a. Criminal control officers, foremost among them the members of Investigation and General Prosecution officers.
 - b. Public authorities.
 - c. The pertinent court. The goal of the complaint is to bring the criminal to justice and punish him if he is convicted.

The Saudi Law of Criminal Procedure does not stipulate a certain form for the complaint. Therefore, verbal or written complaints may be filed. This agrees with the majority of comparative criminal procedural laws.

The reason that made the legislator consider the complaint a limit to the freedom of Criminal Investigation and General Prosecution Authority is that in some crimes the victim is considered more capable than the investigation authority of appreciating the suitability of criminal procedures in addition to the fact that the private right in these crimes is more visible and stronger than the public right.

The Saudi Law of Criminal Procedure has not specified the crimes in which the complaint is considered a limit to the freedom of the Investigation and General Prosecution Authority in the criminal lawsuit while comparative criminal procedural laws provide for it specifically.

In Islamic jurisprudence, the authority of Investigation and General Prosecution may only be limited or constrained in filing a

1. This constraint is the most applied one because it relates to every citizen and resident within the territories of the state. Therefore, the Saudi Law of Procedure expressly provides for it other than limits including request and permission.
2. There is urgent need to elaborate on the rulings of this constraint, especially that they are unknown to many people or perhaps to some of the members of the Investigation and Prosecution Board and some judges.

The author concludes the following:

- According to the Saudi Law of Criminal Procedure, the complaint is only valid if submitted by the victim, his representative or heir.
- Comparative criminal laws state that only the victim or his representative may submit the complaint but not the heir.
- The provision on accepting the complaint from the heir of the victim by Saudi Law of Criminal Procedure is the sound opinion as it agrees the provisions of the Islamic jurisprudence which states that rights of human beings transfer to heirs by way of inheritance.
- The one who files the complaint should be of legal age which is 15 years under comparative criminal procedural laws. This differs from the legal age for filing a claim which is 18 years.
- The complaint should be filed against the person criminally responsible for the crime, whether he is a perpetrator or a partner and the person complained against should be identified and not unknown.

Alqadhaaiyah Journal

A Refereed Study Rulings on Complaints as a Constraint to the Authority of the Board of Investigation and Prosecution in Processing Criminal Complaints in the Law of Criminal Procedure

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Abstract

The established rule in comparative criminal procedural laws is that the Board of Investigation and Prosecution has full authority to process criminal complaints. However, this rule is sometimes limited. One of these limits, in terms of importance, is the complaint itself.

This study is concerned with the elaboration on this constraint in the Saudi Law of Criminal Procedure, comparative criminal procedural laws and Islamic jurisprudence.

The importance of the topics of this study can be summed up in the following: