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- * Organizational Objections of Commercial Companies Against Third Parties
Rabia Eskini and Mohammad Heydari
- * The Role of Object in The Capacity of Commercial Companies...
Seyed Ali Seyed Ahmadi Sajadi and Esmat Danesh Ara
- * Conditions for Imposing Intimidation of Rights and Freedom...
Seyed Ahmad Habibnezhad
- * A Jurisprudential Study on Lack of Sanction in Natural Commitments
Seyed Mahdi Mirdadashi
- * The Legal Nature of Maritime Mortgage
Zohreh Sadeqi Tafii and Abbas Mohammadi
- * Analysis of the Rule of Exchange in Emamiah Jurisprudence...
Esmaeil Nematollahi
- * Bail in Had (Prescribed Punishment) and 'Taz'ir (Discretionary Punishment)
Rahim Nobahar
- * Protection of Providers 'Security in ICC Jurisprudence...
Javad Salchi
- * A Comparative Study of Crime Prevention Strategy...
Shahrdad Darabi and Ali Najafi Tavana



Center for Comparative Law Studies

Bail in Had (Prescribed Punishment) and Ta'zir (Discretionary Punishment)

Rahim Nobahar¹

The aim of bail in a civil action is to ensure the presence of the defendant at trial. In criminal cases, bail means to ask from the accused or the offender to designate someone who guarantees his appearance at trial or his presence for implementation of the punishment. According to some Islamic narrations (*ahadith*) it is prohibited to stand bail in criminal cases. These narrations have often been construed as referring to *had* in its idiomatic sense, i.e. prescribed punishment as opposed to discretionary punishment.

Through analyzing the jurisprudential evidences of the decree, the author concludes that first, due to ambiguity of the evidences it is hard to consider such a decree among the jurisprudential rules. Secondly, the prohibition of bail is not limited to *had*. Some kinds of bails like those that undermine the certainty of the punishment, or imply unjustified delay in the execution of the punishment, or require unnecessary obligations for the offenders or the accused are not allowed, be the punishment *had* or *ta'zir*. Thirdly, obtaining some expediency or avoiding an evil may make the bail acceptable or even necessary. Accordingly, the decrees of bail are not a cause for differentiation between *had* and *ta'zir*.

This article also implicitly compares bail in civil and criminal cases.

Keywords: Had, Ta'zir, Bail, Islamic penal law.

1. Seminary researcher and associate professor, Faculty of Law, Shahid Beheshti University
Email: r-nobahar@sbu.ac.ir