



Compensatory Justice In The Contract Rights Of Afghanistan

Afganistan'ın Sözleşme haklarında telafi Edici Adalet

ABSTRACT

Compensatory justice is a justice that determines the exact amount of each person's rights. The acknowledgment of this theory serves as a safeguard for the contractual parties' rights, a recognition that is currently acknowledged by legal experts. From a pragmatic standpoint, the concept of compensatory justice entails the necessity to equitably address the rights of parties within a compensation agreement, grounded in the principle of addressing harm. This theory in Afghan law is a combination of objective and personal criteria, and the lawmakers has discussed about compensation in cases of restoration of justice through the right of imprisonment, but in some other cases, he refers to termination and the right of imprisonment.

Keywords: Afghanistan, Compensatory Justice, Law, Agreements, Civil Code.

ÖZET

Telafi edici adalet, her kişinin haklarının kesin miktarını belirleyen bir adalettir. Bu teoremin kabulü, sözleşme taraflarının haklarının korunmasına hizmet etmektedir; bu, halihazırda hukuk uzmanları tarafından da kabul edilmektedir. Pragmatik bir bakış açısından, telafi edici adalet kavramı, zararın ele alınması ilkesine dayanan bir tazminat anlaşması kapsamında tarafların haklarının adil bir şekilde ele alınması gerekliliğini gerektirir. Afgan hukukundaki bu teori, objektif ve kişisel kriterlerin bir birleşimidir ve yasa koyucular, adaletin hapis hakkı yoluyla yeniden tesis edildiği durumlarda tazminat konusunu tartışmış, ancak diğer bazı durumlarda fesih ve hapis hakkına atıfta bulunmuştur.

Anahtar Kelimeler: Afganistan, Telafi Adaleti, Hukuk, Anlaşmalar, Medeni Kanun.

INTRODUCTION

Ensuring parity in the contractual rights of the parties involved in a compensation agreement necessitates that their respective rights are on par with each other, resembling the equilibrium of a balanced scale, which is called compensatory justice, whenever the balance of contractual rights is compromised. Compensatory justice requires that by means of valid principles be compensated legally.

"Justice" is a concept that mankind has known since the beginning of its civilization and has tried to establish it in different aspects of life and in different aspects of philosophical justice, political justice, moral justice, economic justice and legal justice. Equitable justice stands as a fundamental objective in the field of legal science. To attain this objective, it is imperative to consider legal theories alongside statutory texts. The theory of compensatory justice is one such legal theory that aligns with the narratives of fairness within the framework of governance by the people. Consequently, it remains essential for the legislature to take this into account.

Section One: Legal examples and theoretical foundations of compensatory justice in law

To justify this theory in the contract law of Afghanistan, legal precedents and theoretical foundations of compensatory justice can be pointed out. Since most of the provisions related to the rights of contracts are in the civil and commercial law, in this section we will examine the legal examples of compensatory justice in these laws.

A – Legal examples of compensatory justice in Civil Code of Afghanistan: The principle of justice is the main goal of Islamic legislation and it is mentioned in the Holy Quran:

« ولقد ارسلنا رسلنا بالبينات وانزلنا معهم الكتاب والميزان ليقوم الناس بالقسط . »

This principle is one of the central principles in Islamic jurisprudence and especially in Hanafi jurisprudence. The effect of this principle can be seen in different parts of Islamic jurisprudence in the Civil Code, the role of this principle is obvious, and compensatory justice explains some of the rules and theories in the Civil Code.

1. The right of detention: in case the two parties to the transaction do not make a specific decision regarding the time of exchange of two counters, it is clear that the expectation involves a reciprocal exchange, such as the simultaneous creation of ownership for both parties when selling. In essence, two alterations must occur

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concurrently. Compensatory justice necessitates the simultaneous fulfillment of two reciprocal obligations, without any discrimination between the involved parties. The mutual dependency on equality between the two parties is such that, if compelled to uphold their end of the contract without receiving the agreed-upon expectations, they are obligated to relinquish what they had promised. They perceive an injustice because there is a potential risk that the other party may be unable to fulfill its commitment, be it due to insolvency, compelled destruction of the committed subject, or other contributing factors. The jurists have also considered the right of imprisonment as a requirement for compensation. Sheikh Ansari (RA) says in this regard: "Ensuring the rightful delivery to each party involved in the contract is a mandate that each participant must uphold in accordance with the terms of the agreement."

Jurists also believe that the right to arrest is based on the dependence and confrontation of the obliges, Dr. Amami believes: "There is a dependence and relationship between the two cases of the indemnity contract, which gives each of the parties the right to refuse to hand over the pledged item." Do it to the other side fulfill your commitment. "In another context, it is argued that the rationale behind the right to detain stems from the principle of compensation, arising from the interplay between liability and recompense. The cause of compensation obligation is not specific to sale and it is valid in every contract of compensation. Concerning the explanation of the obligation in a barter contract, two requisites are involved, with one counter posed against the other. This dynamic results from the interdependence and relationship between the parties, reflecting the intentions they have mutually set forth. The fundamental factor in every transaction involving the acquisition and control of two entities is the procurement and control of the substitute from the territory of the other party. In essence, ownership and control of the substitute only exist when there is possession and control over it. As he knew that he could not get the compensation, he could not transfer his property to the other party. The right of imprisonment is generally accepted in the public jurisprudence, although it seems that Maliki's jurisprudence has not said anything about it. The right of imprisonment has been presented and defined widely in Hanafi jurisprudence and, accordingly, in the Civil Code. Kasani has presented the right of imprisonment in marriage, mortgage and sale. Ibn Najim mentions the right of imprisonment in his book *Al-Bay*. Shafi'i jurists have recognized the right of imprisonment and have cited it in various chapters, among them Nawi says in his book, "The seller has a stake in it, which is the right to hold it to collect the price". The right of imprisonment is also a subject of attention among Hanbali jurists, Ibn Qadamah writes in *Al-Maghni*: "All scholars agree that a woman can refrain from marriage as long as she has not received her dowry." This statement of his is used that the jurists of Ahl-e-Sunnah have a consensus on the right to imprison a wife.

2- Options: To justify some options, they have provided reasons, including negation of wrongdoing, and compensation of damage, which of course can be referred to the theory of compensatory justice as an example of the basis of beneficence and the option of wrongful justice. When there is greed in a contract, independence is achieved and the prohibition of independence is based on the principle of harm. The moral basis of independence is nothing but respect and equality. Of course, Islamic sects have different opinions on this. Malikis and Hanafis believe that if the contract is with inexperienced and uninformed people or if there is an imbalance in the contract, it will be canceled due to independence. According to Shafi'is and Hanbalis, the disproportion must be gross and accompanied by fraud. The Civil Code does not mention the definition of embezzlement and its types. Real and if the purchase price is 15% or more, it is an example of embezzlement. Furthermore, in cases of product or pricing defects, not only does harm befall one party, but customer satisfaction is also compromised. A customer is unlikely to be content when receiving a flawed product, especially if unaware of its defects.

3- Loss of sale before seizure: The rule of loss of sale before seizure, which is found in Article 1085 of the Civil Code, is based on the theory of compensatory justice, because it should be known that the ultimate goal of buying and selling is that the buyer receives the money against the good that is sold. The fundamental objective of buying and selling is for the buyer to obtain the goods in exchange for the payment made to the seller.

Indeed, it's crucial to recognize that the primary aim of buying and selling is for the buyer to receive the goods or services in return for the money provided to the seller during the transaction. If he finds out, he is not ready to deal with it only transfer of ownership alone does not provide this goal, if the buyer finds out that he cannot get the good against the money he pays he will not enter into transaction. It is agreement of both sides, to give the price to the seller and control over the sale is created as a compound entity, and the destruction of one part of it destroys the other part as well. As soon as the sale is lost, because the buyer's commitment to pay the price loses its basis, it also disappears and returns to the buyer.

Section Two: examples of exchange in the commercial law of Afghanistan

The execution of a contract between two or more individuals signifies the mutual intention and will of the parties involved, with each party anticipating the full fulfillment of their obligations by the other party. However, there are instances where one party to the contract may be unable to fulfill their commitment, such as in the case of bankruptcy. To prevent potential harm to the parties involved, the legislator has granted the right to request fulfillment of the commitment from the other party. This provision ensures that, in the face of a looming threat, the non-defaulting party has recourse to enforce the commitment, preventing the possibility of the defaulting party evading their obligations. This topic is included in Article 645 of the Commercial Law, so that if a customer becomes bankrupt in a commercial sale before the delivery of the price, the seller can refuse to deliver the goods to him. Also, the justice of the compensations determines that the work commission will receive its wages in exchange for the transaction that it does for the order. Hence, the labor commission has the authority to derive its salary from the proceeds obtained through the transaction.

Part Two: The theoretical foundations of compensatory justice

Classical Roman law does not consider the price to be fair and just in contracts as mandatory, in such a way that one party to the contract could buy or sell a commodity at a lower price, gradually reducing the partiality of the contract. The Greeks and the Romans had a decision Justin's code existed that if the seller sold the land for less than half of the price, he would have the right to cancel, but the buyer could cancel the cancellation right by giving the real price. The jurists of the middle ages developed this theory in such a way that, in addition to land, it also included other movable property and it was applied to the buyer and seller. Natural law theorists also accepted this point of view. Grosius believed that there should be balance in the compensation itself and the main subject of the contract, although he himself believed that accepting claims based on imbalance after the contract would lead to countless disputes. Pouniy also says: "If the contract is not balanced, then it is flawed from the point of view of fairness, which affects the conscience. At the same time, if there is no gross bribery, the legality or legitimacy of the contract will not be affected. Otherwise, the principle of liberty or autonomy of contract and the principle of permanence the stability of transactions is weakened be it." Nevertheless, he indicated the sale at a just or reasonable price and says: "The nature of the contract requires that each of the parties get the equivalent of what they transferred. In the 16th century, based on the thoughts of Aristotle and Aquinas, compensatory justice supported the distribution of wealth among citizens. Aristotle claimed that compensatory justice includes contracts such as sales, loans, mortgages, and loans. Aquinas states that compensatory justice is achieved when a person voluntarily transfers money to another. If the transfer is in such a way that the recipient does not have a debt or commitment, like the case of Hebe, this is an action unrelated to fairness or justice and is a result of freedom.

1- A person should transfer his money to the opposite party in exchange for the money he receives, for instance, in the case of selling.

2- The person transfers the rub to another person so that the transferor uses it with the commitment to return it to the owner, if this use is not free, it is a rental transaction.

3- The person transfers the rub to another person to take it back again. This action is done to protect the property or because of an obligation, such as when the person pledges the rub.

In the Anglo-Saxon legal system, the core of the notion of unfairness in the contract and non-observance of compensatory justice should be sought in the courts of justice. It creates a trade between two subjects, they refrain. Here we refer to two judicial precedents. The judgment of Robert Hyde, a judge of the London High Court in 1663, and the opinion of Judge Halt in 1705, both cited the lack of balance in the transaction between an urban expert and a rural party ignorant of the market situation.

In German law, good faith is considered as a basic concept. Broadly speaking, it can be asserted that a contractual party is obligated to conduct themselves in a manner that considers the legitimate interests of the other party. The application of this principle in Germany leads to the creation of conflicts. Even though the Roman theory of excessive greed has become part of German law, it was abandoned during the compilation of the Civil Code and did not appear as a special provision in the Civil Code. The German judges of the 19th century also considered compensation for the unfairness of the contract price as an exception to the principle of binding contracts. Finally, the rights were justified in clause 2 of the article 132 of the German Civil Code, it was established: "If a person takes advantage of another person's need, inexperience, lack of serious decision-making, and the will to obtain a benefit for himself, which is clearly not commensurate with what he himself gives." the contract will be invalid. "One of the recent lawsuits in Germany is related to the contracts that obligate the artist to the advertising company. In this contract, the company abused the inexperience and youth of these people and used them to

conclude contracts for profit. He was deceiving as it has been said, the theory of compensatory justice is based on fairness in common law and goodwill in German law, but in the law of Afghanistan, this theory is based on the rule of harm. Based on this rule, the rights of the parties must be balanced. Balance should exist and the transaction should not harm the parties at this time that if the balance of compensation is disturbed, as a result of the transaction, one of the parties will be at a loss, and the justice of compensation will be misrepresented.

Part Three: System of compensatory justice in Afghanistan's contract rights

In order to organize compensatory justice in Afghanistan's contract rights, it is necessary to examine its criteria and provisions. The first section: the criterion of compensatory justice in the contract rights of Afghanistan In relation to compensatory justice, personal, objective and composite criteria can be considered.

A- The personal standard of compensatory justice in Afghanistan's contract law: It is possible that the compensation is in the will of the parties without there being any balance between the compensators in the outside world, the parties have reached consensus to this compensation, for example, in the case of an emergency transaction. This is one of the obvious examples of the need that because of financial hardship, a person sells his property for less than its real value. In some hadiths, dealing with the poor is forbidden, but due to the legal basis of the prohibition in this hadith, it is not a sanctioning prohibition, but rather an indication of the immorality of the transaction. Talk to the person in need according to the Hanafi jurisprudence, the Civil Code of Afghanistan has also invalidated the emergency transaction in Article 513, or if the sell is defective and the buyer, aware of this defect, settles the cost of the quality product, in this case, even though the balance between the claimants will be disturbed. Since he customer has given his consent to this transaction, there is no right of cancellation for him.

B- The objective criterion of compensatory justice in Afghan contract law: according to this criterion, there must be a parity between the compensators, for example, if the sale is lost before the collection, the contract of sale will be canceled because the ultimate goal of the sale is that the buyer in exchange for the price of the sale and for the same reason, if the buyer knows that he will never find the sale, he is not ready to complete the sale, also in the case of option of fraud, in which the balance of the value of the substitutes is destroyed, if this gross fraud is huge, that is, the size fifteen percent or if it is more, the right of cancellation will exist.

C - The composite criterion of compensatory justice in the contract rights of Afghanistan: the legislator considers it invalid in the case of emergency transaction, even if there is no balance between the parties, because the compensation is in the will of the parties and the parties are satisfied with this compensation. They have given a personal standard has taken into account and in case of loss of sale before receipt, which leads to cancellation, or in the case of option of fraud, he has paid an objective criterion, therefore, it seems that the criterion of compensatory justice in the contract rights of Afghanistan is a combination of the personal criterion and it will not be.

Part Four: Provisions of compensatory justice in the contract rights of Afghanistan

Whenever the balance of contractual rights is disturbed, the theory of compensatory justice requires that it be compensated by means of valid legal principles, which in some of the legislative materials terminates the right of the injured person and in other places the contract is protected. The rest and the balance should be provided in another way.

A- Revival of compensatory justice by preserving the existence of the contract: In some cases where compensatory justice is destroyed, the legislator gives the possibility to provide compensatory justice by preserving the contract and by methods such as arrest and the right of imprisonment.

1- Restoring compensation justice through the payment of compensation: The person who makes a transaction wants to get a healthy and faultless property, and he imagines that the transaction is healthy, so the legislator, in case of a defect in the transaction, in order to prevent loss the dealer is considered a bad option for him. The right of rescission due to a defect is not the sole means of redress; alternatively, the customer may choose to accept the contract and receive compensation in the form of the price difference between the defective and non-defective goods. Compensation is attainable as long as there is a potential for rejection, as the owner is not obligated to remit payment for defects unless satisfactory. Thus, when rejection is not feasible due to factors like contract loss, the buyer can communicate with the owner regarding the defect and secure a refund.

2- Restoring compensatory justice by creating the right of arrest: After the contract is finalized, each party holds the right to withhold the transferred funds until the other party is prepared to reciprocate in a manner that legal scholars refer to as the act of submission and surrender, wherein the parties engage in the mutual surrender and fulfillment of their obligations. In accordance with this entitlement, each of the two parties involved in the exchange has the right to condition the fulfillment of their obligation upon the receipt of the agreed-upon compensation outlined in

the contract. This option, which suspends the performance of the commitment without terminating the contract, is called the right of imprisonment.

Nevertheless, in this scenario, a complication arises that, if each party can ignore the fulfillment of the covenant with the excuse of the other's refusal, it is not known how this conflict and conflict can be ended enough. It points to the fact that the applicant should be condemned to injustice or can both be required to fulfill the promise? In order to avoid this problem, some jurists have tried to consider the seller's obligation to be fulfilled before the buyer. This statement is based on the necessity of the seller to submit the request to the buyer, and in its reasoning, they said that because the seller is obligated first and he is the one who pays the money in return, he must also be the first to fulfill the obligation and in addition to the price.

And for this reason, the sale will not be established until the sale is delivered, and the loss of the sale will cancel the sale. But this opinion cannot be accepted because not only the buyer can also be the proposer of the transaction and as a result the speaker of the request, but after the agreement of the parties, the exchange is a set in which a part of it is exchanged for another part. Each party's commitment is set against the other's commitment. Asking alone does not create any religion, but it is this group of asking and acceptance that creates both religions together, which does not have any superiority over the other. In any case, in the last assumption that both of them wanted to compel the other, it may be possible to issue a verdict to accept the obligation of the buyer and the seller.

B- Restoring compensatory justice through breach of contract: In order to restore compensatory justice, the legislator refers to rescission in some cases and the right to rescind in other cases.

1- Restoring compensatory justice by announcing the termination of the contract: In this context, it's pertinent to consider the principle of the seller's loss before receipt, grounded in the theory of compensatory justice. As soon as the sale is nullified, the buyer's obligation to pay the price dissipates, and any payment made is refunded to the buyer. Returning the price to the buyer is called rescission in legal language, which is not against the rule. The provision of Article 1085 is in the category of legal principles and does not apply to the sale contract, this principle should be applied in situations where the price is lost before collection, extending to cases such as rent, loans, settlements, and compensation. This application aligns with the ultimate intention of the parties, which is to acquire monetary value. The rejection of the transaction is in accordance with the general principles of contracts and the outcome of adhering to the mutual intent of the parties. The rule of loss of sales before receipt is a principle that the parties can mutually agree to contravene. This flexibility stems from the same joint wills that form the foundation of executing this rule, and the buyer can opt to go against it as well, for example, it can bet that the loss of the sale is from the customer and he returns all or part of the price to the seller. In international commercial proceedings, specifically concerning the transfer of security for compensation as per Article 67 of the Convention on the International Sale of Goods, the legal norm dictates that the potential risk in a contract for the sale of goods abroad typically shifts when the goods are handed over by the seller.

2- Revival of compensatory justice by creating the right of termination in the contract: At times, one of the contract parties discovers the right to terminate the contract beyond the contract's defined scope (such as through an option) because the legislator aims to enable this method for potential gain. Don't see indemnification for damages take away the damage from him, among these things, you can point to the option of fraud and the gross fraud. In every transaction, there is an agreement based on the health of the subject, the attention of buyers and sellers is to the extent that they do not see a reason to stipulate the existence of this description in the transaction, this implicit condition is present in the exchange contract, which is the subject of must be flawless, the seller guarantees the hidden defects of the sale, and the buyer also believes that the guarantee is the same when he pays the price. In simpler terms, in such a scenario, two aspects are distinguished: the completion of the transaction involving the purchase and sale, and the accurate representation of the item's condition as described by the seller. Therefore, the lack of description does not destroy the first desire and does not invalidate the contract, even when the subject of the contract is certain. Therefore, the right of cancellation is a means to compensate the buyer's loss which has a contractual root, the responsibility of the seller of defective goods is also based on the agreement between him and the buyer, and the necessary contract is considered to be cancellable. In case of a defect, the customer can cancel the contract before the receipt, but if the receipt has been made, the contract will not be canceled without the consent of the parties or a court ruling. In the case of option of fraud, it is also considered a group based on an implicit condition that is agreed upon by both. They say that in exchange contracts, both parties expect to receive the equivalent of what they undertake, and the transaction takes place on this basis. Therefore, the silence of the two parties means that they have accepted the economic balance between the two parties as a condition. In this way, whenever it is known that the condition in question has not been fulfilled in the transaction, the loser can cancel the contract based on the violation of the implied condition. In this regard, the main goal is to compensate

for the lost damage, except for the harm that arises due to the failure to implement of the implied contract. In other words, canceling the guarantee is a breach of contract and has a contractual root.

Conclusion

- 1- Ensuring parity in the contractual rights of the parties involved in a compensation agreement necessitates that the rights of each party are equivalent to the other, like two levels of the scale, and this equality is called compensatory justice whenever the balance of contractual rights is threatened. The theory of compensatory justice requires that by means of principles be compensated legally.
- 2- From the legal examples of compensatory justice, we can refer to the right of imprisonment, legal options including the option of embezzlement and the option of fraud and loss of sale before receipt.
- 3- The theoretical basis of compensatory justice in Afghan law is the rule of harm. According to this rule, there should be equilibrium between the rights of the parties in the contract, and the transaction should not inflict harm upon any of the involved parties.
- 4- The legislator has paid attention to the personal criterion regarding the emergency transaction, and in the case of the loss of the sale before the collection, or in the case of theft, he has applied the objective criterion, suggesting that the criterion of compensatory justice in the contractual rights of Afghanistan should be both personal and objective.
- 5- In some cases where compensatory justice is involved, the legislator makes it possible for compensatory justice to be provided by preserving the contract and through methods such as the right of arrest and imprisonment.
- 6- In order to revive compensation justice, the lawmaker refers to the right of cancellation in cases such as loss of sales before collection and in others such as theft and options of fraud.

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