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Comparative study on the fundamental principles of the damage opposition rule from the perspective of international convention on sale of goods (Vienna 1980) and Islam as well as Iran laws

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ABSTRACT

It is essential for the individual who experiences loss that common operations are done so as to prevent the inducing of loss or its reduction, otherwise, the damage party is not responsible for experiencing the losses induced by short calls and is not liable to claim those parts of losses to which it was not possible to oppose. What is important is that what the basis are of responsibility are in relation to the demanding when it comes to oppose the loss or its reduction. There are different perspectives proposed in this regard such as the causality, measure rule, no-loss rule, joined fault rule, predictability rule of loss, and good faith rule. Thus, economic efficiency is claimed to be the basis of the rule and it is contributed to type of rule extension within Islam and Iran law. However, it seems that the most appropriate rule which can justify the afore-said rule is that the causality relationship is the measure rule in Iran and Islam laws due to the fact that short calls exclude the causality relationship between the agent of loss and the induced loss when it comes to perform the common essential affairs in an attempt to oppose or reduce the loss. In fact, it is lack of performing the necessary affairs to reduce the losses that the causality relationship of the loss agent and the induced loss is contributed to the Dhimma demanding individuals. Although there is no clear demonstration of the loss opposition in Islam and Iran laws, the rational is said to be that it is admitted in Iran rules through referring to the article 167 of the constitution.

KEYWORDS: opposition to loss, losses, causality relationship, rule of measure

INTRODUCTION

STATEMENT OF THE PROBLEM

The aim of civil responsibility such as contract-based and forcible is that no loss remains unopposed. The reason is that in case the individual faces the loss derived from the commitment violation or any other convention, all rational of civil responsibility are congregated so as to oppose the induced loss and to establish civil justice. This is one of the most important issues in the field of civil responsibility which demonstrates that the loss agent either as contract-based or forcible should oppose to the loss. The questions is that incase loss is induced to the promise due to involuntary actions, should the promise or the losses observe the inclusion of loss with the possibility of its opposition or it is qualified that common actions are done in order to oppose the loss or its reduction. This is discussed in the common-law system as Mitigation of Damage according to which, demanding or the individual who experiences losses is responsible for preventing the loss or its extension through doing the common actions, otherwise, it would not be feasible to claim for the part of loss to which he has been able to show opposition (Treitel, Law of Contract, 881). In contrast, the agent of loss would not be responsible for those parts of losses to be formed due to the action of sloth demanding individuals. The main application of this rule is within the field of international commerce and it has been clearly demonstrated in an extensive way (Shoarian, Molaii, 2011, 132). As the act of 7-4-8 of international commercial contract principles states: the responsible party of not making commitment does not take the responsibility of the loss which was possible to reduce through doing rational and common measures by the losses. Hence, principles have been determined based on the article 9-505 having to do with principles of European contract law regarding this issue (Principles of European Contract Law, 445, Lando). This rule has been clearly demonstrated in international convention of goods sale so that article 77 of the afore-said convention states that: “the party who relies on violation of contract is responsible for running common measures to oppose the losses such as not enjoying the benefits of violating the contract. In case no measure is done by the part, the violator is free to claim for the reduction of loss to the extent that the loss should have been reduced”.

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Despite the fact that this rule has not been clearly stated in Iran laws and Imami jurisprudence, one can infer the product of this rule through referring to the principles and justice rules (Safayi Seyedhosein et al., 2011, 231).thus, the aim of the present study is to explore and review the fundamentals of afore-said rule in Iran and Islam laws as well as its extension to the Iran laws.

Fundamentals of opposing the loss in Islam laws

The rule of measure

One of the Muscat liability in Islam laws is the rule of measure. The rule claims that thesource of loss is the individual himself, no one is responsible for the induced loss (Mirfatah Maraghei, Alanavin, 499). From historical perspective, the measure rule is considered as one of the exemption tools of responsibility and contribution of loss to the losses and that sloth is regarded as one of the extension of running this rule (Katozian, 2006, 124).Hence, one of the justice rules that is liable to induce inevitable loses is the rule of measure on the condition tat inevitable losses rely on sloth of losses. The reason arises from the fact that in case the losses committed to the determined responsibility, such losses would not be induced. Having described the rule of measure in short terms, the researchers examine the fundamental status of this rule in Islam laws in line with opposing the loss.

The concept of measure rule

Most of scholars have defined the measure as proceeding on task, doing affairs, and accomplishing affairs (Amid Persian Dictionary, 1977, 206). Other wise men have added diverse definitions among which is action on war means bravery (Lesanolarab 467; Majmoalbahrein, 134-235). In legal terms, this implies that the individual who does affairs which bring losses is not liable to refer to another individual in order to redress (Darabpor, 1998, 89). In other words, when the owner disrespects his assets, the liability of its responsibility is excluded and the owner cannot claim for loss. Inthis regard, one can refer to version of "Does not solve the wealth of a Muslim himself, but pleasant" and the opinions of all muslins (Mirfatah Maraghei, Pishin, 418; Mosavi Bojnordi, 2013, 77; Ghasemzade, 1999, 225).

In Imami jurisprudence, the sentence has been issued to no liability in case the losses individual does loss-inducing act. As an example in case, when the gentle individual makes transactions with minor or insane and gives his assets to them, the minor and insane are not responsible if the asset are wasted (Mosavi Bojnordi, 1996; Darabpor, Pishin, 90). This issue is seen in civil law. According to the article 1215 of localrule, in case the property is given to minoror insane and they waste the property, they are not responsible. The reason is that the owner has induced losses himself through giving his property to the minor or insane (Katozian, 2007, 729).

The rule of measure as fundamental of losses opposition rule in Islam laws

Regarding diverse definitions proposed for the rule of measure, the question is that can the rule of measure be considered as the inducing basis of inevitable loss to the losses? A number of scholars believe that in case the losses does not run the related actions to reduce the induced loss, he has done something as loss to himself and this is the reason he cannot claim for the damage caused by such sloth. In fact, the jurisprudence resources have considered the opposition rule of damage as integrated discussion and one cannot find clear issue in this regard; however, it is clear from the proposed versions that the rule of measure in Islam laws can be taken into account as one of the basis of loss opposition rules. For instance, when someone leads others to damages and that he does not attempt to survive himself and gets die, it is believedby scholars that retaliation is exempted (Sheikh Tosi, Khalaf, 161). Regarding the atonement, some believe that it is not exempted (the same, 162; Mohamad Hasan Najafi, Javaherkalam, 42, 25).contrary to the afore-said theory is proposed by the view of Imami jurisprudence that the atonement should not be given (Mohageg Helli, SharaieAl Elsam, 972; Allame Helli, Gavaedalahkam, 584; Moahamdsadeg Rohani, Feghalsadeg, 20). The two statements have been proposed among the public jurisprudence (Ebne Gedame, 9; Abdorahman Jazaieri, Alfafe Alal Mazahebalarbae, 279).

Although in the above-mentioned example and the opinions proposed b scholars in line with the exemption of retaliation and not belonging of atonement to the opposition rule of loss, it seems that what all the statements an opinionshave in common is that the rule of loss implies that when an individual does not show anyreaction when confronting difficulties and events or no attempt is done to get survived, he has directly disrespected his own soul and no one else is liable to be committed. In thsiregard, scholars maintain that the individual has committed something illegal to the soul (Mohageg Elli, Shareieleslam, 972; Alghazi Alberaj, Almazhab, 642; Sheikhe Tosi, Mabsot, 19; Allame Helli, Tahriralahkam, 241; Shahid Sani, Sharhe Lame, 20). Other scholars have indicated that such a situation is contributed to the individual himself and not to theperson who has caused the loss (Allame Hello, Gavaedlahkam, 584). Those who believe that the atonement is not belonged in this case, think that when the individual does not rescue himself through abandoning the situation, this implies that he has get out of the fire and has trapped himself into it again. Thus, such an affair is claimed to be against the liability of Muscat

(Mohamadsadeg Rohani, Fegholsadeg, 26, 20). Regarding the idea that atonement and retaliation are exempted in these conditions and that the afore-said issues have to do with the loss inclusion to the soul and spirit of human, one can admit the responsibility falls in the assumed hypothesis within the financial case (Shoarian, Molayi, 2011, 148). In other words, when it comes to abandoning the detrimental situation is possible for the losses and the sloth causes the loss in this regard, the agent of loss is not responsible for the induced loss (the same, 148). So, one can declare that the rule of loss opposition is one of the aspects of total rule of measure and the rule of measure can be taken into account as the main jurisprudence principles of loss opposition rule in Islam laws.

Principles of loss opposition rule in Iran laws

The causality relationship

One of the required conditions to oppose the loss is the existence of causality relationship between violating the commitment and occurrence of loss. This is highlighted when it is known that the loss would not have been induced if it had not been violated. Thus, in case it is evident that the loss would be induced even if the commitment is not violated, then one cannot consider the commitment violator responsible and it is not feasible to ask for claim (Shahidi, 2010, 75).

One of the issues discussed in the field of legal principles of loss opposition rule is the causalityrelationship. In fact, in case the promise or losses does do not perform the common preventing acts when it comes to the inducing of loss, the individual himself gets loss and would not have the right to ask for claim (Shoraian, Molaii, Pishin, 134). It has been stated by one of the authors of common law that mitigation of damage is not a separate rule, rather it is one of the paradigms of broad theory implementation of causality. Contracts and civil responsibility can exclusively bring about losses to be caused through illegal agent of loss. Any type of loss induced by uncommon measures should be tolerated by the individual himself(Bridge,Mitigation of Damages Contract and the Meantng of .Avidable Loss,400). Even, in some of the legal system in which no loss opposition rule is predicted, the lawyers stick to the causalityrelationship in justifying the afore0said discussion (Shoarian, Molaii, Pishin, 137). As an example in case, in France law, where no act is demonstrated in a clear way, some of the lawyers follow the causality relationship when it comes to probe the existence of the afore-said rule(pautremat, Mintigation of Damage: A French Perspective, 206.). In contrast, rejecting the afore-said theory, some of the lawyers believe that the main damage mitigation rule cannot be contributed to the causality relationship since the causalityrelationship is the fundamental of joined fault rule and that the concept of afore-said rule differs from the joined fault theory although they overlap in some cases (Michaud Mintigation of Damagein the Context of Remedies for breach of Contract, 298).This carries the meaning that in case causalityrelationshipsconsidered as the basis of damage mitigation rule, one cannot distinguish between the rule and joined fault theory since the basis of both will be the same; however, this claim cannot be justified since different legal terms might have common dimensions in some principles such as the no-loss rule which has been claimed to be the basis of different authorities like fresh fraud and error (Shoarian, Molaii, Pishin, 134).in Iran law, some lawyers have mentioned the causality relationship as the basis of loss opposition and they have announced that in case the losses does not provide measure to rescue himself from the damages, the agent of loss is not liable to be responsible since it is the loss inducing individual himself that causes the condition (Shahidi, 2010, Pishin, 76). A number of Imami jurisprudences have indicated that, leaving the act can be considered as the cause. For example, in case one individualcauses damage to another person and that the person does not rescue himself from the very situation intentionally, the prior individual is not claimed to be culprit since death relies on the act abandoning of the dead. Hence, lack of loss measure in relation to one would disintegrate the causality relationship between the do and doer (Khoii, 2001, 6).

A number of scholars have indicated that abandoning the act can be deemed as causality. For example, when a person causes that another individual gets into trouble and that the individual can flee from the situation but does not perform any accomplishment, the first person is not culprit since the death is approached when the person abandons the job and lack of loss doing would disintegrate the relationship between doing and doer (Khoii, 2001, 6).

Even, a number of consultants believe in this regard that when another person is got into trouble and he does not make efforts to rescue himself and then dies, there will be no responsibility since he is the cause of death (Shahidsani, 1989, 26). Also, they have declared that in this extension, death is caused by the person himself and it is not true to know the other individual as the culprit (Allame Hello, 1992, 3). Some other scholars view the fact that it is the victim who is the cause of death (Mohagege Ardebili, 383).

Common assignment use

When the contract is breached for any reason and the losses does not prevent the inclusion of loss, there are two causes for the inclusion of damage i.e. the breach of contract and lack of doing the measure to oppose the damage or its reduction. Now, it is the time to examine whether the common cause of damage inclusion and breach

of contract is the fault of the damage agent or lack of doing the measure by the demanding in line with opposing the damage or reducing the damages which could have been prevented. It seems that sloth of promises in line with not opposing the induced damage or its reduction is the common cause since this is sufficient to claim that lack of doers to oppose the damage would be the cause of damage inclusion (Darabpor, Pishin, 118). What is meant by cause is the events which lead to damage in the normal current of affairs and based on the common judgment. The common cause and main one are easy to be distinguished from other conditions and it is feasible that problems occur due to the integrity of causes of "close and non-intermediate", "priori in bringing effect", and discussions related to "the equity of tools and conditions" as well as "the effect of each tools". (Darabpor, Pishin, 118). In addition, a number of lawyers highlight that the theory of common cause and main one has been based on the scientific distinguishing of probabilities which claims that one should distinguish between the inclusion cause of damage and the conditions which have brought about such conditions: all events and conditions involved in the occurrence of damage should not be regarded as their tools. One regards those events and causes that are based on common and normal trend of affairs leading to the inclusion of damage; however, the conditions which happen by accident are not the causes (Katozian, 2006, 473). Hence, everybody is responsible for indemnification of damages derived from the common trends of him. Putting into other words, the culprit is the only responsible for events which are predictable from the custom perspective. For example, if a shoemaker does not make maximum efforts in repairing the shoes and that the businessman is not able to take part in commercial contract sessions, one should not blame the shoemaker as the culprit (the same, 474). Hence, one should consider the causality relationship as the main basis of damage opposition since the sloth individuals do not embark on accomplishing the prevention tasks of damage inclusion which results in disintegration of the causality relationship between the doing and doer. This causes that the culprit is exempted and such an assignments based on common trend of affairs.
Some of the instances of rule in Iran statutory laws

Opposition to damage in civil rule

One does not observe the text within the civil law dealing with the involvement of opposition to damage, but one can find out the implications rooted within the concepts and contents of this rule through making meticulous examinations. The civil law, in some cases, assigns the affairs to the customs and the necessity of contraction is highlighted by authors of civil law as the conditions of contraction (Katozian, 2012, 45). Act 226 of civil law states in this regard that: commonality of an affair in custom and tradition means the inclusion in contraction so that the contract is not clearly stated". Legal scholars justify the statement saying that when the parties donot compromise the same as the rules, the thing to say is that they have attempted to assign the reasonability to the tradition (Katozian, 2000, 160; Emami, 2006, 231). Hence, the custom knows indemnification of loss as essential component unless it is inevitable in some cases that any common individual can ignore it. Such a necessity is regarded as the duality and agreement in some cases and commitment traditionally means the specification. The reason is that silence in relation to the custom of which the two parties are informed, means implicit satisfactions to observe it. It should be noted that the custom rules of contract are the same as the ruling components although the two parties are unwise (article 356 of civil law, Katozian, 2011, 272). In summary, in case the custom of businessmen across international fields are claimed to be the part of contract, in which the parties believe implicitly that in case of inducing damage the doers accomplish some acts to prevent it, then the afore-said rule would not have position in civil law (Darabpor, Pishin, 125). As article 222 of civil law states, in case the commitment is observed based on observation of the afore-said article, the ruler can allow the person to do the task himself who has observed the commitment and to sentence the violator. The promise, who is similar to the opposition rule of damage, prevents the damage caused by lack of observing the commitment (the same, 126). Hence, one can find the position of afore-said rule in civil law through drawing attention to the effect and concept.

Damage opposition in civil responsibility law

The most explicit rule article in relation to the damage opposition is article 4 of the civil responsibility law (Mohageg Damad, Jafari Khosroabadi, Pishin, 1140. Article 4 of the civil responsibility law and its act 3 indicate that the court of law can alleviate the damage value in the following cases: when the damaged facilitates the establishment of damage or helps its addition or when it intensifies the induced damage. Regarding the effect of the afore-said article, one can find a good position for damage opposition in Iran statutory laws which state that when the damaged bring about the facility of damage inclusion or that the entering and leaving of doing, either in time of damage inducing or its following, intensify the damage, it is considered as the damage inducer which enables court of law to reduce the amount of damage(Darabpor, Pishin 125). Even, many of the legal scholars believe that in cases the damaged is able to oppose or to reduce the damage and that he does not do the require operations in this regard, the civil responsibility law does not provide a clear issue for the damage reduction. Only, it can alleviate the damage

value based on article 4 of the civil responsibility law (Katozian, 2006, 124).Presumably, the questions raised is that the article 4 deals with the damaged conditions in the time of entering and leaving of damage and that the opposition rule of damage makes the damage asking individuals responsible for recue to exclude the damage derived while the fore-said claim lacks any exclusive reason and damage must be prevented in any case (Darabpor, 2008, 89). Thus, using a united article, one can say that this article works with the wages of contracts, particularly when the contracts violated or there I no illegal condition. This means that the asking individuals should not have empty hands, instead they monitor the entering and leaving of damage to themselves. In other words, he is not able to ask for indemnification when the damage is somehow inevitable 9Darabpor, 125, 1998).

Damage opposition in insurance law

Regarding specific principles in issuing the contract, the insurance law states in its article 15 that the insured should take care of the issue of insurance the same as the way he uses for preventing the possible damages and performs the actions to prevent the extension of damage development to other area when the event approaches. It is possible in the first place that the insured is informed of within 5 days of the dating issue. He would not be responsible for, unless the insured proves that informing the insurer has been out of his capacity due to the events". This principle has things in common with the damaged opposition rule in some aspects sine the insured (damaged0 should make affords so as to avoid and prevent the extension of damage and it is essential in this regard that repercussion of sloth cannot be attributed to someone else (Katozian, 2006, 306). Hence, the insured should not neglect the preservation of insurance only due to the fact that the insurer has insured his proprieties so that the guarantee of penalty execution of the insured is issued in article 14 saying that the insurer is not responsible for the damages induced (Ebrahimi Yahya, 2007, 77-78). The main question is whether the regulation of insurance law is specific to the relations between the insured and insurer or it can be generalized to other contract-based and non-contract commitments. The answer is that as the afore-said article is related to the insurer, it is not exclusive for the insurer. Since it is compatible with the principles of contracts, it can be generalized to other contracts (Darabpor, 1998, 124). In addition, some of the legal professors have indicated that the implication of the afore-said article is not only generalizable to the responsible-based contracts, but also it can be extended to other non-responsible contracts. They have added that although the afore-mentioned article is specific to the relations of insured and insurer, both the damage agent and damaged must do some tasks to prevent its development (Mohagegdamad, Jafari Khosroabadi, 2010, 115). It seems that right is based on this issue and the afore-said article is effective in other responsible-based contracts and even non-responsible contracts.

Damage opposition in maritime law

The policy maker states in article 114 of Iran maritime law that in case the carrier director proves that the death or physical injuries occur due to the negligence of the passenger himself or that the act of passenger has led to its occurrence, the court of law would exempt the director partially or generally based on the condition. In other words, the innocence requires the proving of fault whose fault has caused lack of damage opposing. Thus, one should not doubt that the damaged is responsible for oppose the damage or it is true only when the opposition should have been done. The afore-said article has to do with the transportation director as knowing him the culprit unless the opposite is proved involving the conditions that such a fault is consistent with entering of damage or followed by it. Hence, if the damaged avoids using and taking drugs and brings about other more damages, then the damage inducing person is not responsible for that. So, it is essential that the damager opposes to the damage (Darabpor, 2008, 90).

Damage opposition in penal code act of 2013

Principles have issued in penal code act of 2013which indicate the admission of damage opposition rule from the concept and implication aspects (Mohagegdamad, Jafari Khosroabad, Pishin, 115). Article 496 of penal code states that the technician is responsible for the damages induced due to the transcript provided unless the technician acts according to article 495. Note 1 of this article demonstrates that in case the patient or nurse knows that the transcript is not correct and would bring about damages and that they follow the transcription of the doctor, the following repercussion would be contributed to themselves and not to the doctor. Note 2 of the article proposes that when someone commits one of the afore-said accomplishments in another individual housing and that the third party gets injured who has entered the house without permission, is liable to pay the atonement unless the occurrence of event is caused by the injured himself. In such a case, the committer installs signal-based warning or locks the door and in which the injured enters the house through breaking the door. Note 3 declares rather in cases the injury is related to the injured such as the cases in which the enterer knows that the animal is dangerous and the allowing person is not aware of that, no responsibility is determined.

Article 537 of the penal code states that in all afore-said statements, when the commit is exclusively related to the intentional acting, the responsibility is not determined to that agent. In cases the origin of crime are intentional, then the extension of that document intentionally is not liable to be taken as responsible. Considering the statements proposed and the mentioned 512 article, one can say that the position of the afore-said rule is tangible in penalty code.

Conclusion

Based on the damage opposition rule, in case the individual who is about to experience damage, is responsible for doing some accomplishment so as to prevent the damage or to reduce it. This rule roots in common law system and develops in it and that it has been adopted in many countries so that the article 77 of international convention on goods sale has directly addressed it, but there is no clear demonstration of it in Iran law. However, since the issue of article 167 of constitution and using different legal texts, one can perceive the position of that in Iran and Islam laws. Hence, one can rely on the measure rule and causality relationships since the rule of measure is regarded by many famous Imami scholars as responsible inducing factor. This demonstrates that when the individual is aware of the anger and enters the damage without preventing it, he has lost the respect in relation to the soul and spirit and no responsibility is determined for him. Thus, this rule can be regarded as the main rule of damage opposition in Islam laws. Also, the causality relationship can be counted as the main basis of this rule in Iran law which states that when the individual is about to experience the damage and that he does not embark on doing preventing affairs, then the causality relationship between the do and doer disintegrates and the responsibility is determined in this case and that no responsibility is issued for the agent of damage.

In sum, one can perceive the position of damage opposition place in Islam and Iran laws. Hence, attachment of Iran to the convention would give rise to the international creditability and economic development through preserving local principles.

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