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Study of the Compensability of Damages Caused by Loss of Profit In Hanafi Jurisprudence and Afghanistan Law

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Abstract

This article studies the compensability of damages caused by loss of profit in the field of Hanafi jurisprudence and Afghan law. The damage caused to the victim is included in the damage caused by the loss of profit and the causer of the damage is obliged to compensate it. However, Hanafi jurists do not consider the damage caused by the loss of profit to be a guarantee and do not consider the cause of the damage to be compensated for. Therefore, the question is what are the base, reasons, and documentation of this point of view in Hanafi jurisprudence? And why can't the loss of profit be compensated? The findings of this research show that the non-compensability of damages caused by the loss of profit in Hanafi jurisprudence is rooted in profit, the definition of property and non-taxability of benefits from the point of view of Hanafi jurisprudence, and Afghan law does not follow Hanafi jurisprudence in this regard. The damage caused by the lack of profit is compensable, regardless of whether the damage is caused by a breach of contract or an illegal act.

Keywords: *Loss of Benefit; Compensation; Hanafi Jurisprudence; Afghan Law*

Introduction

In the realm of responsibility, the causer of the damage is required to compensate the damage caused to the victim, including the damage of the loss of profit. Whether the damage was obtained as a result of a breach of contract or the result of an illegal act according to accepted principles of civil responsibility and jurisprudential rules such as the "prohibition of detriment", "rule of destruction" "The rule of causation" and " rule of deception", the perpetrator is obliged to compensate all damages caused by his act or omission. Therefore, the realm of compensable damages is wide and includes damages caused by loss of profit including all types of profit. However, Hanafi jurists do not consider the loss of benefits except for three cases (benefits of endowment property, orphan property, and property ready for exploitation) as a cause of warranty and do not consider the cause of damage to be obliged to compensate for the resulting damage. The question is, what is the basis of non-guarantee for loss of profit? What is the documentary of Hanafi jurists? Has Afghan law, which is mainly based on Hanafi jurisprudence, remained subject to Hanafi jurisprudence in this case or has it adopted another theory? To answer the

above-mentioned questions, this research analyzes the concept of damage in the dictionary, Afghan law, and jurisprudence. As well as examine the types of benefits and comparative study of damage caused by loss of benefit in Hanafi jurisprudence and Afghan law and present the findings.

1. The Concept of Damage

The main goal in compulsory guarantee and civil liability is to compensate for the damages and the main pillar for realizing the liability is the damage. Therefore, it is necessary to examine the concept of "damage" in Afghan vocabulary, jurisprudence, and law:

1-1. Damage in the Word

The word "damage" in the dictionary means loss (Dehkhoda, 1968, vol. 21, p.p. 524-523), the opposite of profit (Ibn Al-Athir, 2008, vol. 3, p. 69), harming and losing, (Omid, 1983, vol. 2, p. 1017). Therefore, from a literal point of view, damage is any loss or damage caused by one person to another and causes damage, loss, loss, and loss of his capital.

2-1. Damage to Afghan Law

In Afghan law, the term “damage” is not precisely defined and is used in the same literal sense as a loss. Article 779 of the Civil Code of Afghanistan uses the "damage" and "loos" synonymously and says: "The compensation court shall determine the compensation [damage] in proportion to the loss..." but its purpose is to compensate all damages including intellectual damage, the loss of prospective profits and damage of the delay in payment. Because, Article 778 of the Civil Code says: "Compensation of loss includes the evaluation of moral damage" and Article 734 of the Civil Code of Afghanistan, obliges the court to "... considering the loss inflicted on the creditor and the loss of profits and determine the amount of damage. Likewise, according to Article 735 of the Civil Code of Afghanistan, "the creditor can demand compensation for the loss caused by the delay in payment, which is equal to (3%) [three percent] annually". Also, Article 38 of the Civil Law says: "...if a person uses another person's last name to himself and this action causes damage to the first person, the affected person can, in addition to demanding the prohibition of its use, compensate also demand damages from the aggressor". Therefore, in Afghan law, the word damage is used in the same literal sense and includes all types of damage.

3-1. Damage in Jurisprudence

In jurisprudence texts, instead of the word damage, the word "harm" is used more often, and Muslim jurists, while discussing the rule of harm, presented extensive discussions about the concept of "harm", but they do not agree on the concept of "harm". In the definition of "harm", some have said that harm is the removal of wealth or benefits from the hands of a person without any replacement (Naraghi, 1996, p. 49). Some others have said in the explanation of harm: that the word "harm" in common means a defect in property, honor, body, or something belonging to a human being after it has existed or a near necessity for its existence has been realized, as it is called by common (Bojnoordi, 1998, vol. 1, p. 214). In another definition, it is stated that damage is any defect that occurs to a human being, whether it is a defect in the body, property, reputation, respect, or other rights of a person, regardless of whether the damage is current or future, small or large. (Farahi, 2009, p. 581).

Another jurist, after giving different interpretations and definitions about the word "harm", says: The result of the mentioned definitions as well as the cases of use is that harm is the loss of something that a person has, such as life, property, reputation, and physical health, so when someone's property, body part, life or reputation is damaged due to loss or waste, voluntarily or involuntarily, it is said that he has suffered, but usually the lack of benefit after requirement integrity is also considered a loss (Naini,

1997, p. 378). It seems that this definition is more comprehensive than other definitions; Because it includes all kinds of financial, physical, and spiritual loss and even lack of profit.

2. Types of Benefit

The benefit of the property, which in jurisprudence is also interpreted as extra property, is a situation that is inherent in the property itself and can be contracted and transferred with this credit (Emami, 1996, vol. 2, p. 4). The benefits can be divided from different perspectives.

2-1- On the basis that it has been used or not taken; It is divided into used and unused benefits, and it is divided into connected and disconnected benefits depending on whether it is connected or disconnected from the principal of the property. Associated benefits are benefits and attributes that add to the value of the property, but do not exist independently of the property, in other words, they cannot be materially and physically separated from the property; Such as the fatness and growth of the animal, the removal of the defect and disease of the animal, the increase in the price of the property, etc. Detached interests refer to interests that are materially or legally separable from the same property and can exist independently and separately from the original property. Therefore, separate benefits can also be divided into two categories:"objective separate" benefits that are materially separate and independent from the original property, such as tree fruit, sheep's milk, bee's honey, etc.

2-2- "Separate credit" interests that are independent of the property only in terms of law and can be imagined separately from it, such as living in a house, wearing clothes, riding a car or an animal, using human labor, etc. (Abbaslu, 2010, P.P. 61-62) Since the interests of the property, both connected and detached, are created in the property of the owner and according to the principle of property, it is considered the property of the owner, the majority of popular jurists, except the Hanafi jurists, absolutely guarantee the loss of benefits for the person who lost it (Ahmed Siraj, 1993, P. 146). It does not matter whether the profit was lost due to use or was lost due to remaining unused, and also does not matter whether it was obtained due to a breach of contract or due to a harmful act. Therefore, we examine the damages caused by the loss of profits, including connected, disconnected, used, and unused profits, in the field of Afghan law and Hanafi jurisprudence.

3. Loss of Benefit in Hanafi Jurisprudence

Hanafi jurists believe that the loss of interests is not guaranteed and cannot be compensated, and they adduced some reasons to prove their claim, the most important of which are:

3-1- Form of Benefits

Hanafi jurists believe that benefits are forms not matter and they do not exist independently until they are acted upon. Because forms appear and disappear moment by moment over time (Alatasi, n.d., Vol. 2, p. 698). Therefore, benefits cannot belong to the act of destruction, so the loss of their benefits is not a guarantee, and the victim does not have the right to claim damages. Although this statement is philosophically correct, according to law, the ability of the usurper to survive is not a condition of the usurper's responsibility, for example, when the usurper returns a house to the owner after using it for one year without paying the compensation, people say: the usurper wasted, the one-year benefit of the house. So, common sense is enough to be responsible. On the other hand, from the philosophical point of view, the act of wasting does not belong to benefit; Because the interest does not last, but taking possession of someone else's property, because it is the cause of the loss of interest, creates responsibility.

The bases and purposes of philosophy and law are different. The goal of the law is to establish justice and eliminate oppression based on customary and social laws and rules, while the goal of

philosophy is to understand nature and truth based on rational and logical analysis. According to the mentioned differences, it cannot be said that because the benefit is temporary and does not have survival and stability, its loss does not cause a guarantee (Ahmadseraj, 1993, p. 130).

3-2- Non-ownership of Benefits

Another reason for not guaranteeing benefits according to Hanafi jurists is the non-ownership of benefits. (Ahmadseraj, 1993, p. 131) because they believe that property is something that has material existence (Al-Zahili, 2006, p. 120; Al-Zahili, n.d., Vol. 5, p. 21) and can be preserved and stored for use in times of need; On the other hand, benefits are not like that and when they go from non-existence to existence, they disintegrate. Because the benefit is not property, its loss does not cause a guarantee (Sarkhsi, 1993, v.11, p. 79; Ahmadseraj, 1932, p. 132), regardless of whether it is lost due to use and exploitation or due to delay. (Al-Zahili, 2006, p. 120). So, the Hanafi jurists consider the benefits of the usurped property to belong to the usurper and say: If someone lives in another person's residential house without his permission or cultivates in another land without the owner's permission, he is not the guarantor of the lost benefits and has only an obligated to return the property to its owner (Samarkandi, 1993, vol. 3, p. 89). If the usurper leases the usurped property, the rent is given to the usurper and not to the owner, because the benefit has arisen in the hands of the usurper and has been valued and gained financial value as a result of the usurper's contract (Samarkandi, 1993, vol. 3, p. 90). Also, if someone deprives a person of his freedom and uses the benefits of his action without paying him, he is not the guarantor of his wage, he has only sinned and will be punished for it. (Sarakhsi, 1993, vol. 11, p. 78).

From the point of view of intellectuals, the benefits of property are not only valued like the property itself, but they are also considered as the criteria of property and property value, and basically, the main goal in exchanging property is to achieve their benefits, and property is the only means to achieve them, so, properties without benefits have no value. For this reason, people without intellectual and philosophical accuracy, consider benefits as their property and based on that, they conclude all kinds of lease contracts to transfer the ownership of benefits.

3-3- Benefits Versus Guarantees

The most important document of Hanafi jurists for not guaranteeing benefits is a rule based on the Prophetic hadith. that the great prophet (pbuh) when judging a lawsuit where a person had bought a slave from another person and used the slave for some time and realized that the slave had an old defect, complained to the prophet. He ordered the slave to be rejected by the seller. The seller said: O Messenger of God, the customer has used my servant during this period and must pay the price of the benefits he used. The Prophet said: "benefits versus guarantee." (Zarei Sabzevari, 2008, vol.2, p. 51). Referring to this rule, Hanafi jurists say: Although the aforementioned rule is stated in the case of a certain event (rejection of the seller due to a defect), since it is general, in addition to the guarantee of benefits in a valid contract (special case), it includes the guarantee of benefits in all contract, valid and invalid.

Because the concept of "benefits versus guarantees" appears in the fact that, in general, the interests of an object belong to the person who is its guarantor in case of loss of property; Regardless of whether a person's control over property is not the result of a valid contract, corrupt contract or usurpation. Therefore, the benefits of the property belong to the usurper because he is the guarantor of its loss and damage (Kashif al-Ghata, 2001, vol. 1, p. 196; Sarkhsi, 1993, vol. 11, p. 77).

A group of scholars of the principles of jurisprudence believe that when general words are introduced in a specific case and cause, they are assigned to the same specific case and do not make general use (Ahmedsaraj, 1993, p. 133); Because, in this case, the general word (Alkherag/Benefits) used in the specific case and when a word is used as text, it cannot include other examples. Because if it includes other examples, this inclusion will be based on appearance, and in this case, it can no longer include the location of the cause (specific case) in the form of text; Because, when general words include

all the examples, they cannot include some examples in the form of text and others in the form of appearance, because the general relation to all examples is the same. Therefore, the hadith of "al-Kharaj with guarantee" is the text of the customer's guarantee for the interests of the seller and does not include the usurper's guarantee for the interests of the usurped property; Because, otherwise, there is no other way than inclusion through emergence, which also causes the meaning of the general word to be in the form of text in some instances and the form of emergence in others, and this is against the necessity of unity about common and rejected people (Ahmadseraj, 1993, p. 133).

On the other hand, referring to the general rule of "Interest vs. Guarantee" may cause the encroachment and usurpation of other people's property to be considered a legitimate means of acquisition, and the usurper, due to his responsibility towards the usurped property, can use its benefits for a long time without compensation. This is eating someone else's property unjustly (Sobhani, 2008, vol 1, p. 298) and the opposite of the current custom and the way of the wise.

Therefore, the above-mentioned rule only includes exchange contracts, whether it is based on a valid or invalid contract; Because, in the case of the hadith, it is presumed that the customer's lack of guarantee regarding the benefits of the property is because the aforementioned benefits are in contrast to the benefits of the value that is in the hands of the seller (Sabhani, 2007, vol. 1, p. 299).

Later Hanafi jurists, as reflected in Article 596 of the Journal of Al-Ahkam al-Adliyyah, to comply with social interests and prevent the increase of encroachment on other people's property, exceptionally accepted the guarantee of the interests of other people's property in three cases and considered the usurper to be obliged to pay an exemplary reward:

a) If the usurped property is a waqf.
b) If the usurped property is the property of an orphan.
c) If the purpose of acquiring property is to exploit and benefit from it, for example, the property was built, bought, or rented for three consecutive years (Al-Zahili, 2006, p. 121; Ahmadseraj, 1993, p. 135).

Of course, waqf property and orphan property are excluded, and the usurper must pay the appropriate remuneration for the time of usufruct. For example, if someone lives in someone else's house for a while without a lease agreement, he does not have to pay the equivalent. unless the house belongs to an orphan or a waqf; In this case, he is required to pay compensation. However, the use of property that has been prepared for exploitation and profit is not excluded and is subject to two conditions:

1- As stated in Article 597 of the Journal of Al-Ahkam al-Adliyyah, is that the usurper has not used the said property as his own, otherwise he is not responsible. For example, if one of the partners uses the joint house for a while without the permission of the other partner, he is not a guarantor and there is no need to pay him the share of the partner, even though the joint property was prepared for exploitation and profit; Because he used the common property as his property (Al-Zahili, 2006, p. 121; Ahmadseraj, 1993, p. 135). Also, if one of the partners causes delay and loss of the interests of the common property, he is not a guarantor; Because delaying is related to the property and the owner can leave his property unused, and likewise if one of the partners rents out his partner's share for one year and the tenant uses it for two years, he is not required to pay a similar fee for the second year, because the tenant violator is a partner. (Effendi, n.d., vol. 3, p.p. 413-412).
2- The usurper has not used the property according to the contract, otherwise, he is not responsible. For example, if a customer buys a shared shop from one of the partners and uses it for a while, and the other partner does not allow it, the contract will be terminated for his share. The partner cannot claim the remuneration for the time of benefiting from his share from the customer; Although the common property is prepared for exploitation and renting; Because the customer has used his share according to the sale contract and is not responsible. Also, if someone sells

another Asian stone as his own and gives it to the customer and the customer also uses it, if the owner, after proving the ownership, recovers the said stone, he does not have the right to demand compensation for the time of possession from the customer; Because, his use was due to the contract of sale (Al-Zahili, 2006, p. 121; Ahmadseraj, 1993, p.p. 136-135).

4-3. The Rule "Reward and Responsibility Cannot Be Combined"

Hanafi jurists have also deduced another rule from the hadith "Al-Kharaj Bal-Daman" that says: "The reward and the guarantee are not combined". That is, the guarantee of benefits and responsibility due to the loss or defect of property cannot be collected together with one person. Therefore, if a tenant uses the object for more than the specified time and the object is lost or defective, the tenant is the sole guarantor of its original and is not responsible for the benefits used; Because, otherwise, the guarantee of benefits and responsibility will be gathered with one person (Ahmadseraj, 1993, P.P. 135-134).

Some have said in the analysis of this rule that the combination of reward and guarantee is prohibited if the cause of both is the same and if the cause of both is different, their association is correct. For example, when a person rents a donkey with the condition that he rides only himself he also rides another person and the donkey dies. In addition to demanding rent, the owner can also demand half of the donkey's price from him, because the reasons for both are different; The reason for the reward is the lease contract and the reason for the guarantee is the violation of the obligation by the lessee; Therefore, there is no problem in the combination of the two (Rostambaz, 2010, p. 58).

Also, Hanafi jurists predicate to the rule of "harm v. benefit" .According to it, the obligation to pay compensation is due to the use of property benefits. In other words, the guarantee due to the loss of property is the responsibility of the person who uses its benefits. Hence, the usurper's responsibility towards the object of the usurper is due to benefiting from its benefits. So, the usurper is not the guarantor of the interests of the usurped property.

4. Loss of Benefit in Afghanistan Law

Although Afghan law is based on Hanafi jurisprudence, it does not follow Hanafi jurisprudence in some cases, including the compensability of damages caused by loss of benefit, and considers loss of profit to be a guarantee and civil liability. Therefore, Article 2310 of the Civil Code says about the violation of the contractual obligation by the beneficiary: "When the benefit is bound for a certain period and the beneficiary keeps the object after the mentioned period and does not reject it by the owner, and [the benefit] is destroyed." the recipient of the benefit is obliged to pay its price [benefit]. Although she/he did not use the object after the expiration of the usufruct period [it is not satisfied] the owner did not demand its rejection." So, if the benefit contract is concluded for a certain period and the beneficiary refuses to return it to the owner after the end of the period, he is obliged to pay the interest price to the owner in addition to rejecting the interest, regardless of whether it is from the interest. used or not.

Also, Article 1375 of the Civil Code says about the tenant who refuses to reject the object: "The tenant is obliged to take back the leased object at the end of the rent term. If he keeps the item in his possession without any reason, the lessor is required to pay a replacement that is equal to the rental price of that item and to pay compensation for the damage...". Therefore, the delinquent tenant is required to compensate other damages caused to the owner in addition to the compensation for late possession; unless the non-return of the object is due to an emergency or a factor in which he is not involved; In this case, he is only "obliged to pay rental value to the lessor". Article 1386 of the Civil Code also says: "When a notice of eviction is issued by one of the parties to the other, yet the lessee continues to use the leased property after the end of the lease, this does not mean the renewal of the lease." unless there is a reason to the contrary. In such a case, the lessee is obliged to vacate and pay the rent, for example, from the period of profit that he made after the end of the lease.

Article 1344 of the Civil Code says: If the lessee, before agreeing with the lessor on the quality and quantity of the rental price, collects and uses the same leased property, he must pay the equivalent of the time of possession. Also, Paragraph 1 of Article 2152 of the Civil Code considers the loss of benefit as the cause of guarantee and says: If one of the heirs prevents the benefit of the bequeathed person in all or part of the bequeathed period, the guarantor of the benefit has died and is obliged to pay the benefit. Unless all the heirs agree that the person can benefit from the said thing at another time to an extent equal to the time of deprivation. Article 807 of the Civil Code also stipulates: "Whenever a person uses another person's property without permission, he is obliged to pay its benefits".

Also, Article 768 of the Civil Code considers the interests of the usurped property, both connected and separate interests, as the property of the owner, and says: "Extras of the usurped property belong to its owners if the expropriations are destroyed or depreciated by the usurper, the usurper He is obligated to guarantee it. Also, Article 765 of the Civil Code says: "1- The usurper is obliged to take back what he usurped. 2- If damage is caused as a result of the usurpation, the perpetrator, in addition to returning the stolen property to the place of usurpation, is also obligated to compensate for the loss. Therefore, according to the provisions of the aforementioned articles, the interests of the property belong to the owner, and the usurper, in addition to rejecting the usurped property and compensating for other damages caused to the owner, is obliged to return all the interests of the usurped property, including attached and detached interests, to the owner. Article 769 of the Civil Code, contrary to Hanafi jurisprudence, considers the interest of immovable property as a guarantee and says: the usurper, in addition to rejecting the property of the usurper, is obliged to pay the owner a similar fee for the time of possession, and if you have built a building on the usurped land or planted a tree, he must destroy the building and trees and return the land to the original condition and hand it over to the owner, or receive the price of the building as destroyed and the price of the trees as cut from the owner and return the building and trees to Owner to deliver. The owner has the power to choose. If the real estate in the hands of the usurper is damaged or incomplete or its value is reduced, the usurper is obliged to compensate all the mentioned damages, even if he did not play a role in the occurrence of the damage.

The mentioned materials clearly show that the Afghan legislator did not follow the Hanafi jurisprudence in the matter of guaranteeing benefits, and contrary to Hanafi jurisprudence, he considers the loss of benefits to be a guarantee, even though the said benefits have been lost due to use. Or it has been lost due to being unused. Therefore, the legislator considers the usurper to have absolute responsibility and, in addition to rejecting the property, he is required to compensate the interests and other damages caused to the owner. If the property has one benefit, the guarantor is the guarantor of the same benefit, but if it has several benefits if the aforementioned benefits can be combined, for example, a garden has both fruit and is habitable, the usurper is the guarantor of all benefits, and if they cannot be combined, for example, the land is the usurper's property. Cultivation has many crops, in this case, the usurper is the guarantor of the benefit that has the highest value, even if the usurper has used a benefit with a lower value (Abbaslu, 2010. p.p. 62-61). While Hanafi jurists not only consider the benefits of landed property as a guarantee but also do not consider the loss of the principal property (landed property) as a guarantee (Samarkandi, 1993, vol. 3, p. 89).

Conclusion

The result of the research shows that from the Hanafi jurist's point of view, the benefit of property is not property, unless it is taxed and acquires financial value as a result of a contract such as a lease contract, therefore, the damage caused by the loss of benefit if before taxing the benefits, it does not result to civil liability. So, if the usurper rents out the usurped house, the rent belongs to the usurper's property, because the benefit of the house has been taxed as a result of the usurper's contract. Unless it belongs to an orphan, is a waqf property, or is prepared for profit and exploitation. Hanafi jurists have cited several reasons, including prophetic hadiths, for proving their point of view. However, Afghan law, although

based on Hanafi jurisprudence, does not follow Hanafi jurisprudence regarding the interests of property and considers the interests of the property to be the property of its owner and considers the damage caused by the loss of interest as a guarantee and civil liability. Whether the benefits are connected or separated, whether they have been lost due to use or lost due to remaining unused.

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