



Journal of Internet Banking and Commerce

An open access Internet journal (<http://www.icommercecentral.com>)

Journal of Internet Banking and Commerce, December 2016, vol. 21, no. 3

Measuring the Intellectual Damages in the Iranian Law

KAMAL RAOUF

Department of Private Law, Islamic Azad University of Tehran, Iran, Tel:
+0060122457334;

Email: parviz873@gmail.com

HOSEIN ANGURAJTAGHAVI

Faculty of Law and Political Sciences, Chalus branch Islamic Azad
University, Iran

Abstract

In the Iranian system, on the basis of some debates by legislative bodies including the Guardian Council of Constitution of Iran, and former supreme legal counsel on the impossibility of financial restoration of intellectual damages, doubts and problems were made. This is while with a scrutiny in Islamic references and predicting restoration in the Iranian rules, and finding no contradictions among them; its verdict in some articles of the constitution especially in article 171¹, the jurisprudents removed the obstacle and moved the process toward the restoration of this kind of damage. Recent years have

¹Article 171: Should someone suffer moral or material loss as a result of interpretation, or mistake of fact or law by a judge, or application, by him, of a rule on a particular case, in the event or default, the defaulting judge shall stand as a guarantor according to the principles of Islam, otherwise the losses shall be indemnified by the State. In many events, the accused person shall be rehabilitated.

seen decisions that have been logical, documentary, and interesting, among which was known as "the Hemophilia case²" urging government to restore intellectual damages. Recently, article 14 of the 2015 criminal proceeding and its amendment 1, and the additional amendment defined intellectual damage, and include its financial restoration, mentioning some instances. This paper studies the subject with the legal view based on written law. The question is "In today's world, can a person have the harm and damage imposed on his emotions, reputation, and personality by legal, and natural persons restored?"

Keywords: **Intellectual Damages, Compensation, Iranian Law**

© Kamal Raouf, 2016

SECTION 1: THE MEANING OF INTELLECTUAL DAMAGES

It is any sort of damage upon one's personality as well as any physical or emotional Harm [1]. In other words, intellectual damages can be concisely defined as "damages on emotional and non-financial interests" [2]. Moreover many Islamic texts have mentioned intellectual damages saying that "loss" includes the destruction of anything that a person has the right to have it whether in a person, honour, mental or a part of body [3]. What is certain is that, intellectual damages do not come from the same source [4]. The French law categorizes the source 3 which can be accepted in Iran, too: offences, tort, and contract. Concerning the two categories, it is safe to say they are totally agreed upon both in legal texts, and in legal decisions. The third is mostly focused by governments. As mentioned above, today both doctrines and court decisions confirm that no feature is considered in restoring non-financial damages, and there is no difference between a responsibility concerning an offence, and that concerning an agreement. Now, the question is "How does the Iranian Law consider the case? Can the same idea be given about a damage caused by an agreement?"

The feasibility of financial assessment of an offence (clause 2 of rule 9 of the former criminal procedure), and its guarantee are specified in the rules, but there is clear rule concerning the breach of agreements [2]. Legal traditions also hardly accept such a case. Agreements are the boundary common in financial exchanges, the breach of which causes a financial damage. There is nothing however to prevent a creditor from demanding the compensation of his intellectual and honour damage. Imagine a contractor invest all his assets on a plot an employer has hoping that a remarkable consideration can fulfil his agreements and guarantee his fame as a contractor. The employer breaks the agreement so if the contractor's checks bounce the promissory notes he signed will be put to use, and he will be notorious for lying and breaking agreements in the business. Will adding 12 per cent on the original contract restore the

²In this case the Iran's Ministry of Health was sentenced to compensate the victims who were shot infected blood.

damage which will surely have serious financial consequences? Can law remain negligent this unfair loss? [5].

Articles 221 and 226 of the civil law can also solve the problem. Article 221 states: "If a person precedes an action or promise to do it, but avoids doing it, he will be responsible for the loss, unless the loss was specified previously, or the promise is an assurance or legally guarantee the action". If so, why loss just should be considered in financial cases? And why should not one claim that a loss higher than an offence or tort is unfair? The excuse might be that the article goes on saying: "with the condition that ...", and this infers that the subject of the article concerns matters in which the parties agreed upon restoring the damage or the act of law or tradition denotes it. The answer is that a responsibility based on a contract is among general principals of any contract, and the specification by the parties or act of law or tradition [6] is related to unusual damages, so the article should not be brought to limitations.

According to article 226, if a date is set to fulfil the promise, and the date is due, and if the person incurring the damage has the right to take a legal action, and if he can prove that he asked for fulfilment of the promise, he can demand damage. Here, "damage" is a general concept including "intellectual damage". The implication of damage however depends on interpretations by French jurists of French Law since article 1142 of French civil law that states: "Any agreement based on a contract to fulfil an act or omission will lead to compensation" [7]. In addition, article 1149 states "compensation should be given to the creditor for the benefit he lost, and the loss or bankruptcy ". As you see, this article talks of compensations set in contracts without directly mentioning the concepts of "intellectual" or "financial". However, the problem is why the concept "bankruptcy" or "insolvency" only has a financial implication, but not an intellectual implication, while the concept can be used for intellectual damages too. If this is denied, one cannot claim that all the words and expressions imply that financial damage is inferred from the articles, there are exceptional instances in which compensation is not used [8]. Even a basic study can suggest that authors have controversies over compensation of intellectual damage in contracts [9]. However, Mouricaull suggests in his speech: "The amount of compensation to a creditor should restore all the damage because of lateness or omission". In addition, French, and Italian laws state that there should be a compensation for insolvency or deprivation of interests, "but considering the matters behind the curtain, we have to agree that these laws do not consider intellectual damage" [4].

Most courts hold that compensations are made in this cases [4] in omission of contracts related to things with intellectual values such as family photos, were no accomplishing a contract by either party hurts other's religious feeling ,were a director of a movie sets a bad character for a star, or were the breach of a job contact hurts the employer's statues, or were a doctor inflict a person with pains and scars because of not doing his agreements, or where an undertaker inflict a mental pain on a family for his lateness in burying a dead body. Concerning an author and his work, when the work is sold he is not deprived of rights about it e.g. the buyer is not allowed to change the words and

expressions so that it hurts the author, he has to agree to compensate, i.e. like a financial damage, an intellectual damage has to be compensated but on a cause and effect relation between a damage and its source.

In the British law, there is no such categorization but some cases on intellectual damages inflicted by an offence or a tort some of which follow in a case accepted by the jury, and finally by the magistrate court, the plaintiff was a woman playing a role in a movie titled "Raspotin". The jury convicted the defendant, and the court sentenced him to pay 95000 pounds for intellectual damage [10]. In another case, a 36 years old female doctor signed a contract with a hospital for nursing a baby but she got a heart attack due to overwork leading to her unbearable intellectual damage and full dependence on others. The court sentenced the defendant to 20000 pounds for the intellectual damage [4].

SECTION 2: THE LEGAL STATE OF INTELLECTUAL DAMAGES

The legal state of intellectual damages as mentioned above, among fundamental principles accepted by jurists and legal systems is the fact that intellectual damages are compensable, this is also accepted in the Islamic jurisprudence according to some Islamic rules [11].

Apart from criminal law, intellectual damage is not mentioned in civil law, but in some instances, the existence of intellectual damage is observed while its compensation is not discussed. For example article 1130 of the civil law (amendment, 1991) states: "If the continuity of marriage causes a disability for a wife, she can refer to the judge for divorce; if the disability is proved in the court, the court can have the husband divorce, and if the husband disobeys, the religious judge will divorce his wife". The note to this article (approved in 2000) states the condition which continuously of a conjugal life inflicts an intellectual damage on a wife. In addition, articles 130, 132, 133, 1035, 1037, 1041, 1043, 1056, 1103, 1115, 1117, 1173 and 1191 of the civil law also states instances of obligation in the civil law concerning intellectual damages [12]. The civil procedure code dominating civil proceedings and procedure, includes all the legal proceedings and procedures (articles 47-66), and defines damage and its instances in article 515 and 519. Although the above articles do not directly mention the concept "intellectual damage", they can guarantee the accomplishment of articles 3, 40, 169 and 171 of the constitution to follow legal fairness and justice. The law of the inspecting the behaviour of judges was ratified in 2001 [13].

Section 3: Compensation of Intellectual Damage in Legal Thoughts

1. The idea of impossibility compensation of intellectual damages, 2. Complex idea and 3. The idea of possibility of financial compensation of intellectual damages; are the 3 famous theories of compensating the intellectual damages [14].

According to the first idea, it is impossible to compensate an intellectual damage in a matter how high the sum of money is, since it cannot return the beauty or remove the pain [15]. The reason law practitioners mention, include: 1. the impossibility of an exact estimation of intellectual damage, 2. the impossibility of equalizing it with money, 3. the impossibility returning to the previous condition by a financial compensation, 4. the impossibility of removing the effect of the harmful conduct, and 5. the inconsonance of a damage and its financial equivalent [16]. Van Litz, the German legal theorist who developed the complex theory, suggests that only interests supported by law can be compensated. Accordingly, only those intellectual damages supported by law have to be compensated, so those not supported by law are not necessarily compensated. Some Iranian theorists consider the Iranian law of civil liability derived from this theory according to whose article 1, they believe any right created by law, if violated, is considered restorable [17].

Many French theorists do not agree with the rising of the component of financial compensation of intellectual damage suggesting that it is possible if it includes the elements of civil liability. Theorists such as Mazo and others have this idea. Some believe that misunderstanding the meaning of "compensation" is the reason why they deny the possibility to compensate an intellectual damage [18], because they think compensation means returning the victim to the same physical and mental position they were in previously; this is while some financial damages are not possible to compensate in this view. That is why some legal theorists have tried to clarify the concept of compensation [19]. Delmas suggests: "compensation means replacement, since money is the best substitute, so it is possible to compensate any damage". Teribs suggests that it is not logical to deny compensation with the excuse that is impossible to exactly restore something lost. Instead, it is wise not to deprive a victim of the decision taken for him [16].

The author believes that although it might not be possible to evaluate financially what a victim loses, this does not let a culprit unaccountable to the damage he causes. Instead, fairness, justice, and legal reasoning in civil liability require a culprit to compensate damage. A judge must try his best to help a victim regain the best of what he loses intellectually to mitigate his mental pains. The money paid for a damage does not exactly compensate what is damaged; it is at least partly satisfactory for the victim, and a penalty for the liable person and a lesson for others, so in every case the judge has to estimate the sum of money that may compensate the damage best. In this regard, the victim's current situation rather than the severity of the offence must be considered [20,21].

SECTION 4: HOW TO COMPENSATE AN INTELLECTUAL DAMAGE

Four ways of compensating damages are discussed here. One way is to restore the same thing and rebuild the damage. In cases where the criminal constantly uses something to cause the problem removing that thing is the best way to stop the damage. Although this will not prevent a victim from legal proceedings [22], this is how

article 8 of civil liability code predicts it" one who hurts a person's position or reputation by testifying or defusing something contrary to fact, has to compensate it. The victim can call for the stoppage and claim damage".

Another way is to recovering a victim's reputation by his claim for damage or the offender's confession in mass media [23]. Another way is nominal or symbolic rehabilitation where the sum of damage is not considerable or the damage cannot be proven or the victim does not claim for the damage. In such a case the judge will charge the offender to nominal or symbolic rehabilitation. In this method, the victim tries to gain victory over the offender rather than rehabilitation the damage [24].

This method runs in countries such as France, the U.S.A, or England where the offender has to pay the lowest currency in the country e.g. one dollar [9]. Although the damage and the compensation is very low, they prove the plaintiff gained victory against the accused. This method indeed includes no real compensation [25]. The method does not run in Iran [26]. So compensation is not made for every single kind of contact breach; "the necessity of inflicting a damage" is a principal in creating a right for claiming for a compensation [6,27]. Author method is the penal compensation for preparative conducts to inflict and intellectual damage. Penal compensation is decided upon where a conduct is done with MENS REA. The conviction will be a lesson for the culprit and the society as well. In countries such as the U.S.A, The U.K, and France, penal compensation is made for cases including illegal detention, oral or written calumny, distributing false information, trickery [12].

A similar punishment is common in Iran, the sum of which is decided on by the judge including attribution of commission of adultery equal to a penal compensation [16].

SECTION 5: METHODS OF ASSESSING INTELLECTUAL DAMAGES

Part 1: Financial Assessment of Intellectual Damage

One method of compensating intellectual damage is the financial compensation. According to article 3 of the civil liability code, the decision on the amount of damage and how and when to compensate is on the court; the prosecution will assign and expert to estimate the damage financially and convict the offender. The court has the power to convict the offender to pay a certain sum of money, restore the damaged property, pay its profit or accept the plaintiff's victory [28]. The restoration made must be the same as what is damaged i.e. there has to be a conventional relation between what is damaged and is given in return [29]. The purpose is not to rebuild the thing damaged, but to compensate it as much as possible [30]. In fact, since the offender's conviction reduces the victim's pain, and castigates the offender, social logic accepts it [31].

There are different ways to accomplish this method, one of which is compromising. In this method, the sum of compensation is set before and after the loss. In this regard common in contrasts, the offender has to pay the penalty. Such contracts, if not contrary

to the law, convention or ethics, are valid and binding. Article 230 of the Iranian civil law also confirms this [32].

In the U.S law, the court requests the jury to consider the compensation on the base of "collective conscience", and imagine themselves a victim on the basis of a "golden rule" the jury allocates a reasonable sum of money e.g. one dollar per day for it [15]. This is also near a normal person's condition [33].

Part 2: Non-Financial Compensation of Damage

The recreation of a reputation is the non-financial method for compensating a damage stated in the Islamic criminal law, article 1 of the civil liability code, and article 171 of the Iranian constitution. It can be accomplished in different ways including apology, announcement in mass media, etc. According to article 1 of the civil liability code, a victim can claim financial and intellectual compensation against the party inflicting the damage. The court can sentence the offender to announcement in mass media or an apology. There is no limitation in this article, and the decision is on the court. For example, if a person is brought to a court on the basis of a false report regard illegitimate adultery, and his innocence is proved, he can claim for compensation against the court. The court will sentence the reporter to announce the victim's innocence in public. Article 19 of computer crimes also includes this.

SECTION 6: CRITERIA FOR ASSESSMENT OF INTELLECTUAL DAMAGES

One major issue in this regard is whether compensation includes a financial damage, or an intellectual one, too? Afterwards, damage over the compensation is discussed. Some legal theorists believe compensation should be financial, but this theory is questionable because first, as the time goes on, the same mulct does not fit the pattern. Second, intellectual damage has historically included physical damage along with financial loss instead of bloody revenges while financial compensation cannot rebuild every loss. Moreover, an intellectual compensation is the only solution when a judge neglects financial compensation for it [34]. Although this issue has not been clearly considered, these kinds of studies can help it forward. Moreover, reasons such as chapter Nesa (Verse 58): "When judging between people, be fair", fig rules considering loss, disability, and rules including civil liability code infer that any loss - intellectual, or financial - has to be compensated.

One kind of intellectual damage clearly mentioned in the Iranian criminal proceeding law (Art. 9, par.2) is mental damage [35]. One case is the detention of an innocent person who has to request compensation within 6 month after the final decision of the court. The provincial commission including 3 members will confirm the compensation based on the conditions in the law. The person can announce his protest against it to the commission within 20 days after the decision on the basis of article 258.

The six month term for protest is allocated because most decisions are protested in the first instance, but in the appeal the final decisions are made. It is worth to note that a 20 day or 2 month term is set for the decisions made in the first stance, and not protested within 6 months (article 431) [36]. In conjugal relations, the case may include misbehaviour, yet, it is an offence, and penal liability relating to assault and battery, but other cases lead to compensation in the way to prove the offence. There is another instance in which the victim is not the offence's spouse but indirectly affected by the offence including the spouse's addiction to drugs, or his detention [9,37].

Among instances of conjugal intellectual damages is violating certain agreements including a negative social relation [38]. The rights and responsibilities between spouses need a positive relation between them, and the violation of the relation is an instance of negative relation [39,40]. Another instance is violating the marriage preconditions. Trickery, avoiding sexual intercourse, and apostasy are the instances [38].

Another kind of conjugal damage is made by the husband confining his wife at home, having her take care of his parents, and violating the legal number of wives [38]. To compensate a conjugal damage considering the spouse's negative relation' the case should be considered different with intellectual damages outside conjugal relation. The civil liability code (article 3) suggests that that kind of damage, family condition, and the couple's decision is effective in allocating compensation. The damage may be compensating by a sum of money, or redeeming some responsibilities from the wife, etc., but it might not work for a couple from a high social class and need compensations including an apology, attending training classes etc. [40].

Another instance of compensation is legal divorce if the methods above do not work. According to the civil law (Art.1130), if any problem from the husband's side enables the wife's conjugal life troublesome, and impossible, she can request divorce, and if the case is approved by the court, the husband is bound to divorce her [8]. Sometimes living together with the wife makes intellectual damages for the husband; the civil law does not consider the case. The quality of the couple's rights enables the husband request the court for a decision on temporary separation of the domiciles [6,27].

Another method of compensating husband's intellectual damages according to the civil law (art.1108) is depriving the wife of her expenditure if she avoids living in the same domicile with her husband. Besides the above methods, the prosecution can have either of the spouses compensate damages according to the civil liability code (art.10) in a nominal or non-financial method such as an apology.

CONCLUSION

There are many ways (financial and non-financial) to compensate intellectual damages regarding their kinds. There is no way to deny intellectual damages compensation in

Islam, it rather considered cases including body damages. Assessment and financial estimation of pains have always been a problem for legal theorists and judges. All methods have shortcomings. The wish for paying money to escape the risks in countries where these studies have been conducted seems the most practical method, because sum of money is allocated on the basis of the society's condition. More studies are needed to find the best way of financial assessment of these damages. There have been so serious studies regarding this subject matter.

RECOMMENDATIONS

1. Judges can preserve people's intellectual security if they realize its importance themselves. They should not be afraid of following laws, and their extensive interpretations. The authorities should give them the power to do so.
2. The parliament should review the civil proceeding code, and the criminal proceeding code to fill the gap, and clearly present the principle article 171 of the constitution is based upon.
3. Compensating intellectual damages, the trend should be toward intellectual compensation while also considering the financial one. So an offender can be convicted to pay sum of money besides intellectual compensation. This is referred to as "complex compensation". So, compensating an intellectual damage in any way should be done with the priority for the intellectual compensation, and also financial compensation if all the damages cannot be intellectually compensated.
4. To avoid acting according to one's taste or with a revenging wish, the amount, kind, and method of compensating is on the court considering the case so that a decision is made on the basis of general interest of the society, human's dignity, and avoiding any conduct against social ethics and rules.

REFERENCES

1. Hosainqoli H (1995) Civil Responsibility Act (Tehran: Beheshti University Press, 1995).
2. Naser K (1991) Civil Rights (Tehran: University Press, 1991).
3. Khansari N, Mosa S, Altolab M (Qom: Mortazawi Publisher, 1979).
4. Gholamreza H (2000) Intellectual Damages in Law, (Tehran: University Press, 2000).
5. Naser K (1997) General Rules Of Contracts, (Tehran: Enteshar Publisher, 1997).
6. Naser K (1999) Civil Law in General, (Tehran: Dadgostar Publisher 1999).
7. Christian von B (1998) The Common European Law of Torts, (Oxford: Claredon Press, 1998)
8. Naser K (1999) Family Civil Rights (Tehran: Mizan Publisher, 1999).
9. Holmes, Oliver Wendell, The Common Law (Boston: Little Brown and Company, 44th Printing, 1951).

10. Treitel GH (1983) *The Law of Contract*, (London: 6th edn).
11. Sarbakhsh MK, Hedayatollah S (2013) *Damage Compensation Rule*, *Journal of Islamic Canon Basis*, Iran, 6th year: No.12.
12. Afshar, Hasan (2015) *Intellectual Damages in Civil Law*, (Tehran: Majd Publisher).
13. Walidi, Saleh M (1996) *Research of the Legal Nature of the Judges Fault in Islamic Criminal Law*, *Journal of Legal Rights Point of Views*, No.1.
14. Zohre N (2013) *Compensating Intellectual Damages in Islamic law & Canon*, 6th year, no.11.
15. Avraham, Ronen, *Put a Price on Pain And Suffering Damages, a critique of the current approaches and a preliminary proposal for change*, (Northwestern University School of Law, 2006).
16. Naqibi A (2007) *Theory of Financial Compensation of Intellectual Damages in Islamic Law*, *Journal of Islamic Researches*, No.76.
17. Nakhjiri F, Hassan (1972) *Private Claims in Criminal Court*, Ph.D. Thesis, Tehran.
18. Ahmed SA (1995) *Alwasit fi Qanoun Almadani Aljadid* (Bairut: Darolahya Publisher, 1995)
19. Carol H (1987) *Understanding Tort Law*, (London: Fontana Press, First Published, 1987)
20. James Barr A (1908) *Law and Morals*, (22 *Harvard Law Review*, 97, 99. 1908).
21. Morteza Q (2009) *Requirements without Contract*, (Tehran: Mizan Publisher 2009)
22. Naser K (2014) *Requirements without Contracts*, Tehran: University Press, 2014).
23. Masoud A (2012) *Intellectual Damages In Iran Judgmental Procedures*, Ph.D Theses, Mofid University Of Qom.
24. Yousef I, Farhad A, Amin M (2014) *No Damage Rule & Intellectual Compensation Research*, Qom International Congress of Thought.
25. Guenter T (2003) *The Law of Contract* (London: Sweet and Maxwell, 11th edition, 2003)
26. Mahdi HM, Esmat G (2015) *Comparative Research of Contract Damages Compensation In England and Iran Law*, *Journal of Civil Right Science*, 2nd year: No.2.
27. Chitty G (1983) *The law of Contract* (London:, 25th edition)
28. Hedayatollah S (1997) *Comparative Research of Judges Civil Responsibility*, *Journal of Qom Mofid University*, 3rd year.No.11.
29. Hamid A (2011) *Responsibility of Judge* (Tehran: Jangal Publisher, 2011)

30. Fattah N, Samad (2004) Financial Compensation of Intellectual Damages in Iran Legal System, Journal of Iran Lawyers Bar, No.186-187.
31. Hasan I (1977) Civil Responsibility, Journal of Law National Faculty, No.5.
32. David GO (1995) Philosophical Foundations of Fault in Tort Law (Oxford: Clarendon Press, First Published, 1995)
33. Nafiseh S (2011) How to Measure The Instances of Pains, Journal of General Law Researches, 13th year, No.33.
34. Hedayatollah S (2001) Responsibility of Intellectual Damages (Qom: Mofid University Press, 2001)
35. Hedayatollah S (2014) Comparative Research of Intellectual Damages, (Tehran: University Press, 2014)
36. Ali K (2014) Code of Criminal Procedure (Tehran: Shahre Danesh Publisher, 1995)
37. Homa D (2011) Rehabilitating the Intellectual Damages of Divorce, Journal of Islamic Law of the Family, No. 54.
38. Ali S, Razavi F (2015) Responsibility of Intellectual Damages of Divorce. Journal of Islamic Law of The Family (NedayeSadeq), No.62, Tehran.
39. Andre T (1983) International Encyclopedia of Comparative Law (London: Martinus Publishers, 1983).
40. Mazaheri, 8-Masomeh, Khoiniishaq (2013) Legal Principle of Fairness, Journal of Islamic law and Canon Researches, No. 27.