

Extent of the transfer of the right to compensation for moral damage (Comparative Analytical Study)

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Abstract

This study aims: to reach a solution to the research problem related to the transferability of the right to compensation for moral damage according to Article (267) of a Jordanian civilian.

What concerns the law within the scope of harmful work is the development of legal texts that guarantee that the individual obtains his rights as a result of this harmful and illegal work through compensation. If the harm, both material and moral, affects the individual and affects his rights, compensation must include this harm, and the restrictions or conditions imposed negatively affect those rights, especially in the case of the victim's death before claiming it or a final court ruling regarding moral damage. To put these two restrictions is wrong; This is because, in practice, the time required to conclude an agreement with the official or obtain a final judgment may not suffice, and the matter becomes more dangerous in the event of immediate death.

In this study, we address: the position of the civil legislation under study regarding compensation for moral damage, then we discuss the position of those civil legislation that took compensation for moral damage on the issue of transferring the right to compensation for moral damage to the heirs.

Research Methodology: The comparative analytical approach between the texts of the Jordanian civil law with the Egyptian civil law related to the subject of the research, with reference whenever necessary to the French and Algerian civil law.

The study recommended: amending the second paragraph of Article (267) of a Jordanian civilian to become as follows: "In the event of the death of the injured person due to the harmful act, the guarantee shall be imposed for the moral and material damage

caused to the injured as a result of death, because the damage was achieved in relation to him before death and is included in his estate as part of his money. The right to this guarantee passes to the heirs because it is part of the estate, even if the injured person did not claim it before his death.

Amending the third paragraph of Article (267) of a Jordanian civilian to become as follows: "It is not permissible for the heirs or others to claim other compensation for the moral damage they have suffered due to the death of the injured person, other than what was mentioned in the aforementioned second paragraph."

The study recommended: amending the second paragraph of Article (267) of a Jordanian civilian to become as follows: "In the event of the death of the injured person due to the harmful act, the guarantee shall be imposed for the moral and material damage caused to the injured as a result of death, because the damage was achieved in relation to him before death and is included in his estate as part of his money. The right to this guarantee passes to the heirs because it is part of the estate, even if the injured person did not claim it before his death.

Amending the third paragraph of Article (267) of a Jordanian civilian to become as follows: "It is not permissible for the heirs or others to claim other compensation for the moral damage they have suffered due to the death of the injured person, other than what was mentioned in the aforementioned second paragraph."

Key words: compensation, moral damage, transfer of compensation, heirs, material damage, and others.

Introduction

The damage is the result of a breach of a person's right, or of a legitimate interest for him, and this is equal to whether the consequences of this breach are material or moral. His heirs, whether compensation is for material or moral damage, and the same is also the case if the injured person claims compensation and obtains a final court ruling on it before his death.

But if the injured person dies before obtaining a final court ruling for compensation or before claiming it, then a distinction must be made between material and moral damage; With regard to material damage, there is no problem because, in the event of the victim's death, it is transferred to his heirs without restriction or condition, as long as he did not waive his right during his life, and did not absolve the one responsible for it.

Moral damage is not transmitted by the text of the Jordanian Civil Code until after one of the two restrictions is fulfilled, which is that there is an agreement between the injured and the responsible on the

value of compensation, or that there is a final judgment for compensation.

We are faced with two difficult situations in which it is difficult to transfer the right to compensation for moral damage with the presence of the two restrictions - referred to - and they are:

1- If the period of time between the occurrence of the harmful act and death is short, during which the injured was unable to express his will in agreement with the official and the subsequent negotiations that may result in disagreement. Issuance of a final judicial ruling also before the courts requires not a little time.

2- If the death is immediate, then the two restrictions referred to do not apply to this type of harm (death damage), as if we give the official an award in exempting him from the claim for compensation for moral damage represented in the death suffering by the injured and what follows that.

Previous studies:

Previous studies dealt with the position of the civil law on the extent to which the right to compensation for moral damage can be transferred without giving a proposal for an amendment in the legal texts. Rather, some of them only praised the position of the Egyptian civil law, which did not address the problem in a radical way, and these studies include:

Amjad Muhammad Mansour, Compensation for Moral Damage for Tort Responsibility and its Transmission, *The Arab Journal for Security Studies*, Naif Arab University for Security Sciences, 2005 AD, Vol. 20, p. 39, pp. 49-76.

In the first chapter, he dealt with the definition of moral damage and its types, the second chapter: the conditions for compensation for moral damage, the third chapter, the persons who benefit from compensation for moral damage, and the fourth chapter: When does the right to compensation for moral damage transfer.

Muhannad Azmi Masoud Abu Moghli, Compensation for Literary Damage, A Comparative Study, *Journal of Civil Judiciary*, 2012, p. 3, p. 6, pp. 13-33.

In the first chapter, he dealt with the elements of estimating moral damage and compensation for it, and in the second chapter the reality of the elements of estimating and compensating for moral damage.

Youssef Ahmed Ali Mufleh, The Extent of Transmission of Moral Damage to Others According to Jordanian Legislation, *Journal of Legal and Political Sciences*, 2018, p. 8, p. 2, p. 93-118.

In the first topic: the concept of harm and the distinction between moral and material damage, the second topic: compensation for moral damage, and the third topic: the right of the heirs to claim compensation for moral damage and financial consideration.

Legislative position on moral damage and compensation

The principle of compensation for moral damage has been established in all Arab legislation with explicit and clear texts, with the exception of the Algerian law, which refused to acknowledge this principle. In this demand, we will address the legislative position of the Arab countries, which shows us two directions:

The first trend: represented by the Algerian legislation, and we will discuss with it the French legislation, which are among the silent legislation on the text of compensation for moral damage.

The second trend: This is found in most of the legislations of the Arab countries, and it is the legislation that stipulates the principle of moral damage and its absolute

Legislation silent on the text about moral damage and compensation

First: French Civil law

According to the French Civil Code issued in the year (1804) and extrapolating the texts related to tort responsibility in it, we find that there is a general text that Article (1382) includes: (Every act that causes harm to others obliges the doer to compensate for this damage) and thus it cited a general principle requiring compensation for damage regardless of the nature of this damage and whether it is a material or moral damage (Tanago, 2005), it was satisfied with obligating the person who caused harm to others to compensate for this damage.

Referring to the preparatory work of the French Civil Code in the field of tort and even contractual liability, its authors did not prevent compensation for moral damage, nor did they explicitly allow it for the simple reason that this type of damage was not in their mind when drafting these texts and they only thought of material damage. As it represents the natural state of the damage, otherwise they would have required compensation for it as it was in the old French civil law, or as stipulated by the French legislator in the Civil Procedure Code and the Penal Code that compensation must be paid for some moral damages (Al-Amri, 1981).

However, the majority of French jurists agreed to endorse this principle, and the French judiciary also approved this principle a long time ago in many of its rulings (Al-Sanhouri, 1964).

The French legislator has also approved the principle of compensation for moral damage through the issuance of several other laws after the Civil Code, such as the Press Law issued on 7/29/1881.

Secondly: Algerian civil law

We note through the provisions of compensation for moral damage in the Algerian legislation that there is a clear contradiction between the civil law, which is the general law and the most important of the legal system, and the rest of the other private legislation,

The Algerian legislator did not stipulate the principle of compensation for moral damage in the civil law, as did the French legislator.

Rather, it stipulated in Article (124) of it a general principle that requires compensation for every harm inflicted on an individual without distinguishing between moral harm and material harm, as follows: In the legislation, it is considered flawed, because the good wording in the legislation is what was in clear formulas and phrases that clearly indicate the intention of the Algerian legislator to follow the example of Arab legislation, especially the legislation of the Arab Maghreb countries, which clearly stipulated the adoption of this principle.

However, the Algerian jurisprudence (Suleiman, 1990) agrees to compensate the various types of moral damage. Some of them see; The text of Article (124) of the Civil Code was general, as it did not specify the type of harm to others, which indicates that the Algerian legislation accepts compensation for moral damage. This is one of the principles established in the interpretation of texts that the general text does not allocate without a specific text, especially if the assignment is to escape the responsibility of someone who causes moral damage to others, his punishment may be more severe and more dangerous than that resulting from material damage (Sulaiman, 1984).

Also, the Algerian judiciary, in its applications, ruled to pay moral compensation for unapproved wounds, aesthetic damage, and prejudice to honor from indecent assault, and for feeling pain as a result of the death of a son in a traffic accident, and for the physical and moral damage caused to the wife because of her expulsion after three days of her marriage, And about harm to reputation and honor and about moral damage as a result of the death of the injured in a traffic accident within the limits of spouses and second-degree relatives only, and about moral damage resulting from committing a

misdemeanor of manslaughter and not having a driver's license (Al-Arabi, 1995).

Several scattered laws were also issued that provided compensation for moral damage, such as the Algerian Family Code, which stipulated in its fifth article compensation for material and moral damage resulting from the annulment of engagement (Al-Saadi, 1992).

Legislation approving the principle of moral damage and its absolute compensation

First: The Egyptian Civil law

The Egyptian Civil Code explicitly stipulates the principle of compensation for moral damage. The provisions of Article (222) thereof include the following:

- 1- Compensation also includes moral damage, but in this case it may not be transferred to a third party unless it is determined by an agreement or the creditor has requested it before the court.
- 2- However, compensation may only be ordered for spouses and relatives up to the second degree for the pain they suffer as a result of the death of the injured person.

The memorandum of the preliminary draft of the Egyptian civil law in force, especially with regard to Article (222), indicated: (The stability of opinion in the present era on the necessity of compensation for moral damage in general, after the hesitation factors in the mind ceased to exist in this regard).

There are several observations on the text of Article (222):

- 1- This text was mentioned in the second chapter on the effects of the obligation, and therefore it is applied to all types of obligations, whatever their source. Therefore, the compensation referred to in this text includes compensation for moral damage arising from contractual liability, as well as compensation for moral damage arising from tort liability. (Imran, 1999).
- 2- He launched the concept of moral damage, including all its types and forms, leaving the details of that to jurisprudence and the judiciary.
- 3- The Egyptian legislator adopted the prevailing opinion in Egyptian jurisprudence and judiciary and in many countries of the world about the necessity of compensating moral damage, before issuing the civil law in force.
- 4- Distinguishing moral damage according to the Egyptian legislator's viewpoint (in personal capacity) due to the fact that compensation for it is accompanied by the injured person only in the non-fatal serious

injury unless it was determined in advance and before the death of the injured by agreement or demanded before the court (Al-Gamal, 1999; Abdeen, 1995; Al-Bayah, 1995).

5- The Egyptian legislator specified the persons who are entitled for moral damage arose in the fatal injury of spouses and relatives to the second degree only, without stipulating that they suffer real pain (Mark, 1988; Qassem, 1994).

6- Limiting the right to compensation for moral damage to the non-injured in the case of fatal bodily harm, while the non-injured is not entitled to any compensation for moral damage, regardless of the severity of the injury. The person injured as a result of a non-fatal injury is greater than the moral damage caused by a fatal injury, as if the injury resulted in total disability or severe disfigurement or others.

Second: The Jordanian Civil law.

The Jordanian civil law has chosen to stand by the supporters of compensation for moral damage, explicitly Article (267), and the Jordanian legislator was keen, in the explanatory notes, to confirm his bias towards the principle of compensation for moral damage, influenced by the laws that preceded it, and also by the Islamic jurisprudence in which it was stated that compensation about this damage.

These notes cited some examples from Islamic jurisprudence books, as the following was stated in it: (In Hanafi jurisprudence, it came in Mabsut al-Sarkhasi, that he narrated on the authority of Muhammad ibn al-Hasan al-Shaibani in the surgeries that heal on a face that has no trace left, that: The pain he suffered.

In the Zaydi jurisprudence came in the sea Zakhar; And whoever suffers from a tooth and becomes disturbed, he waits for its recovery for the period during which the experts say it will be cured. If a ransom falls, and if it remains, then it is a government... and in pain, there is government... and in pain... and in the age that exceeds the count, there is a government because there is no benefit or beauty, and nothing in cutting the tip of the hair, as it does not affect In beauty, the effect of taking half or more is government because of the adornment it contains.

And in Shiite jurisprudence, it came in the laws of Islam for jewelry: If a person grows a bone in the place of the extracted tooth, and it grows, then it is uprooted...That it contains pain because it is accompanied by pain and disgrace.

And in the Al-Magni Hanbali , and in cutting their nipples with blood money... Malik Al-Nawawi said: If the milk is gone, their blood money

is required, otherwise a government is required to the extent of its disgrace) (Al-Zarqa, 1988).

The explanatory memoranda in support of financial compensation for moral damage also cited the following arguments:

1- The chain of transmission in this section is the hadith of the Messenger of God, may God's prayers and peace be upon him, "There is no harm or recidivism," which is a general text, and limiting it to material harm is a specification without a specification.

2- Compensation is not intended merely to replace money with money, rather it is intended to be sympathy if it is not similar. And whoever manifests the applications to that of blood money and compensation, neither of them is a substitute for money, nor for what he does with money.

3- Saying not to compensate for moral damage opens the door wide for the aggressors against people's honor and reputation, and this is a special corruption. The general public is what makes it obligatory to treat, and among the reasons for treatment is deciding compensation.

It is noted that the Jordanian legislator did not stipulate moral damage among the effects of the right, but rather stipulated this type of damage in Article (267) and among the provisions of the harmful act.

Article (267) of the Jordanian Civil Code states the following:

1- The right of warranty covers moral damage as well. Every infringement on the freedom, honor, reputation, social status, or financial consideration of others makes the infringer liable for the guarantee.

2- He may order the guarantee for the spouses and the relatives of the family for the moral damage they suffer as a result of the death of the victim.

3- The guarantee for moral damage shall not be transferred to third parties unless its value is determined by virtue of an agreement or a final court ruling.

This text addresses two important issues:

1. Who has the right to compensation for moral damage.
2. Transfer of the right for moral damage.

First : Who has the right to compensation for moral damage.

The principle is that whoever personally suffers moral damage is the one who has the right to claim compensation for the damage, but the damage may arise from the death of the injured, then the damage that befalls the deceased himself must be distinguished from the damage

inflicted on his relatives, for the damage that befalls the deceased himself is not transmitted by inheritance, unless it is determined Under an agreement or a final court ruling, and this is unimaginable. As for the harm that befalls the family and relatives of the dead (apostate damage), the second paragraph of Article (267) defines the Jordanian people who have the right to request compensation by saying: (And he may order the guarantee for the spouses and those close to the family for the moral damage they suffer as a result of the death of the victim).

The husband includes the husband and wife, and the relatives leave their determination to the judge, as there may be among the distant relatives who are more painful and saddened by his death (Ahmed, 1999).

Second: Transfer of truth from moral damage (Al-Zoubi, 1995; Sultan, 1998; Al-Sarhan, 2000):

The right to compensation for moral damage does not transfer to third parties unless it has a financial value, and this is done in one of two ways:

The first method: that the be quester agrees with the person responsible for the harmful act on the amount of compensation for the moral damage.

The second method: to determine the value of compensation for moral damage by virtue of a final judicial ruling, that is, the deceased filed a claim for compensation for moral damages that inflicted him before his death, and the court awarded him these compensations.

However, there are several observations on the Jordanian Civil Code regarding its regulation of moral damage provisions, as follows:

1- The first paragraph of the aforementioned article (267/1) defines moral damage as that which affects a person in his freedom in the comprehensive concept of freedom, which is his personal freedom, such as the freedom to move and own property. housing, residence, correspondence, choosing the way of life in terms of work and marriage, and the freedom to do or abstain from work of whatever nature and scope within the limits of the law, as well as what afflicts a person in his honor, i.e. what afflicts him as a result of defamation or slander in his morals, as well as what afflicts a person in his position The social person may be rumored to be corrupt, intolerant, biased, or weak in character. The same applies to the person in his financial position that is rumored to be bankrupt, insolvent, unable to pay, incapable of managing his money, or otherwise. However, what the aforementioned article defines for moral damage are cases and the examples that can be applied to these cases are not limited.

2- The text of Article (267/2) did not specify the concept of (close relatives of the family) and did not specify the degree of kinship due for compensation.

3- The article limited the right to compensation for moral damage to the non-injured in the case of fatal bodily injury, which is a fundamental flaw in the law, because the recurring moral damage in the non-fatal bodily injury is not less than the moral damage in the case of fatal injury.

4- The third paragraph of the aforementioned article (267/3) stipulates the compensation that is transferred from the inheritor to the heirs according to the hereditary lawsuit if an agreement is reached between the injured party and the perpetrator of the harm, or a final court ruling is issued, which is an improper direction.

Legislative position on the transfer of the right to compensation for moral damage

When we talked about the position of the legislation on the issue of compensation for moral damage, it became clear to us that there are two trends in civil legislation:

First trend: Legislation silent on the text compensation for moral damage.

Second trend: Legislation that approved the principle of moral damage and its absolute compensation.

When we review the texts that stipulate compensation for moral damage, they also dealt with the issue of transferring this right - compensation for moral damage - but with restrictions.

It is natural that the legislation that did not provide for compensation for moral damage did not address the issue of the transfer of this right, but its judiciary turned, after hesitation, to the unconditional transfer of the right to compensation for moral damage. Since 1943, the French courts have allowed the transfer of this right despite The French Civil Code did not provide for compensation for moral damage or the transfer of the right to it. We will explain the position of comparative legislation on the transfer of the right to compensation for moral damage. We will discuss the position of Egyptian and Jordanian legislation on the transfer of the right to compensation for moral damage:

Egyptian Legislation

Article (222/1) of the Egyptian Civil law stipulates that: (The compensation also includes moral damage, but in this case it may not be transferred to others unless it is determined by an agreement or the creditor has requested it before the court).

It is clear from the previous text that the right to compensation for moral damage is not transferred to others for any reason for the transfer except in two cases (Mansour, 2000; Qassem, 1994; Al-Adawi, 1995).

The first case: There is an agreement between the injured person and the person responsible for the damage on the principle of compensation.

The second case: If the injured person has filed a lawsuit before the court to claim compensation.

If one of these two cases is realized, then the right to compensation for moral damage is transferred to others, and accordingly, if the injured person dies before one of these two cases is realized, the right to compensation for moral damage does not transfer to his heirs.

The text of Article (222/1), an Egyptian civil, does not prevent the emergence of the right to compensation for moral damage, but rather it enforces it, whatever its source. Perhaps the legislator, when he stipulated that the amount of compensation be determined in accordance with the agreement, was only intending to confirm its financial nature, as he intended from the judicial claim to show the will of the injured party to claim this right that relates to his person, and therefore the purpose of each entry was different from the purpose of the other entry.

This difference raises a question about the legislator's intention to impose these restrictions and whether he considers this right non-financial before one of the two things referred to in the said article is achieved.

Or does the legislator consider this right financially, but the personal printer has stopped it and prevented it from being transferred to others until the injured person shows his will to claim it?

And if the text deals with the issue of transferring the right to compensation for moral damage to a third party, does this description (the description of third-party) apply to the heirs on the grounds that they are from others?

To answer these questions, we will discuss the concept of the financial and personal nature of the right to compensation for moral damage and the extent to which the heirs are considered by others.

First: The financial nature of the right to compensation for moral damage

There are two opinions in civil jurisprudence to clarify the intent of the two restrictions mentioned in Article (222/1) an Egyptian civilian

The first opinion: This is evidence that the legislator considered this right to be of a special kind and it does not become a financial right until after agreeing on its amount or claiming it before the judiciary (Al-Sanhouri, 1964; Marks, 1988; Salamah, 1975).

The second opinion: This is not the intent of the legislator, because the nature of the right in terms of whether it is financial or otherwise

Money is determined by looking at its place in terms of whether it can be valued in money or not at the time of its emergence. And after the nature of this right has been determined, and the article referred to only deals with the matter of transferring this right after it has arisen, just as the reliance in determining the nature of this right to the matter of its transfer leads to a vicious circle, the right does not transfer unless it is financial, and it is not Financially, unless it is possible to transfer it (Sorour, 1979; Hegazy, 1954; Kira, 1959; Abdel Rahman,

The proponents of this view also argue that the legislator did not differentiate between material and moral damage except with regard to the transfer of the right to compensation for them, and it is not permissible to conclude from this that the right to compensation for moral damage is a non-monetary right. This right is considered financial in accordance with what is required by the general rules of civil responsibility and the rules of logic (Sharaf al-Din, 1982).

It is also based on the fact that the legislator may decide not to transfer a certain financial right owed to a person to his heirs except after the fulfillment of a certain condition or several conditions (Sharaf al-Din, 1982), assuming that the text of Article (222/1) civil applies to the transfer of the right to compensation for Moral damage, this does not prevent it from being considered a financial right, and the restriction is only applicable to its transfer.

The legislator, in Article (222/1) Civil, noted in the right to compensation for moral damage what distinguishes it from other financial rights.

Also, what was suggested by the preliminary draft memorandum to Article (238) regarding the consideration of the right to compensation for moral damage as a personal right that is not transferred to the heirs unless its nature is confirmed by mutual consent or the judge's judgment is under consideration, because the right can be financial before it is estimated when it is in It can be appreciated.

Secondly: Personal character of the right to compensation for moral damage:

The determination of the two restrictions on the transfer of the right to compensation for moral damage is explained within Article (222/1) Civil. Compensation for moral damage is closely related to the person

of the injured person and is not transferred to others unless the victim's claim becomes verified.

The two restrictions stipulated in the aforementioned article show the unequivocal will of the injured in the claim, and they are the case of agreement with the official and the case of the judicial claim (Al-Sanhouri, 1964; Ghanem, 1967).

This was not without criticism; Because such a statement is not consistent with all the rules contained in the aforementioned article. If the basis for the ability of the right to compensation to be transferred to others is the mere appearance of the injured person's definitive will in the claim for compensation, it would suffice if the bequeather had agreed on the principle of compensation with the official, and if the person had not It has not been agreed to determine its amount (Ghanim, 1967) or to take any appearance that indicates by itself the departure of his will to claim this right. Such as the victim making his statement before the investigator or submitting a request to the competent recovery committee to exempt him from fees and assigning a lawyer to file the case (Abdul Salam, 1990).

It is not permissible to say that the legislator has established a legal presumption on the victim's waiver of his right to compensation if he dies. Before he agrees with the official on its amount, or before the judiciary demands it, waiving this right is not assumed (Sharaf al-Din, 1982).

Hence, it remains only to say that the legislator has seen that the right to compensation for moral damage is related to the person of the injured, and that the personal quality prevails in it over the financial one, and then it cannot be transferred to others unless the injured person expresses his will to claim it.

This interpretation will not agree with the status of the heirs if we consider that they are an extension of the injured person, and the claim issued by them for the right is an interpretation of what their bequeather would do in his lifetime (Abdul Salam, 1990), so did the legislator reject that and consider them from others?

Third: The extent to which the heirs are considered by others:

A dominant trend prevails in the jurisprudence of the law, regarding the consideration of heirs from others in relation to the transfer of the right to compensation for moral damage, and therefore this transfer must be subject to the restriction set by Article (222/1) an Egyptian civilian (Al-Sanhouri, 1964; Hegazy; 1954; Al-Sharqawi , 1981; Abu Steit, 1954; Ghanem, 1967; Sharaf El-Din, 1982; Abdel Salam, 1990).

That is, what is meant by third parties according to that article is every person who is not injured, and this includes the general successor

(heirs) or any other person to whom the right to compensation is transferred.

This is what was taken in the memorandum of the preliminary draft of Article (238), which corresponds to Article (222/1) an Egyptian civilian.

It is noted that Article (238) of the project and its explanatory memorandum were placed in the chapter devoted to the illegal act, and this may make it more likely that the heirs are considered third parties because there is no contract between their injured legator and the responsible person so that the breach of the obligations arising from it results in the testator being harmed. But this situation has changed by transferring the provision of that article to Article (300) Civil, which was included among the provisions set forth to regulate the effects of the obligation at all, whether its source is contractual or an illegal act. Those who are not in agreement with what is established regarding the consideration of heirs as general successors in contractual matters, especially those affected by breach of a contractual obligation, and despite the lack of harmonization, the direction of jurisprudence sees that the restrictions contained in Article (222/1) civil include compensation for moral damage, whether in Contractual liability or in tort liability, but it was mentioned in the chapter devoted to implementation by way of compensation, and the provisions of this chapter deal with the effects of the obligation, whatever its source, including the obligation to compensate (Sanhoury, 1964; Ghanem, 1967; Salama, 1975).

This is something that cannot be accepted. Because the successor, whether public or private, is not considered a third party in the contract, so the effects of the contract will apply to him, especially the liability arising from the breach of obligations arising from him, Al-Sanhoury, 1964; Al-Sadda, 1984) and the heirs are not considered third parties, when they initiate the hereditary lawsuit based on contractual liability, and although the subject of Article (222/1) civil has made it apply to contractual and tort responsibilities, its origin is Article (238) of the preliminary project, She was in the position designated for tort liability and that was the reason why the heirs were considered third parties.

Where it is not imagined the existence of a contract between their legator and the official, but it was decided to transfer this text to its place in the law in a way that does not apply to the two types of responsibility. others, but it seems that the legislator missed it (Sharafeddine, 1982).

Perhaps what supports this: Article 170, civil, which was mentioned in the chapter devoted to illegal work, referred to Articles (221 and 222) civil with regard to the extent of compensation for damage, and that

referral was a reason for the objection of a member of the Senate because it refers to Article Regarding contractual liability, although the text is ambiguous, Dr. Al-Sanhouri responded to that by saying: “The referral in this case is only intended to be in the characteristics of the text referred to, for this case is the source of the contract, but with the exception of the contract, it does not apply.”

This saying indicates that the legislator was obliged to explicitly stipulate this referral, so that the provisions applicable to contractual liability apply to tort liability.

And if the heirs are not considered from others in relation to contractual liability, this provision does not apply to tort liability, and they are not considered in relation to the transmission of its effects from others as well (Sharaf El-Din, 1982).

It is more correct to say that the legislator intended by this referral one of the two judgments established by the first paragraph of Article (222) civil, which is the judgment which states that compensation includes moral damage as well, and therefore it is likely that the referral was not due to the issue of transferring the right to compensation for damage. It was about estimating compensation for damage, and this is what is understood from the explanatory memorandum of the chapter devoted to implementation by way of compensation, where it says: (With regard to the judicial estimation of compensation, contractual liability and tort liability are subject to the same rules in both, namely: the loss incurred by the creditor and what he misses. From the gain on the one hand, and the material damage and moral damage on the other hand, then she referred to the text of the two articles (221/1, 222) civil).

If that referral aims to introduce moral damage only, into consideration when estimating compensation, and that the heirs are not considered from others in relation to contractual issues, then according to this text they must be considered as such in tort responsibility, so they are not considered from others in it (Sharaf Al-Din, 1982) .

And if the term “others” does not apply to the heirs, if the basis of the right to compensation for moral damage is contractual liability, they are also not considered third parties in the case of tort liability, because the term “others” is either intended to mean every person other than the injured, or it is intended. Its meaning contained in the doctrinal issues, which does not include the heirs of the contracting party as a general successor to him (Al-Sanhouri, 1964; Hegazy; 1954; Al-Sada, 1984; Sultan, 1998; Shanab, 1969).

And if it is assumed that the legislator meant what he did when he transferred the provision regarding the transfer of the right to

compensation for moral damage to others from the chapter on the illegal act to the chapter devoted to implementation by way of compensation, and that this provision applies to contractual issues as well as to tort issues, it must be said: The heirs are not among those covered by the term “others” mentioned in Article (222/1) civil, but the ruling contained in it is a general ruling that includes both types of liability, provided that this ruling does not apply to the heirs of the injured in contractual liability, since it is recognized that they are not from others in it, and since the text did not differentiate between the two types of contractual and tortious liability in this field, they are not considered as third parties with regard to tort liability, and what is meant by third parties in the text is every person other than the injured and his general successor, including the assignee of the right and the creditors of the injured (Sharaf al-Din , 1982).

This is evidenced by the fact that the legislator in Article 19 of the Author’s Protection Law No. 354 of 1954, as amended by Law No. 14 of 1968. It has decided to transfer the author’s moral right over his work to the heirs after his death, and then the right to compensation for him, without the transfer of this right to compensation being restricted by the availability of one of the restrictions stipulated in Article (222) Civil (Ghanim, 1967).

Although the author’s moral right is considered a personal right, and this indicates the legislator’s consistent tendency not to consider the heirs from others, and because it was said that the text of Article (19) of the Author’s Protection Law is an exception to the rule restricting the transfer of the right to compensation for damage Literary.

This statement will be rebutted because there is nothing in the nature of the literary damage that affects the author that distinguishes him from other forms of literary damage (Sharaf al-Din, 1982).

If the general successor of the injured person is not from a third party because they receive the right to compensation for their inheritor, he may object to this that there are cases in which the heirs are considered to be from others, and there are cases in which the effect of the contract does not go to the heirs while they remain in succession and such an objection, if true, will be easy His response is that the heirs are not from third parties except in specific cases, not including the case of the transfer of the right to compensation for moral damage. Cases of non-dismissal from the contract as a result of the contract to the heirs while they remain in succession are only mentioned in relation to contractual liability (Sanhoury, 1998; Salama, 1975) from what Article (145) Egyptian civil states: “The effect of the contract goes to the contracting parties and the general successor - without Violation of the rules related to inheritance - unless it appears from the contract, from the nature of the transaction or from the text of the law that this

effect does not go back to the general successor, “from the waiver of the injured in the contract concluded between him and the person responsible for the right to compensation for moral damage resulting from the breach of the obligations of this contract And that is in the cases in which this waiver is permissible, and there is no doubt that the heirs in that case do not have the right to claim this right (Sharaf al-Din, 1982).

As for the second and third cases, in which the transfer of the right to the heirs is not envisaged, they are the case if the nature of this right prevents it from being transferred to the heirs of the injured, and the case if there is a provision in the law that this right should not be transferred to the heirs (Sanhoury, 1998) .

The third case may be attached to the second case, so that the real basis for the non-transfer of the right to compensation for moral damage to the heirs is his contact with the injured person, which is the content of the restriction contained in Article (222/1) Civil.

And if this right is personal, does the claim of the heirs make him lose the character of his personality, or does it not lose him this character as long as we consider them as an extension of his person?

The French legislator took the latter approach, which stipulates that the personality of the heir is considered an extension of the personality of the bequeather so that the first replaces the second in his financial liability, so he bears his obligations and owns his rights, and he can therefore claim them even if they are related to the person of the bequeather as long as the law does not prevent this and this was what was in place In Roman Law (Abdul Salam, 1990).

So, and in the process of knowing the extent to which the right to compensation for moral damage has passed to the heirs, a choice is made between two things:

The first: As for the transfer of this right and the claim for it to the emergence of the will of the injured party to claim it, whatever form is taken to show this will, and this is based on the personal character.

Second: As for the principle of inheriting this right and the claim for it upon the death of the affected person, unless it is proven that the injured party waived it before his death, and this is based on the financial nature.

He criticized the position of the Egyptian Civil Code, in its report on the transfer of the right to compensation for moral damage, that it was wrong with regard to the formulation of restrictions on the transfer of this right to the heirs (Sharaf El-Din, 1982; Abdel Salam, 1990):

First: He unintentionally included the heirs in the meaning of others, as long as there was no reservation in this matter in Article (222/1) Civil.

Secondly: He did not achieve consistency between the two aspects of the restriction he required and with which he aims to ensure that this right does not relate to the injured person.

Third: His determination of the two matters in which the absence of this right with the injured person is achieved is arbitrary, as this can be reached by various means. He intends to claim this right.

Fourthly: Article (222/1) civil has prevailed over the personal aspect of this right over the financial aspect, and since that was acceptable in the life of the injured party, this predominance is not acceptable after his death if it is decided that his death before expressing his will in this regard does not indicate his waiver of this The right, and if at the same time we want the official not to escape the penalty just because the injured person dies before claiming his right to compensation.

Jordanian Legislation

Article (267/3) of the Jordanian Civil Code stipulates:

This article requires the transfer of the right to compensation for moral damage to a third party by the availability of one of two things (Lutfi, 1982; Naji, 1984; Abdel Wahab, 1964).

The first. That the amount of compensation has been determined in accordance with an agreement between the injured party and the person causing the damage. This agreement should be concluded between the victim himself and the official, so that agreement must be the case of the victim's life in particular, as if a person suffers moral harm as a result of an order or accident such as an injury to the body, mutilation, or slander that affects honor and consideration, and so on. In these cases, the official may claim compensation. If he agrees to an amicable settlement in which the amount of compensation is determined, then the subject of this agreement is transferable, like all other rights and financial agreements.

Second. The value of compensation for moral damage shall be determined by a final judgment.

It is inferred from the text of the aforementioned article that the moral damage that affects the injured person before his death is not transmitted to others except in two ways (Al-Zoubi, 1995; Mansour, 2001; Taimat, 1998; Ahmed, 1999; Al-Far, 1998; Sultan, 1998; Al-Sarhan, 2000).

First method:

If the testator agrees with the person responsible for the harmful act on the amount of compensation for the moral damage, then this agreement is binding on them, so that the person responsible for the harmful act must pay the value included in the agreement. According to the rules of inheritance

Second method:

That the value of compensation for moral damage be determined by virtue of a final judicial ruling, i.e., that the deceased filed a claim for compensation for moral damages that he sustained before his death, and the court awarded him these compensations. compensation and that this judgment has not been appealed and the period of its appeal has expired, or that it has been appealed and the Court of Appeal upheld the judgment of the Court of First Instance. If the injured person dies at this time, after the judgment becomes final and before the person responsible for the harmful act pays the amount of compensation, he must pay it, as long as this amount has been determined by a final court judgment, and if he refuses to pay it, it shall be collected from it according to the law of the procedure that requires him to be warned. It is necessary to fulfill it first, and if he does not fulfill it, it shall be executed on his movable and immovable property and they shall be sold by public auction. It is annexed to the estate and divided by the heirs according to the rules of inheritance.

The assessment of the position of the Jordanian legislator regarding the right to compensation for moral damage is in two respects, one of which is related to the person of the injured, and the second is a financial aspect, and this duality in the nature of the right had its effect on its ability to transfer to the uninjured.

The text of Article (267/3) civil has dealt with the issue of the transfer of the right to compensation for moral damage after it arose in the custody of the injured, and it may be said that the legislator, when it stipulated that compensation for moral damage be determined by agreement or a final judgment, was what was intended behind that Ensure his financial capacity, and confirm that the will of the injured was directed to claim a right related to his person.

Thus, the discussion of this issue - the transfer of the right to compensation for moral damage - is related to three issues (Mulla Hosh, 1980).

The first issue: the financial nature of the right to compensation for moral damage.

Some have argued that the two restrictions set by Article (267/3) on the transfer of the right to compensation for moral damage to others

are nothing but evidence that the legislator considered this right to be a right of a special kind so that it does not become financial until after agreement on its amount or a final ruling is issued on it (Al-Bashir, 1980; Taha, 1970).

This opinion is not correct, because (Al-Mulla Hosh, 1980):

Determining the nature of the right in terms of whether it is financial or non-financial is based on its location in terms of whether it can be estimated in money or not at the time of its emergence. As for the transferability of the right, it is only after the emergence of the right and its nature has been determined.

The Jordanian legislator did not differentiate between material damage and moral damage except with regard to the transfer of the right to compensation for them, and this does not mean that the right to compensation for moral damage is a non-monetary right.

Those restrictions in Article (267/3) of a Jordanian civilian only apply to the transfer of the right, and this matter does not prevent this right from being considered financial, because the legislator may decide not to transfer a certain financial right that a person owes to his heirs unless a certain condition or several conditions are met. It is up to the legislator.

The second issue: the personal nature of the right to compensation for moral damage.

It is not hidden that the text of Article (267/3) and the restrictions it stipulates on the process of transferring the right to compensation show the close connection of the right to compensation for moral damage to the person of the injured person, so that it cannot be transferred to others unless the victim's claim becomes verified, and it is not so unless if Agree on its value by final agreement or judgment

This expresses the fact that research into the existence of moral damage and the statement of its elements necessitate delving into moral considerations that only the uninitiated can address.

And what was mentioned in Article (267/3) of a special restriction in determining the value of the moral damage in accordance with an agreement, the aim of which was to verify the intention of the victim to claim the right to compensation for the moral damage he sustained, and it follows that: It is not sufficient to invoke the will of the injured to claim this The right to have agreed with the official on the principle of compensation, and it is not necessary that an agreement had been made between them on determining its amount (Al-Zoubi, 1995).

Accordingly, determining the amount of compensation has no reason to deny the right to it with the injured person, nor to ascertain its financial nature.

As we said earlier, the right to compensation for moral damage has two aspects, one of which is related to the person of the injured person and the other is financial. The Jordanian legislator has adopted the first aspect, through the two restrictions in Article (267/3), where it stipulated:

First: Issuance of a final agreement on its amount between the injured party and the person causing the damage.

Second: Issuance of a final judgment on it.

Hence, the right to compensation for moral damage does not transfer to a third party unless the injured party expresses his will to claim this right.

This interpretation does not agree with the status of the heirs if they are considered an extension of the injured person, so that the claim issued by them is considered an explanation of what their bequeather would do during his lifetime. Did the legislator reject this consideration and make the heirs from others where the restriction that stipulated the transfer of the right to compensation for moral damage applies to them According to Article (267/3) of a Jordanian civilian.

With a brief question, what is the reason for the transfer of the right to compensation for moral damage to the heirs only after a claim is issued by the injured person during his lifetime? This is what we will try to answer when we present the third question.

The third issue: the persons to whom the right to compensation is transferred

What is meant by third parties according to Article (267/3) civil show me: is every person who is not injured, and that includes the general successor or any other person to whom the right to compensation has been relinquished (Al-Bashir, 1980).

Likewise, the heirs in the contractual responsibility are not considered from a third party, because the successor, whether general or special, is not considered a third party in the contract (Al-Hakim, 1969).

If it is agreed to say that the general successor of the injured person is not from others because they receive the right to compensation for their inheritance, then it may be said. There are cases in which the heirs are considered to be from others. There are also cases in which the effect of the contract does not go to the heirs while they remain in succession.

The heirs are not considered third parties except in specific cases, not including the transfer of compensation for moral damage (Al-Bashir, 1980; Al-Sanhouri, 1998).

Likewise, cases where the effect of the contract does not go to the heirs while they remain in succession, are not presented as far as contractual liability is concerned.

The first of these cases is the ones stipulated in Article (206) of a Jordanian civil: “General successor” and according to which the injured party may waive in the contract concluded between him and the official the right to compensation for moral damage resulting from the breach of the obligations of the official, in the cases in which it is permissible to agree on this waiver, and if this is achieved, the heirs are not entitled to claim this compensation .

As for the second case, it is in which it is not envisaged that this right will be transferred to the heirs in the event that the nature of this right prevents it from being transferred to the heirs of the affected

As for the third case, it is the case if there is a provision in the law that this right should not be transferred to the heirs (Taha, 1970).

Based on the foregoing, the reason for the refusal to transfer the right to compensation for moral damage to the heirs only after the claim is issued by the injured person during his life is that the heirs are from others, but the basis for this is the personal nature of this right.

This explains to us the position of the Jordanian civil law in that the personal character has prevailed over the financial nature of this right, and hence the restriction mentioned in Article (267/3) applies to the transfer of the right to compensation for moral damage to the heirs, not as third parties, but predominantly. For his personal character over his financial character.

Hence, the criticism directed at the Jordanian civil law in this regard focuses on the basis of the ruling in itself. Restricting the transfer of the right to compensation for moral damage to the heirs is a logical result of giving priority to the personal nature over the financial nature of this right.

Here, the question arises as to why the legislator chose this character, and why did his financial character not prevail over his personal character and adopt the principle of inheriting the right upon the death of the injured?

We can find an answer to these questions, but they are incomplete, by examining the legislative policy of the legislator whose goal was to narrow the system of the district in which compensation is due for moral damage.

Conclusion

The principle of compensation for moral damage has been established in all Arab legislation with explicit and clear texts, with the exception of Algerian legislation because it is affected by French law.

The text of Article (267/3) of a Jordanian civil in its requirement of the two records to transfer the right to compensation for moral damage is incorrect, and the severity of the second restriction was softened by the Egyptian Civil Code with the phrase (if required before the judiciary) in accordance with Article (222/1) an Egyptian civil.

The positions of Egyptian and Jordanian legislators regarding the transfer of the right to compensation for moral damage shows that they were influenced by the old idea that questioned the entitlement to compensation for this type of damage, or considered that the right to this compensation was weaker than the right to compensation for material damage.

The researcher believes that the legislative amendment is inevitable, as follows, as we will provide the text of the article, the text of Article (267), a Jordanian civilian first, and then we will quote the proposed amendment to them:

Article (267) Jordanian Civilians:

- (1) The right of security includes moral damage as well. Every infringement on a third's freedom, honor, honor, reputation, social status, or financial consideration makes the infringer liable for the guarantee.
- (2) He may order compensation for the spouses and those close to the family for the moral damage they suffer as a result of the death of the injured person
- (3) Compensation for moral damage shall not be transferred to third parties unless its value is determined by virtue of a final agreement or judgment.

We suggest the following text to the Jordanian legislator:

- (1) Keep the first paragraph of Article (267) as it is for a Jordanian civilian, without modification.
- (2) The second paragraph of Article (267) of a Jordanian civilian shall be amended to become as follows: In the event of the death of the injured person due to the harmful act, the guarantee shall be issued for the moral and material damage caused to the injured person as a result of death, because the damage was achieved in relation to him before death and is included in his estate as part of his property, and the right is transferred to This guarantee goes to the heirs because it

is part of the estate, even if the injured person did not claim it before his death.

(3) The third paragraph of Article (267) of a Jordanian civilian is amended to become as follows: The heirs or others may not claim other compensation for moral damage caused to them due to the death of the injured person, other than what was mentioned in the aforementioned second paragraph)

Acknowledgement:

“This Study is supported via funding from prince Sattam bin Abdulaziz University project number (PSAU/2023/R/1444)”

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