



University of Qom - Iran

Online ISSN: 2980-9584
Print ISSN: 2980-9282

IRANIAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

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A COMPARATIVE ANALYSIS OF THE GENERAL THEORY OF ARSH IN ISLAMIC JURISPRUDENCE AND THE PRINCIPLE OF PRICE REDUCTION IN THE CISG

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Article Info

Article type:

Research Article

Article history:

Received

09 January 2023

Received in revised form

25 March 2023

Accepted

10 May 2023

Published online

30 December 2023



https://ijicl.qom.ac.ir/article_2764.html

Keywords:

General Theory of Arsh,
Principle of Price Reduction,
Law of Contract,
Compensation,
Damages.

ABSTRACT

The examination of traditional legal institutions is a prudent approach to ensure effective contractual remedies. “Arsh” is one such institution that predominantly arises in relation to the option of defect. This paper aims to review the perspectives of Islamic legal scholars on Arsh in order to establish it as a general theory. However, it should be noted that this review does not propose a structural alteration in the nature of Arsh; rather, it intends to conduct a jurisprudential inquiry into the subject-matter. With regard to the nature of the general theory of Arsh, it can be categorized as a form of damages and compensation resulting from a breach of contract and contractual liability. In such cases, it aligns with the relevant legal principles. The basis of damages in the general theory of Arsh also exhibits a dual nature. While it is rooted in contractual compensation, if such compensation cannot be adequately provided, civil and obligatory liability may be invoked. One of the well-established legal-historical principles in the Civil Law system is the rule of Price Reduction, which bears resemblance to the institution of Arsh (i.e., the financial difference between a defective and non-defective item that is compensated to the customer) in the Islamic legal system. It is noteworthy that the foundation of Price Reduction lies in the principle of Commutative Justice, which serves as the basis for contractual liability in the realm of contract law.

Cite this article: Behroozi Zad, H.R. (2023). A Comparative Analysis Of The General Theory Of Arsh In Islamic Jurisprudence And The Principle Of Price Reduction In The Cisg, *Iranian Journal of International and Comparative Law* ,1(2), pp: 207-225.



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doi:10.22091/IJICL.2024.8990.1053

Publisher: University of Qom

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Introduction

Considering the profound impact of contracts on modern human life, debates surrounding contract law have expanded alongside communities. One issue that has gained prominence over time is the issue of contractual performance guarantees. The question of what performance guarantee should be provided to the non-breaching party in the event of contract breach by the adverse party has long been deliberated. The answer to this question was clear in primitive societies, particularly in relation to predominantly microtransactions. However, the existing performance guarantee is no longer sufficient in contemporary times, necessitating the development of new plans and the formulation of general rules governing performance guarantees and compensation.

Drafting such general rules should take into account the capacities of domestic law and Islamic jurisprudence. In conventional law of contract, discussions regarding contractual performance guarantees were not thoroughly explored, and the conventional rules of necessity, non-damage, cancellation, and obligation were not sufficiently responsive. The consideration of damages was not given the attention it deserved. However, insights from these rules and conventional jurisprudence shed light on the general theory of victim compensation. Consequently, a conventional, jurisprudential and legal concept, namely “Arsh”, was introduced into modern legal literature. This study is also an attempt at establishing mutual contractual justice and contractual compensation, modernizing conventional law of contract, and interpreting jurisprudential *ijtihad* in a timely and contextual manner without reference to non-Islamic legal institutions.

To incorporate the Arsh institution into our legal framework, it is necessary to articulate and contextualize this institution within conventional practices. It should be noted that the discussion of Arsh in Islamic jurisprudence and legal texts often involves *the option of defect*. Therefore, conventional legal literature should be examined, and as part of this examination, the concept of *Arsh* should be elevated to the level of a general theory.

This article aims to explore the nature of the *General Theory of Arsh* in the law of contract. It also seeks to examine the corresponding *Principle of Price Reduction* in Western legal systems, with a specific focus on its manifestation in the United Nations Convention on Contracts



for the International Sale of Goods (CISG). A comparison of these concepts, yields Arsh as a comprehensive theory that facilitates fair compensation for damages, particularly in contractual disputes, and upholds the principle of mutual justice in contracts, which serves as the philosophical foundation of contract law.

1. Conceptualization: Scope and Definition

This section delves into the conceptualization, scope, and definition of key concepts related to our topic. It aims to provide a clear understanding of the concepts and their relevance within the context of our discussion. The section explores two primary concepts: the concept of Arsh and its scope and the concept of Price Reduction and its scope. Each concept will be extensively examined and defined to shed light on their significance and implications. By delving into these concepts, we can establish a solid foundation for further analysis and exploration of our topic.

1.1. Arsh

The term “Arsh” encompasses multiple meanings. One of its meanings refers to the compensation known as blood money, which is awarded for injuries. Additionally, in the context of a defective property, *Arsh* denotes the compensation that the buyer receives from the seller upon discovering the defect. In *Mesbah Al-Manir Fiyomi*, Arsh is defined as the “blood money for injuries, with its sum referred to as *Orosh*. Arsh fundamentally signifies corruption. Therefore, it is associated with defects found in immovable property, as corruption exists within it. It is stated that the principle of Arsh is Harsh”.¹ Arsh is also associated with other meanings such as *Khadsh*, demanding Arsh, accepting Arsh, bribery, and deceit.² Within Islamic jurisprudence, Arsh carries several connotations:

1. It refers to compensation demanded due to a defect in one of the considerations of an exchange.
2. It represents compensation sought for defects found in the object of possession or in the interest of possession, such as usurpation and non-usurpation.
3. It signifies payment made for a crime that lacks a specified blood money value.
4. It denotes compensation for the defloration of a virgin girl.³

Some Islamic jurists argue that Arsh has different meanings, leading to verbal disagreement. From their perspective, Arsh encompasses distinct definitions. However, the prevailing and more accurate viewpoint is that Arsh is an umbrella term, encompassing an amalgamation and abstraction of the aforementioned definitions and meanings. Scholars who adopt this abstract approach define Arsh as “[p]roperty in which the consideration of a defect lies within the property itself or in the body, and its amount is not specified in Shariah law”.⁴

Legal scholars have offered various definitions of Arsh. Katouzian defines it as the “com-

1 . Ahmad ibn Fars Zakaria, *Moghabis al-Loghah*, vol. 1 (School of al-Alam al-Eslami Qom 1984) 79; Ahmad ibn Muhammad Fumi, *al-Mesbah al-Monir* (Qom: Institute of al-Hijra, 1987) 12.

2 . Mohammed bin Ya'qub Firouzabadi, *Al-Qamous Mohit*, vol. 2 (Beirut: Dar al-Ahya al-Tarath al-Arabi, 1992) 382.

3 . Mohammad Hassan Najafi, *Jawahar al-Klamah*, vols. 23 & 37 (Tehran: Dar al-Kotob al-Eslamiye, 1988) 499.

4 .



compensation for the non-fulfillment of obligations related to the delivery of sound goods”.¹ Some even present a philosophical perspective on Arsh, viewing it as compensation for the disruption of the balance principles in Iranian law.² It becomes apparent that they believe it is a result of flouting the balance of the contract for which the law has provided two remedies: cancellation or demanding Arsh as a right of claim. However, these definitions appear to be largely descriptive and have not resulted in practical application.

1.2. Reduction of Price

The *Principle of Price Reduction* as a method of compensation is not a familiar concept within the common law system. In fact, this principle is rooted in Civil Law, known in ancient Roman law as *actio Arsh*.³ In contemporary times, the legal literature of countries with codified laws widely refers to this principle (for instance, Article 441 of the German Civil Code and Article 1644 of the French Civil Code). Reduction of price is a recognized and significant method of financial compensation in addition to other remedies. It is widely practiced in domestic and international trade.⁴

Article 50 of the CISG also recognizes the right to reduction of price. It grants the buyer the right to deduct the price if the goods do not conform to the contract. However, there is no specific rule regarding reduction of price in the Principles of International Commercial Contracts (PICC) of 1994 and 2010. The omission of this rule is not explained within these principles. Nevertheless, in light of Article 50 of the CISG and Article 9: 401 of the Principles of European Contract Law (PECL), law scholars generally agree that the principle of reduction of price is established as one form of contractual compensation.

Advocates of the principle of reduction of price, based on Article 50 of the CISG, argue that this principle serves a different purpose in protecting transactions compared to damages. It is related to the obligation and represents the moral duty of the parties to preserve it, especially the buyer who is morally obligated to uphold the obligations. In contrast, damages focus on the economic efficiency of the commitments. Therefore, unlike contractual compensation, the principle of reduction of price is not based on actual damages incurred by the buyer but rather on the discrepancy between the actual value of the delivered goods and the hypothetical value of corresponding goods.

In general, it is recognized that the reduction of price primarily pertains to maintaining the contractual relationship between the parties and serves as a means to restore balance in the implementation of the agreement by the parties. Nevertheless, Article 50 of the CISG grants the buyer the right to reduce the price instead of seeking damages in cases where the delivered goods do not conform to the contract.

2. The Nature of Arsh

In order to address the question concerning the nature of Arsh, it is necessary to consider whether Arsh is a part of the description or a description of attributes. This question involves two distinct arguments. The outcome of these arguments can be observed in two scenarios:

1 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 5, 308.

2 . Mohammad Jafar Jafari Langroudi, al-Fareq (Tehran: Ganj Danesh Publications 2003) 218.

3 . Reinhard Zimmermann, The Law of Obligations (A Clarendon Press Publication 1996) 31.

4 . Bianca Bonell, Commentary on the International Sales Law (Giuffrè: Milan; Reproduced with permission of Dott. A Giuffrè Editore, S.p.A 1987).



1. If Arsh is considered as part of the price, then any violation of the description of the healthy conditions of the goods during the contract would render the contract void only with respect to the violated portion.
2. If Arsh is not considered as part of the price, according to the first principle, it should be deducted from the price. However, according to the second argument, it is not obligatory to deduct it from the price, and payment from a non-price source is also permissible.

First, I will examine these two arguments, and subsequently, I will discuss the selected argument, which combines both perspectives.

2.1. Arsh is Considered as per the Rule

Contemporary Islamic jurists have expressed their inclination towards the argument of Arsh in two different ways.¹ Some aspects of this argument have also been mentioned in the writings of some previous jurists.² In essence, they believe that the description of truth forms part of the price. If the description of truth is partial, each mystical or religious consideration opposes the other part. In this case, establishing the existence of Arsh would be in accordance with the rule. Just as in cases of partial breach of sale, the reference is made to the price in front of it, and in the case of a breach of description, it refers to the amount that has been violated in part.

2.2. Arsh is Contrary to the Rule

In the Imamiyya jurisprudence, the majority of scholars hold the view that Arsh is not part of the price.³ There are two reasons that make it impossible to consider Arsh as part of the price:

1. The sale of conveyance of property to property, where the description of the correctness of the estimator is for possession rather than the property itself. Thus, the sale is subject to the number of components of the property.
2. The necessity of the premise that the description of correctness is part of the property would render the sale void in the event of a missing part, and the price would be returned to the buyer. However, the parties to the contract do not intend for it to be void.
3. Furthermore, the principle of Arsh can be waived. However, if it were part of the price, the goods could not be waived.⁴

2.3. Selective Theory (General Theory of Arsh)

It appears that from the perspectives of several jurists in the Imamiyya school, an alternative analysis can be deduced. According to this analysis, Arsh is in accordance with the rule but is not

1 . Seyyed Mohammad Kazem Tabataba'i Yazdi, *Hashiye al-Makaseb*, vol. 3 (Qom: Dar al-Mustafi Le-Ahya al-Tarath 2002) 86-87, 223-224.

2 . Mohammad bin Maki Ameli (Shahid Ava), *Al-Qawaed al-Fawaed*, vol. 2 (Qum: Maktabe al-Mufid, no date)74-7; Hassan ibn Yusuf (Allameh) Helli, *Ershad al-Ezhan*, vol. 1 (Qom: Islamic Publishing 1990) 376; Zayn al-Din Ali Ameli (Shahid Sani), *Rozeh al-Behayee*, vol. 3 (Dar al-'Alam al-Islami Institute 1983) 474; Ahmad Moghadas Ardebili, *Assembly of al-Faydeh wa al-Burhan*, vol. 8 (Qom: Al-Nashr al-Islami-Qom Institute 1987) 426.

3 . Mohammad Hassan Najafi, *Jawahar al-Klamah*, vols. 23 & 37 (Tehran: Dar al-Kotob al-Eslamiye 1988) 236; Mohammad Kazem Akhund Khorasani, *Hashiye Al-Makaseb* (Tehran: Ministry of Culture and Islamic Guidance 1986) 211; Seyyed Abolghasem Mousavi Khoiy, by Mohammad Ali Tohidi, *Mesbah al-Feghaha*, vol. 7 (Qom: Institute of Ansarian 1997) 101; Seyyed Ruhollah Moosavi Khomeini, *Sale*, vol. 5 (Qom: Institute of al-Nashr al-Islami 1990) 129; Mohammad Hussein Mohaghegh Isfahani, *Hashiye, al-Makaseb*, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 436.

4 . Mohammad Hussein Mohaghegh Isfahani, *Hashiye, al-Makaseb*, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 436.



considered a part of the price. Instead, its nature is seen as compensation (in jurists' terms) and contractual damages (in lawyers' terms). Examining the arguments presented so far can further support our argument.

1. In the narratives of Hamad bin Isa¹ and Abdul Malik² who state: "Leh Arsh al-Ayb" meaning the buyer has the right to receive compensation for the defect from the seller; yet, it is not explicitly stated in the narratives from which property this compensation is derived. Both narratives encompass the aspects of compensation and damages. However, in principle, it can be inferred that the compensation would be derived from the price of the property.

The Iranian law-maker, recognizing the prevailing perception among intellectuals and community members, has determined that the description of *health* holds greater significance compared to other aspects in transactions. If Arsh is anticipated in this context, it does not contradict the principle. However, a comprehensive analysis reveals that such news serves as guidance for the common understanding of health descriptions. Consequently, these narratives should not be interpreted hastily but rather interpreted in accordance with the conventional wisdom of these traditions. Through this interpretation, the notion of consensus, which is unlikely to be achieved, loses its value for two reasons. Firstly, consensus is a theoretical concept. Secondly, the narratives are regarded as guiding principles. Therefore, Arsh aligns with the principle and encompasses a detrimental aspect.

All jurists, whether proponents of partial or accurate description, concur that accurate description affects the price and, in certain cases, is contingent upon it. In the most pessimistic scenario for the buyer, it may result in the possession of a defective property. Unlike other attributes, damages must be compensated in such cases if a violation occurs. As Sheikh Ansari stated in the analysis of the narratives, it is evident that the analysis is presented. Referring to the second group of narratives, he states: "[t]he seller must either compensate the customer for the difference between the right and the defect, or reject the difference". This narrative implies that the amount rejected should correspond to what the seller previously received from the customer and the object of the price. They argue that "the aforementioned interpretations indicate that the price has been received by the seller in price transactions and upon delivery. Since these transactions involve cash, the price is often in the form of Dirham, Dinar, or the common currency. The ruling to 'reject the difference' applies to credit transactions. In other words, payment should be made in cash rather than from the object of the price. This interpretation is achieved with precision and contemplation in the contents of the narrative."

Additionally, another response to the narrative is provided by Ibn Sanan, who states: "[i]f the buyer has not yet paid the money to the seller and discovers that the object of sale is defective, the buyer can deduct an amount equal to the value of the object from the price and pay the remainder to the seller. The reason being that in most cases, the price in the transaction is total and becomes an obligation for the customer. Therefore, due to the defect in the object of sale, the seller is obligated to compensate the buyer by Arsh. The customer can deduct the value of the object from the seller's other funds, or if the seller is in debt, deduct it from the debt or the obligated price, and retain the remaining amount".

1 . Muhammad ibn Hasan Horr Ameli, *Wasael al-Shia*, vol. 12 (Qom: Al-al-Bait Institution 1990) 415.

2 . *Ibid*, 416.



It is worth noting that these interpretations are based on the understanding that Arsh serves as compensation under the contract. This is the principle I aim to establish, considering Arsh as a form of damages imposed as a result of a mutual contract and a guarantee on the seller. In other words, Arsh represents compensation and damages within exchange contracts. Some contemporary jurists even argue that the verse implies that Arsh is divided into the components and attributes of *Sahihe* and *Kamalie*, and all factors contributing to the multiplicity of desire and the determination of prices agreed upon by the parties or performed in the transaction.

There exists a distinct disparity between our position and cancellation from the outset, where the sale of possession and non-possession are combined. This is because the jurists in that case ruled on the validity of possession and the annulment of non-possession. The sentence in question is descriptive and partial, akin to a violation of description. There are two approaches to this matter: one involves rejecting the transaction from the beginning and terminating it, while the other entails accepting the transaction and dissolving it partially through description. Consequently, termination is not ruled in this case because the issue pertains to either complete termination or partial dissolution through description.¹

In fact, even if we do not concur with the idea that Arsh is a component of the price, we would still agree that the paid Arsh aligns with the rule. Despite any disparities in its description, according to Sobhani's explanation, it is regarded as part of the price. Furthermore, based on the principles of compensation and damage, no issues arise.² Therefore, the selected theory suggests that Arsh is not part of the price but rather a form of compensation or contractual damages that the buyer is entitled to in case of a breach of the description. This interpretation allows for the enforcement of the contract while still providing protection to the buyer.

2. Islamic jurists also affirm that the payment of Arsh constitutes damages and is in accordance with the rule. In fact, jurists define the continuity of the practice and method in conversations, transactions, and other social relations without considering the parties' rituals, religion, or nationality. Legal scholars recommend compensation. Therefore, Arsh is a matter in accordance with the basis of legal science and the principle. Moreover, examining the narratives indicates that the foundation of legal science has not only been accepted but also endorsed.³

3. The Nature of the Principle of Price Reduction

In the CISG, the reduction of price bears certain similarities to the claim for damages. In many instances where a defective commodity is surrendered to the buyer, the buyer can claim the difference in value of the commodity in accordance with Article 45(1). In other words, if the seller provides additional damages as a result of a failure, the buyer can only seek damages. However, in certain cases, the buyer can choose to combine the claim for price reduction with a claim for damages.⁴

1 . Jafar Sobhani Tabrizi, *al-Mukhtar Fi Ahkam al-Khiyar- Derase Mabsute Fi al-Khiyar wa Ahkam wa al-Shorut wa al-Naghd wa al-Nasiye wa al-Ghabz* (Qum: al-Emam al-Sadeq 2002) 427.

2 . Ibid.

3 . Mohammad Ali Kazemi Khorasani, *Explanations of the discussion of Principles of Mirza Na'ini- Fawayed al-Osul*, vol. 4 (Qom: al-Eslami Publishing 1986) 192; Mohammad Baqir Sadr, *Dorus Fi Elm al-Osul*, vol. 1 (Beirut: Dar-al-Montazer 1987) 111; Mohammad Javad Zehni Tehrani, "Expression of al-Morad, Persian Description on the principles of Jurisprudence," *Mo-zaffar*, vol. 3, (Ganjine Zehni 2009) 760.

4 . Peter Schlechtriem, Schwenzler, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2016) Fourth Edition Oxford University Press, Article 50(15).



If the buyer has acted correctly in accordance with the provisions of Article 50, the price is reduced based on the relevant amount. The buyer also becomes the owner of the reduced proportion of the price. If the buyer has not yet paid the price, they are only required to pay the deducted amount. If the buyer has already paid the price, they can claim the fractional portion, and the seller must refund the corresponding part. This demand is directly assumed based on Article 50 of the CISG.¹ Additionally, commentators on the Convention agree that the buyer can claim the benefits of a portion of the price to be returned to them. However, there are differences among legal scholars regarding the description of this right. Some argue that this right is based on Article 78 of the CISG, while others consider Article 84(1) as its foundation.²

In the arbitration procedure of the Convention, price reduction has been accepted. The contract price is determined proportionally to the value of the non-conformity of the goods with the expected value. The price is reduced accordingly. The criterion for determining the value is the actual value of the goods at the time of surrender³. In a lawsuit, it was decided that if the improper packaging of a bottle causes it to explode or become non-sterile, rendering it completely unusable, its value is not assessed based on the time before transportation, but rather on the time the bottles arrived.

Nevertheless, the contracting parties can agree on a specific method for reducing the value. If the parties agree to sell the non-conforming product at the best possible price, the buyer can reduce the original contract price with the price of resale. In the event of a disagreement between the parties regarding the determination of the value of the relevant item, it will be determined by expert witnesses.

4. The Basis of the General Theory of Arsh

The basis of Arsh can be either obligatory or contractual. In other words, the basis of Arsh must be either a contract or something outside the contract. It is necessary to discuss each of these bases in detail.

4.1. Contractual Basis of the General Theory of Arsh

This section assesses the contractual basis of Arsh which include exchange guarantee and the Implicit condition of goods' quality.

4.1.1. Exchange Guarantee

Some jurists argue that the guarantee of price reduction is a type of exchange guarantee. This is because the function of the guarantee of defect lies in the quality of the defective guarantee. If the guaranteed price is usurped, it is referred to as the liability of unlawful possession. In this case, the defect of the guaranteed item is assigned to the total price in exchange for description. If we consider the guarantee as part of the consideration, it implies a lack of ownership of consideration in exchange. Thus, this type of guarantee can be classified as an exchange guarantee.

The main reason for this classification is that the guarantee functions in conjunction with the whole. Exchange guarantee means that when a component of the consideration is defective

1 . Ibid, Article 50(16).

2 . Ibid.

3 .



or partial, the same defect or partiality triggers the guarantee, not the price of the defect. The guarantee of the entire object of sale on the seller is also considered valid as an exchange guarantee. This means that the seller guarantees the delivery of the object of sale to the buyer, and if the seller loses part of the object of sale, they are responsible for the corresponding amount of the price.

The main issue with exchange guarantees is that they are applicable before delivery or before the expiration of the option period. The rule regarding the loss of the object of sale before delivery does not encompass the loss of description.¹ The answer to this issue lies in the nature of Arsh, and if we opt for compensation, the exchange guarantee can be considered an appropriate basis for price reduction.

4.1.2. The Implicit Condition of Goods' Quality

Some jurists consider the quality of goods as a condition of the contract. According to their perspective, the quality of goods is apparent to the buyer and therefore does not need to be explicitly stated as a condition during the transaction. Consequently, they believe in the existence of inherent conditions.²

In legal terminology, the condition of correctness is often not explicitly stated in the contract, but the law deems it as implied based on the nature of the exchange. The term "contract" implies the necessity of the goods being in good condition. However, the condition of the goods' health is not a requirement for the validity of the contract; rather, it is a customary and rational expectation. If the object being sold does not meet the contractual requirements, the seller must compensate for the violation by paying Arsh. According to this viewpoint, the health of the goods, unlike other features, is tied to a portion of the price. If a problem arises, the buyer can request a partial refund.

It should be noted that the amount of the price is not necessarily contingent upon the health of the goods. The health of the goods, along with other conditions, incentivizes the buyer because, under this perspective, the transaction would be void with regard to the affected portion of the object being sold, and the corresponding price should be refunded. Furthermore, if the goods subject to the obligation possess defects or hidden risks, it is the responsibility of the seller, under the implied health guarantee, to inform the buyer about such defects and risks, provide necessary information on how to deal with them, and advise on ways to avoid potential hazards.

4.2. The Obligatory Nature of Arsh

Some proponents argue that Arsh is based on an obligatory principle. The purpose of this obligatory responsibility is to compensate for damages resulting from violations, solely based on Sharia law and general legal principles, rather than contractual obligations.³

1 . Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath, 2002) 72.

2 . Najm al-Din Jafar ibn al-Hassan Mohaghegh Helli, Sharaye al-Islam, vol. 2 (Najaf: al-Adab, 2010) 290.

3 . Naser Katouzian, non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press, 2003) 74; Asadollah Lotfi, Causes of obligatory guaranty (Tehran: Majd Publications, 2000) 14.



4.2.1. Liability for Unlawful Possession

Some jurists contend that Arsh is based on the liability for unlawful possession, and the buyer is responsible for the price due to the accuracy of the description. The foundation for this prophetic principle is the proposition “Ala Alid Ma Akhzat Hata Todi.” Jurists generally hold two views on the validity of this narrative. Some jurists, such as Mohaghegh Khoiy, consider it as lacking authority¹, while others, like Mohaghegh Maraghi, maintain that the originality of the narrative cannot be established through the document itself. Overall, there is a consensus among the jurists that compensates for the weakness of the document.² The inclusion of liability for unlawful possession for Arsh is feasible when considering the second argument.

According to Sheikh Mufid and Ibn Babu'ye, a problem with property is considered a defect in the property. When a commodity is defective, it means that a portion of the property is lost, and the description of the property is part of the property itself. Therefore, the guarantee of Arsh is not considered contrary to the rules. Consequently, since Arsh is considered non-fungible, it represents the difference in price between a healthy object and a defective object.³

Some legal experts also consider the liability for unlawful possession. They argue that the seller's liability in paying Arsh is akin to that of a usurper.⁴ In essence, the guarantor of the usurper is responsible for non-fungible property or defects in non-fungible property. When one person possesses property belonging to another, the owner becomes the guarantor against loss and defects in that property. The owner is obligated to return the property to its rightful owner and is liable for compensation in case of loss or damage.⁵ In simpler terms, the original property owner is liable to the owner of the property and must return the property if it remains intact. However, if the property is lost or defective, the owner may suffer losses.⁶

According to this perspective, regardless of whether the transaction is valid or invalid, the means of discharging an obligation or debt is to not only reject the goods but also pay Arsh. In this scenario, the property owner is obligated to accept the defective object and its associated Arsh. The option to refuse the defective object and demand the entire price of the property does not exist.⁷

Another proposition, which emphasizes the liability of unlawful possession, states: “[t]he price is dependent on the object of sale, and the accurate description and correctness of the object have value in the market, while defects in the description diminish the value, as the condition of accuracy is lost. The object of sale does not possess the partiality of a proper description, and this deficiency in the price is irreplaceable.” The price is distributed over the entirety of the object of sale, and indeed, one part of the price is not transferred to the seller. This aspect aligns

1 . Ali ibn al-Hussein Mohaghegh Korki, *Jamne al-Maghased*, vol. 4 (Qom: Al-al-Beyt Le-Ahya al-Tarath Institute, 1988) 87.

2 . Mohammad Taqi Boroujerdi, *A narrative of the discussions of Aqa Zia Araghi*, Nahaya al-Afkar (Nashr al-Islami 1992) 54-55.

3 . al-Fiqh al-Reza Ibn Babu'ye, *al-Mu'tmer al-'Alami Lel-Imam al-Reza* (Mashhad 1986) 253; Muhammad ibn Muhammad Sheikh Mufid, *al-Maqnah* (Qom: Institute of al-Nashr al-Islami, 1990) 596.

4 . Sayed Mostafa Mohaghegh Damad, *The Rules of Civil Jurisprudence* (Tehran: Islamic Sciences Publishing Center 2006) 61.

5 . *Ibid*, 66.

6 . Naser Katouzian, *non-contractual requirements (Obligatory and civil liability)*, vol. 1 (Tehran: Tehran University Press 2003) 29.

7 . Seyyed Ruhollah Mousavi Khomeini, *Tahrir al-Wasile*, vol. 1 (Qom: al-Nashr al-Islami 1996) 500; Sayed Mostafa Mohaghegh Damad, *The Rules of Civil Jurisprudence* (Tehran: Islamic Sciences Publishing Center 2006) 93.



with a corrupt contract.¹ It appears that considering the foundation of liability for unlawful possession, Arsh is obligatory.

4.2.2. Compensation of Commitment

Some scholars view compensation and Arsh as stemming from commitment rather than exchange guarantee and liability for unlawful possession.² Supporting the words of Akhund Mohaghegh Khorasani, Mohaghegh Isfahani stated: “[c]onsidering Arsh as a guarantee does not conform to the customary understanding of liability for unlawful possession since the contract pertains to the description, not the loss of the client’s property in the possession of the seller. Therefore, it falls outside the scope of liability for unlawful possession or exchange guarantee. The principle of wasting the object of sale before delivery does not include the waste of description, and even if we assume its inclusion, it does not require an option. I will explain what I mentioned earlier, that the guarantee of describing the loss of the object of sale falls outside the scope of liability for unlawful possession and exchange guarantee; instead, it is a matter of commitment.”³

Imam Khomeini also addressed the issue of commitment in Arsh and stated, “[i]t is certain that the guarantee in “Ma nahno Fihe” does not imply liability for unlawful possession, assuming that Arsh is guaranteed. It is not considered a guarantee of loss, and it is clear that it is not a cause for guarantee, nor is it considered an exchange guarantee. According to another interpretation, Arsh is an independent guarantee separate from other guarantees in jurisprudence. The buyer has the right to refer to the seller and obtain it.”⁴

Some contemporary jurists have undermined this interpretation and believe that “Arsh is not an issue of commitment unless it is explicitly expressed in laws. It is not one of the issues that require the jurist to apply their common sense and *ijtihad* in providing evidence. Arsh pertains to common matters between traders, negotiators, and marketers, and it is necessary to refer to experts. If we consult the general knowledge of the people and marketers, they would say that Arsh refers to a defect in a property, the price of which is the opposite of the property itself. Therefore, Arsh is a form of compensation that exists outside the essential considerations of its nature. We can refer to the opinions of Islamic jurists to support our argument. Additionally, transaction guarantee is a commitment to the commodity in the transaction. It is not covered by the transaction warranty unless it provides for damages, and the seller is obligated to compensate the buyer for any waste or loss of the object. If the lack of description is explained, the seller’s liability is required, and the payment of Arsh is in accordance with the rule.”⁵ It appears that his reference to custom is the correct approach, and the commitment of Arsh is unlikely.

Lawyers also consider the claim of Arsh as a legal decision. In fact, by accepting the principle of exclusive contractual liability, if the condition of the transaction case is not agreed upon, the inclusion of Arsh is referred to the law. In the same vein, it is stated that if there is no consensus regarding Arsh, it would be incorrect to consider Arsh as an option for defect realization. If it is possible to reject the object of the sale, Arsh does not serve as a substitute for the missing

1 . Mohammad Taqi Boroujerdi, A narrative of the discussions of Aqa Zia Araghi, Nahaya al-Afkar (Nashr al-Islami 1992) 38.

2 . Mohammad Kazem Akhund Khorasani, Hashiye Al-Makaseb (Tehran: Ministry of Culture and Islamic Guidance 1986) 231.

3 . Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 71-72.

4 . Seyyed Ruhollah Mousavi Khomeini, Tahrir al-Wasile, vol. 1 (Qom: al-Nashr al-Islami 1996) 126.

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description of the object being sold. However, if the object of the sale is not rejectable and there is no other way to compensate for the loss, Arsh can be considered valid.¹

4.2.3. Rule of No-Harm

According to the rule of no-harm, a person who causes harm to another has to compensate for it. The rule of no-harm can also be referred to in Islamic jurisprudence as the obligatory basis for Arsh. According to the opinions of Fazel Tony and Mir Fattah Maraghi, the provisions of the rule of no-harm negate the idea of non-compensable harm. In other words, Islam does not recognize non-compensable harm, and anyone who causes harm to another is required to compensate for it.² Seyyed Kazem Yazdi also considers guaranteeing Arsh based on the rule of no-harm.³

Some jurists also consider options and Arsh as a manifestation of the rule of no-harm, as they address the non-contractual aspect.⁴ According to them, the jurist intends to compensate for the buyer's damages through the inclusion of Arsh. Therefore, the seller's warranty becomes a form of obligatory guarantee. Shahid Sadr also states that according to the rule of no-harm, those who damage others by exercising their legal rights will be deprived of their own legal rights.⁵ According to this principle, the rule of no-harm supports the concept of guarantee.

It should be noted that some jurists have invoked the rule of no-harm as evidence for guarantee.⁶ In other words, these jurists have acknowledged the existence of harm and have provided diverse means to prevent harm within the community. Accordingly, the jurist establishes the validity of guarantee in the context of Arsh.⁷ In this regard, it can be argued that the jurist, through the inclusion of Arsh in cases of defect, aims to compensate for the buyer's loss. Consequently, the seller's guarantee becomes a form of obligatory guaranty.

The issue with the rule of no-harm from a jurisprudential perspective is that although it acknowledges the existence of harm in Sharia, it does not specify the method or manner of addressing it. Additionally, if the seller demands the full price assuming the presence of a defective object, it disrupts the balance and renders the complete acquisition of the price void.⁸ Some legal scholars have also discussed the exclusion of harm in relation to the option of defect and Arsh.⁹ The law has provided customers with two options to prevent them from suffering losses due to defects in the object. They can either terminate and dissolve the contract, as with other available options, or they can accept the transaction while receiving Arsh.

Perhaps based on this principle, some legal scholars argue that rejecting the object of sale for any reason is impossible, and the widely-accepted comment, which is also supported by the Civil Code, is that Arsh constitutes a right in the transaction, and rejecting the object is not

1 . Roshanali Shekari, The description and translation of the texts of the jurisprudence of sale and options (Tehran: Keshavarz Publishing 2003) 176-177.

2 . Mir Fattah Hosseini Maraghi, al-Anawin al-Faqh, vol. 1 (Institute of Islamic Publication of Society of Teachers in the Seminary of Qom 1997) 311.

3 . Seyyed Mohammad Kazem Tabataba'i Yazdi, Hashiye al-Makaseb, vol. 3 (Qom: Dar al-Mustafi Le-Ahya al-Tarath 2002) 68.

4 . Abdullah Mamqani, Nahaya al-Maqal (Tehran: Lithography 1965) 103.

5 . Mohammad Baqir Sadr, Dorus Fi Elm al-Osul, vol. 1 (Beirut: Dar-al-Montazer 1987) 489.

6 . Seyyed Ali Hosseini Sistani, Rule of no-harm (the Grand Ayatullah Sistani)- The First Issue (Qom: The Grand Ayatullah Seyyed Ali Hosseini Sistani Publications 1994) 294.

7 . Ibid, 134,150,178.

8 .

9 . Seyyed Hassan Emami, Civil Rights, vol. 1 (publications of Islamiyah Bookstore 1998) 501.



permissible.¹ In Iranian law, Katouzian² does not justify Arsh based on the rule of no-harm, but rather suggests that historical considerations should be taken into account when justifying Arsh. It appears that his justification is primarily based on legal material, neglecting the fundamental principles of options, especially Arsh.

The problem with the rule of no-harm is that it does not provide evidence for the existence of the right to Arsh. The rule of no-harm is a negation-based principle. It states that any judgment causing harm is eliminated, or matters with harmful origins are excluded. The rule of no-harm does not provide evidentiary support. Therefore, according to the rule of no-harm, it cannot be proven that Arsh exists in the transaction. However, if we consider that the foundation for scholars' commentary is the main source of the rule of no-harm, and the notion of no-harm serves as guidance for their rulings, then the payment of Arsh can be seen as compensation for causing harm to others. In this case, it becomes irrelevant whether the rule of no-harm proves or disproves the guarantee, as the payment itself serves as proof of the guarantee.

4.3. Selected Theory on the Basis of Arsh

It appears that Arsh operates on the basis of a dual framework. In other words, Arsh can serve as a foundation for both contractual responsibility and non-contractual liability. It seems that the underlying principle of Arsh is rooted in contractual obligations, and in cases where contractual liability is not applicable, Arsh is based on obligatory liability and must be paid. There is an argument that Arsh can be seen as a form of blood money in punishments, referred to as “non-determined blood money.” Many legal experts contend that blood money has a dual nature.³ Arsh essentially functions as a type of blood money and follows the same dual nature.

In Sunni schools, the responsibility for paying Arsh is believed to be based on a contract. In these schools, the absence of a description implies the presence of a defect that gives rise to the right to terminate the contract or claim Arsh.⁴ In recent discussions on contractual liability, it is argued that the purpose of the damages paid in the event of non-performance of contractual obligations is not to compensate for losses, but rather to provide the promised benefit that the promisee expected from the contract but did not receive.⁵ Based on this introduction, it is necessary to explain the chosen theory in relation to the principle and the exception.

4.3.1. Principle

Given that breaching contractual obligations leads to a right for the promisee to seek fulfillment of their contractual expectations and assert their legal rights, it appears that the principle underlying Arsh is contractual liability. Arsh aims to restore justice in contractual relationships, as the seller receives more than what was sold due to a defect in the object, while the buyer receives less than what they paid for.⁶

Some legal scholars, following Seyed Yazdi, have proposed the concept of exchange justice as the basis for Arsh. They argue that within the realm of meaning, a conflict between the de-

1 . Seyed Hossein Safaei, *Primary Course of Civil Liberty*, vol. 2 (Tehran: Nashr al-Mizan 2003) 283.

2 . Naser Katouzian, *General rules of contracts*, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 320.

3 . Hamid Reza Behroozizad, “The nature of blood money: Penalty or Compensation,” no. 60 (2006), 50-57.

4 . Mansour Bin Younes, *Kashf al-Qanaah*, vol. 2 (Beirut: Dar al-Kotob al-Elmiye) 37.

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6 . Naser Katouzian, *General rules of contracts*, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 309.



scription and consideration is conceivable. In the absence of a condition or description, the party with the right to terminate the transaction contract has two options: termination or claiming Arsh. The reason for awarding Arsh is that the condition stipulated in the contract increases the price, and the added value can be compensated.¹ Furthermore, the concept of exchange guarantee is also attributed to contractual and exchange justice. Islamic legal experts contend that Arsh serves as a means to compensate the option holder for losses, and based on the principle of innocence, the seller is exempt from surrendering a part of the object's price. The buyer, on the other hand, is not compelled to do anything beyond compensating for the losses, making Arsh a form of compensation, and exchange guarantee is the defect in the object being paid to rectify it.²

Jafari Langroudi, based on the verse of consent (Taajara An Taraz) and jurisprudential principles, argues for the necessity of observing the three principles of balancing contracts. He believes that the reason for awarding Arsh aligns with this rule, and the verse of consent serves as the rationale. Additionally, economic balance justifies the payment of Arsh in cases where a condition is required to determine the economic value of the considerations. According to this perspective, the balance in the value of the considerations is a fundamental principle of exchange contracts that the parties considered at the time of entering into the contract. Arsh is considered an example of an exchange guarantee in this context.³ In other words, the purpose of awarding Arsh is to compensate the client's loss, but the seller's responsibility has a contractual aspect, and legal enforcement can be based on a breach of the implicit obligation to deliver sound goods.⁴

Indeed, the principle of the soundness of goods can be invoked to support the contractual basis. Some legal experts, referring to the opinions of jurists on the principle of the soundness of goods, argue that the basis for claiming an option due to a defect should be sought in consent.⁵ According to this perspective, in customary cases, buyers of sound products enter into transactions with sellers based on the belief in the soundness of the object. They consider the implicit condition related to the soundness of the transaction as a specific type of condition governed by certain rules. The right to terminate serves as a means of compensation and has a contractual aspect.⁶

Perhaps the principle of good faith can also be invoked as a contractual basis. The requirement to uphold honesty and avoid deception in contracts is a factor that supports the secondary judgment of awarding Arsh. Arsh serves as a secondary ruling that nullifies the initial requirement of the contract in cases where there is a lack of honesty and deception by one of the contracting parties. Thus, the necessity of honesty and avoidance of deception can be used as a basis for the principles of good faith and fair treatment. In other words, when a defect is hidden

1 . Ebrahim Abdipourfard, Ali Saghafi, 'Arsh of Condition' (2008) No. 19 Journal of jurisprudence and law 72.

2 . Asadollah Lotfi, Sale contract (Tehran: Khorsandi 2009) 195.

3 . Mohammad Jafar Jafari Langroudi, The General Philosophy of Law Based on the Originality of Practice (Tehran: Ganj Danesh Publications 2002) 76, 138.

4 . Naser Katouzian, Non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press 2003) 107.

5 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 5, 303.

6 . Naser Katouzian, Non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press 2003) 105-106.



and cannot be detected through conventional examination, there is a moral duty to disclose it. The deliberate silence of a party aware of the defect, especially when the other party relies on their good faith, constitutes deceit and deception that the law should not overlook.¹

Adopting the contractual basis also serves the interests of the group of users of defective goods and provides them with additional support. Based on Arsh, it can be argued that Arsh is a means of enforcing the agreed-upon commitment within the contract itself. When parties enter into a contract based on the balance of the value of considerations, if this commitment is violated due to reasons such as a defect in the object, the commitment should be nullified.

4.3.2. Exception to a Rule: Contractual Liability and Implied Conditions

Contractual liability and implied conditions present several significant flaws: a dominant party in the contract, such as a manufacturer, may include a non-liability condition, rendering the citation of this implicit condition futile. While implicit conditions may hold weight in traditional contracts, they do not hold the same weight in consumer contracts due to the limited responsibility within the consumption cycle. Individuals who lack a direct or indirect contractual relationship with the manufacturer will not receive compensation for damages incurred. As a result, legal systems recognize that the manufacturer should be held responsible regardless of the contractual agreement. This type of responsibility is referred to as absolute responsibility, irrespective of fault.²

Even in the final stages of development, some American courts have recognized the manufacturer's absolute responsibility by breaching rules associated with absolute responsibility. This means that the manufacturer is liable for damages resulting from the consumption of their products, regardless of the presence or absence of defects in the product design.³ In many cases today, Arsh fails to compensate the buyer's loss. For instance, a car may be sold with a technical defect in its brakes, leading to an accident that causes damages several times the price of the car. However, the price reduction due to the brake defect is minimal.⁴ In such cases, it may be possible to attribute fault to facilitate easier compensation for the loss. Contractual liability is waived here because damages must be direct, meaning that the violation of the contractual obligation is considered the direct consequence. Therefore, the presence of an intermediary between the breach of obligation and the damages incurred will sever the connection between the two. Article 520 of the Iranian Civil Procedure Act of 2000 also supports this view, as lawyers consider this description of damages necessary for establishing a causal relationship between the lack of commitment and the damages suffered.⁵

The principle and exception are also evident in Article 2 of the Iranian Consumer Protection Act. According to this Article, in the case of defective goods and services, consumers have the right to terminate the transaction, cancel the transaction, or demand compensation for a defective product from the supplier. Furthermore, Article 2 stipulates that all suppliers are responsible for the health and safety of their goods. This indicates that the law-makers have taken a

1 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 228.

2 . Naser Katouzian, 'Contractual Freedom Constraints Based on Consumer Protection' (2008) No. 3 Law Quarterly Journal of Faculty of Law and Political Science 334.

3 . Naser Katouzian, Civil responsibility from manufacturing defect (Tehran University publications 2011) 24.

4 . Naser Katouzian, Certain contracts, vol. 1 (Joint-Stock Company of publication 1997) 250.

5 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 248.



contractual perspective. However, it is explicitly stated in the Article that compensation is generally provided in the event of a defect or lack of quality, and compensation is non-contractual.

5. Basis of Principle of Reduction of Price

The underlying bases for the principle of price reduction varies. The CISG mentions several bases for price reduction. Some argue that price reduction is intended to preserve the contract and prevent its dissolution.¹ The Convention states that maintaining proportionality is crucial for the contract.² Another viewpoint suggests that price reduction supports the buyer in cases where the entire object is not delivered and aims to restore the contract.³ Some publications mention the observance of fair exchange, compensation for unjustifiable losses to the buyer, the unfairness of the seller, and the parties' intentions.⁴

The main philosophy behind the principle of price reduction appears to be the implementation of fair exchange and the prevention of unfairness. Since a third party is not entitled to receive an excessive price, any surplus belongs to the buyer. Therefore, if the lack of conformity of the goods is due to force majeure, the right to price reduction should not be eliminated. It is deemed unfair, according to principles of fair exchange, for the seller to receive the total price when the payment of the total amount is unjust. While force majeure absolves the seller of guilt, they should not be rewarded with the payment of the entire price.⁵

Conclusion

There is no disagreement among legal systems regarding the need for compensation. The point of contention lies in how compensation should be carried out and to what extent. One of the most complex issues in legal systems is the concept of damages in Imamiyya Jurisprudence and Iranian law. However, Imamiyya jurisprudence and Iranian law offer mechanisms, such as Arsh, that can help systematize the compensation framework. In this article, I have focused on the nature and foundation of Arsh, presenting it as a general theory.

Regarding the nature of Arsh, we have examined various perspectives and selected a combination of theories in Islamic jurisprudence. It appears that Arsh represents damages and compensation resulting from a breach of contract. According to the general rule, when a contract is violated, the party responsible for the breach must compensate for the damages. Since contract law aims to uphold agreements, maintaining the contract takes precedence over terminating it. This principle of reducing the price is also recognized by the international legislator in Article 50 of the CISG. However, there are some disagreements within the CISG regarding the dis-

1 . Arnau Muria Tunon, 'The Actio Arsh and Sales of Goods Between Mexico and the U.S: An Analysis of the Remedy of Price in the UN Sales Convention, CISG Article 50, and Its Civil Law Antecedents' (1998) available at: www.cisg.law.pace.edu/cisg/biblio/muria.html.

2 . Sondahel, Erika, "Understanding the Remedy of Price Reduction – A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods," available at: <http://www.cisg.law.pace.edu/cisg/biblio/sondahl.html>.

3 . Peter Schwenzer Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Fourth Edition: Oxford University Press 2016) art. 50, para. 4.

4 . Alireza Bariklou, Safar Beigzadeh, 'Principle of Reduction of Price- Comparative Study in the International Sale Convention' (2011) Vol. 15 No. 3 *Imamiyya Jurisprudence and Iranian Law- Comparative Law Studies of Tarbiat Modares University* 72.

5 . Seyyed Hossein Safaei, *Primary Course of Civil Liberty*, vol. 2 (Tehran: Nashr al-Mizan 2003) 274.



inction between price reduction and compensation for damages, which require further review. Nonetheless, it is evident that price reduction carries a nature of damages.

Regarding the foundation of Arsh, while emphasizing its contractual and obligatory basis, it is argued that Arsh has a dual nature. It possesses a contractual aspect, and in cases where the contractual aspect cannot adequately and reasonably compensate for the damages, it resorts to obligatory damages. In such instances, we can explicitly refer to the general theory of Arsh. Scholars perceive a shared essence between Arsh and blood money, as both serve as institutions with a dual nature of punishment and civil liability. Based on this similarity, it can be concluded that the general theory of Arsh encompasses both contractual liability and obligatory liability. The objective is to compensate the damages suffered by the victim. If contractual liability is applicable, it should be pursued; otherwise, exceptions under the obligatory aspect of the general theory of Arsh should be applied to ensure the correct realization of the parties' expectations.



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