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The rule of the harmless rule in resolving the urgency of options

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Abstract

The stability of transactions and contracts is one of the important factors of psychological security of citizens and creates order in the society, but this stability must have restrictions, such as the lack of harm to each of the parties due to negligence, deception, etc. in the transaction, and creating options for the parties in it. Iran's civil law has mentioned features for options and how to apply them, the most important of which is the urgency of options.

This urgency is sometimes in conflict with the purpose of creating options and causes losses to the owner of options. On the other hand, giving credit to the owner of one's choice requires a loss (at least mental loss) for the other side of the transaction. In this article, we want to discuss the evidence of urgency in such a way that the effect of the legal rule of harm can be seen correctly.

Our opinion in this article is that the rule of harmless gratitude governs the evidence of urgency and delay, and it makes both of them absolute desirability, and the best result is to agree to the inter-subject matter (urgency and delay) and like the laws of other countries as in Switzerland, let's set a certain period for exercising the option, and after the expiration of that period, consider it invalid. This article is compiled with a descriptive-analytical method based on library sources.

1. Introduction

The judicial system always needs to review its challenges, goals, methods and mechanisms. Human civil rights play a significant role in transactions between them.

Legal rules should be able to create safe communities for coexistence by regulating relationships between people, especially in providing their mutual benefits and preventing their harm. One of the most common issues in transactions, which is the source of disputes and legal cases for the judicial system and sometimes hesitation in transactions, is the issue of options and the time frame of their application.

The urgency and delay of options, which in Iran's civil law are subject to Sharia rules, especially the harmless rule, is still a place for serious consideration. Therefore, the main question of this article is:

How does the harmless rule affect the urgency or non-urgency of options?

This question will be discussed with the following topics.

2- Urgency of options in civil law

The articles that have been specified in the civil law as a matter of urgency include:

Article 415: "Option of inspection."

And the option of incorrect description is immediate after the inspection.

Article 420: "The option of deception is immediate after knowing about it."

Article 435: "The option of defect is immediate after knowing about it."

Article 440: "The option of trickery is immediate after knowing about it."

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The civil law, as mentioned in the above articles, has a requirement of urgency regarding options such as violation, the civil law specifying the urgency of some options is due to the fact that there is sometimes a jurisprudential discussion about the mentioned options. And since there is no special difference between the options, the specification of the civil law regarding the urgency of the four options can be extended to other options as well and it can be considered a general rule.

Therefore, it can be said that the civil law is not in the position of expressing the urgency or urgency of some options and is silent about other options, but in all options, it has taken the opinion of the wise that urgency is an option. (Khodabakhshi, 2016, p. 446)

According to Note 1 of Article 18 of the Law on the Formation of General Courts and the Revolution in 2005, which is still in effect among the laws: "… in cases of disagreement between jurists, the criterion of action will be the opinion of the guardian of the jurist or the famous jurist".

In relation to the urgency or delay in applying the options of the famous jurisprudence, The rule of urgency is in the options and when there is a dispute about it , it should be the basis of action , and ruled that the options are urgent.

Some lawyers (Jaafari Langroudi, 2011, p. 172, Shahidi, 2016, p. 75, 76) also agree with the majority of jurists .And they believe that the actions of the option should be based on customary urgency, and the owner of the option should exercise it immediately after learning of the loss.

3- The promptness or delay of options not clear in the language of jurists

promptness or delay in different options is a point of dispute and there is no consensus on the options among them. Most of them have only expressed their opinion without explaining their reasons for choosing the option. (Sheikh Tusi, 1407, p. 160 and Ibn Hamzah, 1408, p. 260).

Some jurists have divided the option into three categories; The first category of option is considered to be based on a contract, such as option of defect, option of unfulfilled conditions, option of animal and option of delay; The second category of options are considered to be based on promptness, such as deception, trickery, defect, vision, and trade-offs; In the third category, there is a difference regarding the time of exercising the options, such as the option of trickery. (Khodabakhshi, 2016, p. 436) Some jurists, like Allameh Hali, consider delay to be the current choice in all the options (Asadi Hali, 1414, p. 121).

The difference of opinion regarding whether the option is urgent or non-urgent is about all current options. There is no difference between the types of options, it is only possible that some options have features that make this urgency or delay more prominent in them.

For example, Sheikh Ansari mentions that there is a difference in urgency or delay in all options, and in order for the urgency or delay to be more prominent in them, the specific characteristics of each option should be considered. (Sheikh Ansari, 1419, p. 237).

For example, about the option of deception , refers to the immediacy of the option, but about the option of delayed payment of the price it refers to the non-immediacy of option, which is one of the reasons for this narration.

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: «مَنِ اشْتَرَى بَيْعاً فَمَضَتْ ثَلَاثَةُ أَيَّامٍ وَلَمْ يَجِئْ فَلَا بَيْعَ لَهُ»،

(Tusi, 1407, p. 22).

Naini also states another feature of the option of delayed payment of the price. According to which, this option can be applied with a delay, and that is, the reason for proving the option of deception and the delay is to eliminate the loss. In the option of deception, this loss occurs only once and to prevent that loss, the right of cancellation is established, and in case of a delay in its application, it may be considered that the owner of the option is satisfied with this loss and turns away from his right of cancellation.

But regarding the option of delay, because not paying the price and causing a delay in it, it is repeated and renewed continuously in the following days, and as a result, the loss continues to occur. It does not go, even despite the delay in applying the option and discovering the owner's consent to the loss. (Gharoi Naini, 1373, p. 101)

So, all the options follow the same rules, unless they imply delay or urgency due to their special characteristics. Some legal writers say that because the civil law has only specified the urgency of four options, then we get the opposite concept that the other options are based on delay (Katouzian, 1376, p. 77), if this is not the case . As mentioned above, if the civil law accepts any vote regarding those four options, that vote will spread to the rest of the options as well.

4- Reasons for the urgency of the option

The urgency of options is a general rule and includes all options, because in choices that have no fixed period, the option implies urgency, such as Shafa'a. (Hosseini Ameli, 1419, p. 343).

In addition to the fact that in the exercise of options, one should be satisfied with their certainty and should not extend them, there is no reason that these options should be continuous and the owner of the option can terminate the contract whenever he wants.

Because the reasons for the option, like the harmless rule and the consensus, are verbal reasons, and they should not be considered absolute and rule that the option remains. (Ibid., p. 344 and Najafi, 1420, p. 84). From the moment of conclusion, a necessary contract is subject to the rules of necessity, therefore, the collapse of this contract is an exception and requires a reason.

After the option is created for some reason, the contract is not considered necessary during the period required to apply the option, but after the end of this period, the contract becomes necessary again. For example, if a person is obligated to fast for the whole month, but he should not fast on Friday, it does not mean that he should not fast on the following days as well. Therefore, applying the option requires urgency and it cannot be generalized and include future times. (Ami Karki, 1414, p. 38).

5- Reasons for delay option

The biggest and most important reason that jurists cite regarding the rule of delay in option is one of the practical principles called the principle of Istishab. For example, Shahid Thani mentions that since the loss still exists and the person for whatever reason has not yet made his decision at the moment of knowing about the loss, it seems that there is no obstacle to the flow of the harmless rule, so he makes the survival of the option Istishab and concludes option is still fixed at the time of delay. (Shahid Thani, Beta, Volume 3, p. 204)

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But this can be criticized and is not true, Istihab does not work in this regard. Istihab option is possible when the reason for the ruling is verbal and specifies a specific issue. But if the reason for the ruling is non-verbal, if there is any doubt about its existence, it is not possible to seek help from Istihab. The reason for the option is also from the second category, i.e. "consensus" or "harmless rule", which are non-verbal reasons and do not specify a specific issue, so it is meaningless to use Istihab here. (Khodabakhshi, 2016, p. 440)

Proof of option depends on the existence of loss for each of the contracting parties. If a loss occurs, the option is fixed for the affected party, and if this loss is lost, then the choice is also lost. If the owner of the option has a lot of time to exercise his right, it is possible for the loss to disappear during that time, and with the loss of the option, there is no meaning in taking the option and keeping it. (Hosseini Aamili, 1419, p. 344)

Some jurists also justify the delay of options in such a way that the texts that exist about options and their actions are absolute. And the adverb that limits the duration of the option has not been mentioned at all by the jurists, so due to the application of these texts, options imply a delay. (Tabatabaei Qomi, 1426, p. 86).

6- Proof of option

6-1- Consensus

One of the most important reasons for proving the option is consensus. Because consensus is a verbal and non-verbal reason, and in the principles of jurisprudence, unlike a verbal reason, a non-verbal reason cannot be applied, therefore, in a verbal reason, one must be satisfied with its certainty. And in doubtful cases that we have doubts; Is the proof of option in delay? It should be ruled that there is no option. (Sheikh Ansari, 1419, volume 3, p. 276)

The option is confirmed by consensus, but if we doubt whether this option still remains or not, for the same reason as mentioned, we rule that the option does not remain. So the consensus, which is a non-verbal reason, proves the option to a certain extent, but does not prove beyond that (the remaining of the option during the delay).

6-2- Harmless rule

Harmless rule is one of the reasons established to prove options. That is, the harmless rule proves the right of the victim. When a person suffers from a transaction, for example, a transaction with evident deception, here the rule of harmlessness removes the necessity of this transaction and creates an option for the victim, and the victim can cancel the transaction in order to get rid of the loss. Islam is against sustain a loss and cause to sustain a loss.

6-3- Implicit condition of construction

Rationally, they intend to gain profit from every transaction, or at least they do not intend to sustain a loss.

Contracts are divided into two categories: an aleatory contract and an indulgence contract, which is based on the fact that contracts are aleatory contracts. It is important for the parties that the value of the exchange is equal and that both parties benefit.

Therefore, one of the reasons for the proof of options is the implicit condition of rational construction in their transactions. Now, if the value of one of the substitutes is significantly different from the other due to non-

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observance of this implied condition, the affected person will have the right to choose; Although the transaction was not mentioned in the words of the parties and it was not specified, but because of this implied condition of construction, they agreed to do the transaction.

This opinion was mentioned by the late Bojunordi and he states that the rule of harmless s only used to resolve the judgment of harm and loss and does not prove anything, like the right of options .Therefore, we should be able to prove the right of the option by placing the harmless rule as the basis of this implicit condition. (Bojnordi, 1379, vol. 1, p. 265).

7- Statements about the nature of the harmless rule

Jurists have considered four possibilities for the meaning of the sentence

«لا ضَرر و لا ضِرار فی الاسلام»

(Mousavi Bojnordi, 1377, vol. 1, 215) which are:

1. Prohibition of causing any harm to oneself or others and its haram: (Mousavi Bojnordi, 1377, Vol. 1, 215-216). If this possibility is accepted, the hadith of ``harmless'' will only be a mandatory ruling and it expresses the sanctity of harming oneself or another. And it cannot be used as a general rule in different chapters of jurisprudence (Makaram Shirazi, 2013, Vol. 1, p. 59, Sobhani, 2014, p. 130).

2. There is no such thing as irreparable harm in Islam: (Mohaqq Damad, 1406 AH, Vol. 1, p. 146, Sobhani, 1394, p. 169), that is, whoever causes harm to another must pay compensation and make up for the harm caused. Makarem Shirazi, Al-Qasas al-Fiqhiya, Vol. 1, p. 59).

3. Negation of Harmful Rulings in Islam: Any ruling, whether it is a duty, or a situation that requires harm to the obligee or another, has not been legislated by God (Sheikh Ansari, 1419 AH, Vol. 2, p. 460, Sobhani, 1394, p. 162).

4. Negation of the ruling through the negation of the subject: Akhund Khorasani accepts this possibility. (Sebahani, 2014, p. 165) For example, when it is said

لا صلاة الا بفاتحة الكتاب

(Ibn Abi Jumhur, vol. 1, p. 196)

This means that prayer without Fatiha al-Katab (Surah Hamad) is not basically prayer and the subject of prayer is nullified. Subjects whose primary titles cause harm, their verdict is removed (Akhund Khorasani, 1437 AH, Vol. 2, p. 196); So, for example, an ablution that causes harm to the obligee is not basically an ablution that is intended to be obligatory, because its subject is negated, its ruling is also negated accordingly. Among the above sayings about the harmless rule, the one that requires the option to be proved in transactions is the third saying, because it is more comprehensive than the other sayings.

8- Gratitude is the harmless rule

Harmless rule is a judgment of gratitude. (Damad Researcher, 1406, Vol. 2, p. 101) That aspect of gratitude towards all parties of a ruling must exist and be effective.

In contracts and transactions, the principle of non-harmful should apply to both parties, and eliminating losses from one should not entail losses to the other. That is, the harmless rule should not consider one of the contracting parties. If, according to the harmless rule, we say that the option only implies urgency, the person who owns the option will suffer

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(because his decision-making period is very limited and he must make a decision immediately).

And if we say that the option only implies a contract, the other party to the contract will suffer because the contract is in a precarious state, and even if there is a possibility of termination by the option holder, in addition to that, there is also a psychological loss for him. So the interests of both parties should be taken into account.

9- Proportion of evidence of urgency and urgency of options with the harmless rule

Different views have been presented about the type of relationship between the harmless rule and other evidences of rulings:

1. This rule takes precedence over other evidences (Sobahani, 1394, p. 198), but there are different opinions regarding its quality:

a. Precedence is in such a way that the harmless rule is the supervisor and ruler over other evidences (ibid). For example: the Shariah says "fasting is obligatory" and on the other hand, the rule of non-harm is in charge of the evidence of the obligation of fasting and limits the scope of the obligatory ruling to those cases where fasting does not harm the obligee, and if it does harm, it is no longer obligatory. Sheikh Ansari believes in this view (Sheikh Ansari, 1419 AH, Vol. 2, p. 462).

b. According to Akhund Khorasani, the preemption of the harmless rule over other evidences is not through government. Rather, it is because of the customary plural; That is, the custom combines the harmless rule and the other reason and puts the harmless rule before the other reason (Akhund Khorasani, 1437 AH, Vol. 2, p. 196).

For example, the Shariah absolutely says that "ablution is obligatory" and this includes harmful ablution, and on the other hand, the rule of harm says "ablution is not obligatory" and there is a conflict between these two. When this conflict arises, custom combines the harmless rule and another reason and puts the harmless rule first and says that ablution is obligatory when there is no obstacle such as harm.

2- In the cases where " لاضرر و لاضرار فی الاسلام " means the prohibition of harming oneself and others and the need to compensate for the harm, it is an independent Shari'a ruling beside other rulings and has nothing to do with them (Makaram Shirazi, 1370, Volume 1, p. 79).

10- The legality of judicial votes

In general, one of the essentials for the realization of justice is the regularity of judicial opinions, that is, there should be unity of opinion. One of the basic problems in the field of judicial decisions is the difference, conflict and division in the opinions issued by judges.

As regarding the urgency or non-urgency of exercising options, different opinions are issued by the courts. One of the policies of any healthy and fair judicial system is that judicial decisions should be predictable.

It means that the applicants should know and be sure that if they refer to the judicial system regarding a disputed issue, it will eventually lead to a specific decision. In this regard, the head of the judiciary has informed the courts in the circular dated 07.16.2019 regarding the judicial security document:

Article 2 – The principle of trust and legitimate expectation

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1- The principle of legitimate trust is the possibility of predicting the results of the legal system, which can ultimately gain citizens' trust in the judicial system.
2- Achieving judicial security requires respecting the acquired rights of individuals and supporting their legitimate expectations.

Observance of the aforementioned matters in the field of judicial and administrative decision-making in line with the general principle of legitimate trust, in addition to the stability and predictability of the legal system, also reduces the violation of rights and freedoms.

Legitimate expectations are reasonable demands and expectations that are created in the mutual relations of people with authorities (both judicial and administrative) as a result of administrative and executive decisions, announcements, policies and procedures. And in case of violation, it can cause damage.

Therefore, they should take a measure regarding whether the exercise of options is urgent or non-urgent, which will lead to unanimity of votes and the votes issued in this regard are not contradictory, so that the people's trust in the judicial system is not lost and relative justice is observed in this regard.

11- Urgency or delay in foreign laws

Article 21 of the amended Swiss Obligations Law of 2007 stipulates: "Whenever there is a significant value difference between the obligations and substitutes of the contract, the affected party can announce within one year that he will not continue the contract and terminate the contract and the obligations and substitutes to be reinstated, the above one-year deadline is considered from the time of signing the contract." (Safari and Badkobeh, 2018, p. 350)

This article is related to option of deception. This article is stated in relation to the option of deception, but due to the fact that the similarity of all the options is the existence of harm, therefore, we extend the provisions and ruling of this article which is related to the option of deception to other options as well.

The mentioned period for exercising the right of termination must be reasonable, so that it does not require urgency or delay. If we adopt this solution and determine a suitable period for exercising the option, then we have taken into account the interests of both parties to the contract.

In such a situation, we do not assume the existence of the option permanently for the option owner, nor do we limit the exercise of the option by him to a period of time that requires urgency. As a result, several harmful effects can be prevented in this way, including the instability of transactions in the society, the loss of the option owner due to the lack of opportunity to make a decision, the existence of contradictions in judicial opinions, etc.

Conclusion

In our opinion, since the rule of harmless is gratitude and this rule should not be used as a rule that the options are permanent (due to vacillation in transactions and the deterioration of the security of contracts, etc.) . And it should not prevent the existence of a time limit for the right holder to make a decision and harm him by ordering the use of options urgently.

Therefore, it is fairer for the legislator to set a reasonable and definite period of time for

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exercising the option of the owner of this right.

(الامر بين الامرين) In this way, the instability of transactions in the society is avoided, and the other party is not harmed by a hasty decision or failure to make a decision at the appropriate time, and the different branches of the courts do not issue different opinions on this matter. This opinion is in accordance with Article 21 of the Swiss Code of Obligations.

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