

# CONTRACTUAL RESPONSIBILITY FUNCTION: A COMPARATIVE STUDY

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## ABSTRACT

The contractual liability seeks to reshape a situation similar to the situation that would have resulted from the implementation of the contract, and this is not its only function but rather it has other functions, and the latter may be similar to the function of tort liability or may differ from it, and this means that contractual liability has multiple functions that differ according to the damage that is compensated of it, and sometimes by the difference of fault which leads to the granting of it to another function, though the latter is not a basis or measure of compensation. It was concluded that the contractual liability has a double function, which is implementation and compensation, and the latter has multiple forms that may be corrective and may be satisfactory, as it can be punitive, and this has been confirmed by texts derived from the civil legislation itself, and then this research is an attempt to shed light on the jurisprudential and legal position From the contractual responsibility function.

**Keywords:** contractual responsibility, compensation, implementation in return.

## THE INTRODUCTION

### FIRST: THE SUBJECT OF THE RESEARCH.

Contractual responsibility is one of the most important subjects of civil law, and the first is not achieved by simply not implementing the contractual obligation, but the non-implementation must be attributed to the debtor, and this means that two elements must be available for a contractual error to occur: the material element is the breach of the implementation of a contractual obligation, and the moral element Which is represented in attributing this breach to the taxpayer in order for this responsibility to be established, in more precise terms, that the error in its precise technical sense has a great impact on its establishment, although the issues of contractual responsibility enjoy great interest in legal jurisprudence, and have received many studies, but they always remain in need of depth; In view of the developments taking place in it, in particular with regard to the function of this responsibility.

### SECOND: THE RESEARCH PROBLEM.

If the goal of compensation within the scope of tort liability is to redress the damage and restore the situation to what it was before it occurred, is this goal the same as that pursued by the second form of civil liability, which is contractual liability? Does the latter aim to repair the damage and return the contractor to what it was before Contract as in the first picture? Or is contractual compensation different from tort compensation? And if we say that there is a difference between them, then what is the face of this difference? What are the functions intended by contractual liability that make it a distinct regime from tort liability? These questions represent real problems and impose themselves within the scope of the research, and we will try, through this study, to answer them.

### THIRD: RESEARCH METHODOLOGY.

This study will be done by following the analytical approach and the comparative approach, by analyzing the legal texts and jurisprudential opinions related to the subject, discussing them and giving an opinion on them, and this will be done by comparing each of the French Civil Law of (1804) as amended, and the Egyptian Civil Law No. (131) of (1948) amended, with Iraqi Civil Law No. (40) of (1951) as amended.

#### FOURTH: THE RESEARCH PLAN.

The topic of the research (the function of contractual responsibility - a comparative study) will be addressed through two requirements, the first of which we will devote to: the executive function of contractual responsibility; While we will discuss in the second requirement: the compensatory function of contractual liability, and the research will end with a conclusion in which the most important findings and recommendations will be included.

#### THE FIRST SECTION EXECUTIVE FUNCTION OF CONTRACTUAL RESPONSIBILITY

Some jurisprudence has held that the contractual responsibility has the function of execution in consideration only, that is, the creditor gets what is equivalent to the expected benefit from the contract, while the other damages are outside the scope of the contract, and he believes that the function of compensation is the implementation of the contract, and then there is no difference between compensation for non-execution and the implementation of the contract, and this is what the jurist Philip Letourno and Jean Carbonier went to<sup>(1)</sup>.

In this case, the compensation is measured by the amount of the value of the obligation that was breached, as the debtor is obligated to provide a monetary equivalent that replaces the obligation that he refused to implement, and therefore the recognition or non-admittance of the error does not affect the executive function of the contractual responsibility, so implementation in return is an open option for the debtor when the creditor refuses to fulfil his obligation.

Article (1222) of the French Civil Code of 1804 (amended) stipulates that: ((The creditor also has the right, after warning the debtor, within a reasonable period and at a reasonable cost, to carry out the obligation himself or to remove, with a prior authorization from the judge, what was done in violation of this. He may request the debtor to return the sums spent for this purpose, and the creditor may also request the judiciary to oblige the debtor to expedite the sums necessary for this implementation or removal.

It is noted that the French legislator here gave the creditor multiple options for the implementation of the contractual obligation, including the permission for him to submit a request to the court in order to make the debtor pay a consideration that covers the implementation of the obligation or remove what was implemented contrary to what was agreed upon, and therefore this text is an explicit indication that the legislation The Frenchman has taken on the executive function of contractual responsibility.

It is also in the obligation to deliver a specific thing by type, that is, the thing whose ownership is not transferred except by assignment<sup>(2)</sup>, and if the debtor does not fulfill his obligation and assign the sold thing, here among the options available to the creditor he can claim what corresponds to the obligation that has been breached, regardless of the type of breach, whether it was wholly, partially, or defective<sup>(3)</sup> as Article (248) of the Iraqi Civil Law No. 40 of the year (1951, as amended) stipulates that: ((1- If the obligation to transfer ownership or any right in rem is stated on a thing that was not specified except for its kind, it shall not be transferred. 2- If the debtor does not fulfil his obligation, the creditor may obtain something of the same kind at the expense of the debtor, with or without the court's permission in case of urgency, he may also claim the value of the thing without prejudice in both cases to his right to compensation)<sup>(4)</sup>.

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<sup>(1)</sup> Consider presenting this opinion d. Sabri Hamad Khater, *The Idea of the Standard in Establishing the Contractual Responsibility System - An Analytical Study Compared to Civil Law*, House of Legal Books and Dar Shatat for Publishing and Software, Egypt, 2010, p. 106 et seq; Dr.. Tariq Kazem Ajeel, *Contractual Responsibility, Contractual Responsibility - A Comparative Study*, Dar Al-Sanhouri, Beirut, 2021, pp. 26 and 38.

<sup>(2)</sup> Separation: It is defining the thing by distinguishing it from others and making it specific in particular, as it requires that the seller present something of a kind that has been bound by the contract, given that this specific thing is the thing sold, and it may require that the seller initially perform the estimation process that is commensurate with the nature of the sale such as count, weight, measure, and size. Dr.. Ismail Ghanem, *Notes on Named Contracts - The Sale Contract*, Abdullah Wahba Library, Egypt, 1958, p. 114.

<sup>(3)</sup> In the same sense: D. Muhsin Abd al-Hamid al-Bayyah, *The General Theory of Obligations*, Part 2, *Rulings of Commitment*, Dar al-Nahda al-Arabiya, Cairo, under one year, p. 35.

<sup>(4)</sup> Corresponds to Article (205) of the Egyptian Civil Law No. 131 of the year (1948, as amended).



Just as execution for a consideration is available to the debtor, even if real execution is possible, but it is exhausting<sup>(5)</sup> for the debtor, and reversing it does not cause serious harm to the creditor. Here, the obligation is executed for consideration. This is indicated by Article (1221) French Civil, in which it states: ((The creditor has the right to a specific obligation, after warning the debtor, to demand specific implementation, unless such implementation is impossible or there is a clear disproportion between its cost to the debtor and its benefit to the creditor)).

Article (246/2) of an Iraqi civilian stipulates that: ((If the in-kind execution causes fatigue to the debtor, he may confine himself to paying monetary compensation if that does not cause serious harm to the creditor))<sup>(6)</sup>.

Considering the compensation for non-execution is identical to the execution of the contract leads to confusion that should be avoided, because the first requires proof of damage unlike the second (execution in kind), and also leads to the loss of priority of execution over compensation, especially in cases where the compensation is consensual (penal clause), as In this case, the fate of the contract is made in the hands of the debtor, if he wishes, he will implement it in kind, and if he wishes to pay the penalty clause, since his interest requires that, just as compensation for delay in the implementation of the obligation cannot be said that it takes the place of implementation because the obligation was implemented, but in a late manner<sup>(7)</sup>.

Just as this similarity leads to the loss of the principle of the binding force of the contract, because the principle in obligations is the specific implementation whenever possible and obliges the debtor to do so. Whereas, execution against consideration is a precautionary penalty that is not resorted to unless specific execution is impossible, or if it is burdensome for the debtor, or leads to prejudice to his personal freedom<sup>(8)</sup>.

Subjecting successive damages for non-implementation of the obligation to tort liability makes it difficult to distinguish between damages within the scope of the (self) contract and damages outside it, and this in turn will lead to filing two separate lawsuits, and to different statute of limitations, and if there is a foreign element in the relationship, the situation will be complicated because both lawsuits will be different in terms of applicable law<sup>(9)</sup>.

However, by referring to the texts of comparative legislation and the legislation under study, we find that it categorically rejects the equality of judgments between real execution and compensation for non-execution, and looks at each of them as an independent means that the creditor can resort to either of them in order to obtain the benefit of the contract, as it separated

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<sup>(5)</sup> Fatigue here means the extreme difficulty or extraordinary loss incurred by the debtor due to the execution of the obligation, and as a result of general or special circumstances, and such that the benefit that will accrue to the creditor from the specific execution is absolutely disproportionate to the damage that will befall the debtor from it, and from Then the meaning of exhaustion does not include mere difficulty or an increase in costs as a result of high prices, fees or taxes, and the assessment of that is up to the judge. Dr.. Muhammad Hussein Mansour, *The General Theory of Commitment*, Part 2, Provisions of Commitment, New University Publishing House, Alexandria, 2006, p. 17.

<sup>(6)</sup> Article (203/2) corresponds to an Egyptian civilian; And Article (1221) French civil.

<sup>(7)</sup> Dr. Tariq Kadhum Ajeel, *Contractual Liability*, previous source, pp. 45-46.

<sup>(8)</sup> Dr. Tariq Kadhum Ajeel, *Contract Theory in the Balance of Comparative Law - A Study in Contract Laws*, without a publishing house, without a place of publication, 2022, pp. 275-276.

<sup>(9)</sup> Dr. Tariq Kadhum Ajeel, *Contractual Responsibility*, previous source, p. 47.

the provisions between real execution Forced <sup>(10)</sup> and compensation for non-implementation or (execution by means of compensation) as the Egyptian and Iraqi legislators put it<sup>(11)</sup>.

As a result of the foregoing, another trend emerged in jurisprudence that refuses to limit the function of contractual responsibility to the executive position and gives it an additional function and supports its opinion with arguments derived from the texts of the law itself, and this will be clarified in the next requirement.

## THE SECOND SECTION

### THE COMPENSATORY FUNCTION OF CONTRACTUAL LIABILITY

The other trend went to say: The function of contractual liability is double, the first in which it shares with tort liability, which is compensation for the damage caused by non-implementation, while the second is the implementation function, and in light of this last function, the matter is not only related to repairing the damage, but rather the creation of a situation that he did not have an existence before. It should have been achieved for the creditor by executing the contract, hence the saying: Contractual liability is a wrong concept and it only has an exclusive function which is the compulsory execution of the contract cannot be taken into account. That is because the authors of the contractual liability reform project believe that it is a real concept and aims to repair the damage caused by non-implementation, and not just provide him with the advantage he was waiting for from behind the contract. So it has a double function represented by implementation in exchange for compensation<sup>(12)</sup>.

Based on the above opinion, it becomes clear that contractual liability is not an easy system for compensation and is not an easy system for implementation, as contractual liability seeks to provide the creditor with alternatives to implementation. However, this alternative is not only limited to what is equal to the service he expected as a result of the implementation of the contract, but rather exceeds it in order to cover the loss that befell him and the gain that he missed. Therefore, contractual liability is not a wrong concept, but rather a real concept, but it is very complex and has its importance along with liability negligence<sup>(13)</sup>.

An attempt made by Marie-Yves Rougeau to reconcile the two theories (compensation and implementation) and saw that giving the contractual responsibility the functions of execution and compensation does not have theoretical results but rather practical ones, which makes it necessary to recognize them with defining a clear line to separate them, and then the dual function of responsibility was proven. There were attempts at the beginning of the twenty-first century in order to prove that the contractual liability has only the function of implementation in return, but these attempts were answered by those who defended the compensatory function of contractual responsibility<sup>(14)</sup>.

Also, a careful review of the texts of the legislation in question suggests to us that they give the contractual liability a double function, and this is not evidenced by the fact that the texts related

<sup>(10)</sup> As dealt with by the French legislator in Article (1221-1222) in the second section entitled (Compulsory real execution) of the fifth section, as Article (1221) states that: ((It is permissible for the creditor with a specific obligation to file the lawsuit after the warning requesting the real execution, unless such execution is impossible or if there is an apparent disproportion between its cost to the debtor and its benefit to the creditor)); The same is the case with regard to Egyptian legislation, as it dealt with real execution in Part Two entitled (Effects of Obligation), the first chapter (Real Execution) thereof in Articles (199-215), as Article (1/203) stipulates that: ((The debtor shall be compelled after warning him according to the two 219,220 to implement his obligation in kind whenever possible)); Article (246/1) corresponds to an Iraqi civilian who, in turn, dealt with this type of execution in the first section entitled (Execution in kind), Chapter One (Compulsory Execution) of Chapter Two (Effects of Obligation).

<sup>(11)</sup> See: Article (1/1231) of the French Civil Code in Section V entitled (Compensation for Non-Execution) of Section V; The Egyptian legislator dealt with it in the second chapter entitled (Execution by Compensation) in Articles (216-233); The Iraqi legislator dealt with in the third section entitled (Execution by Compensation) Chapter One of Part Two in Articles (255-259).

<sup>(12)</sup> See: Cousin Clément, *Les Inconvénients De La Petite Mort De L'identité Des Fautes Delictuelles et Contractuelles*. In: *Revue Juridique De l'ouest*, 2017, p.123.

<sup>(13)</sup> Dr. Tariq Kadhum Ajeel, *Contractual Liability*, previous source, p. 167.

<sup>(14)</sup> See: Zoé Jacquemin, *Payer, Reparer, Punir. Etude Des Fonctions De La Responsabilité Contractuelle En Droit Français*, Allemand et Anglais, Thesese De Doctorat En Droit, Université Panthéon-Assas, 2015, p.92-93.

to contractual compensation do not correct their meaning except by giving them the function of implementation and compensation, as stated in Article (170/2) of the Iraqi Civil law It is: ((The compensation agreed upon is not due if the debtor proves that the creditor has not suffered any damage, and it may be reduced if the debtor proves that the estimate was severe or that the original obligation was partially executed, and every agreement that violates the provisions of this paragraph is void))<sup>(15)</sup>.

It is noted on the above text that it refers to the debtor's right to request a reduction of the penalty clause in two cases: the first is if the debtor can prove that the creditor has not suffered any damage. It means that the compensation corresponds to the damage, and the second: if the debtor proves that part of the original obligation has been fulfilled, This shows that the contractual compensation corresponds to the implementation<sup>(16)</sup>, that the question raised here: Does the contractual liability under the comparative legislation have the function of implementation only or compensation only?

A careful examination of the texts of the comparative legislation makes us find that they give the contractual responsibility the two functions of execution in exchange for compensation. As the compensation due according to that it is divided into an alternative compensation for implementation (if the obligation is not implemented - and it cannot be implemented) and this is what we can reach through Article (168 Iraqi civil - Corresponding to Article 215 Egyptian civil, and Article (1/1231 (French civil)) and compensation in addition to execution (in the event that part of the obligation has been executed and part remained unexecuted - or the execution was defective in part, such as damage to part of the goods or late execution). That is, what is paid for the unexecuted or defective part, and if this implementation results in damage to the creditor outside the value of the store, here it is compensated in accordance with the provisions of contractual liability.

This careful distinction between the compensations that the creditor is entitled to as a result of the debtor's failure to fulfill his obligation reveals to us a fact that should be paid attention to: that the term (execution against payment) is an inaccurate term, and it is preferable to use the term (compensation instead of execution); Because the actual implementation is the implementation in kind, which enables the creditor to obtain the same service that was agreed upon in the contract; While the execution is in return, he does not provide the creditor with that, but gives him an amount of money, and the creditor is not obligated to spend it to obtain the same intended service, for example: if the tenant fails to implement his obligation to restore the property, then the landlord is ordered to pay compensation for the restoration, here the latter is not obligated to spend it for this purpose, He may lease the property to another tenant who donates the latter at his own expense to carry out these renovations<sup>(17)</sup>.

However, it is not enough here that mere non-implementation is not sufficient to establish contractual liability and open the way for compensation, but rather it opens the door to implementation only. To show that is, the error must be proven here, with the elemental element: breach of obligation, and the moral element: attributing this breach to the taxpayer, and if this error is proven on the part of the debtor the obligation to take care was like the doctor's obligation. When the creditor proves that the debtor has deviated from the care of the usual person or the care agreed upon when this is proven, the debtor's mistake is realized. But if the obligation to achieve a certain result, for example, whether it is positive or negative, the mere failure to achieve it here proves the error. It is assumed that after the creditor proves the existence of the obligation, that is, that the obligation here is not executed except by reaching a specific goal, such as transferring a specific property or performing an act in which it is sufficient for the creditor to prove, for example, that the buyer does not transfer ownership to him, the debtor is assumed to be wrong<sup>(18)</sup>.

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<sup>(15)</sup> corresponds to Article (1231/5) of the French Civil Code; And Article (224) of the Egyptian Civil law.

<sup>(16)</sup> Dr. Tariq Kadhum Ajeel, Contractual Responsibility, previous source, p. 168.

<sup>(17)</sup> Dr. Tariq Kadhum Ajeel, Contractual Liability, previous source, p. 170-171.

<sup>(18)</sup> Dr. Ahmed Abdel Daem, Explanation of Civil Law - The General Theory of Obligation, Part 1, Sources of Obligation, University of Aleppo Publications, Aleppo, 2003, p. 200; Dr.. Ahmed Shawky Muhammad, Legal Rulings for Practical Applications in Civil Responsibility, Volume One, Personal



But if the goal was negative - to refrain from doing an act - and the creditor claimed that the debtor had violated his obligation and performed the violating act. Here, the burden of proving that falls upon the creditor, for example: the obligation to refrain from competition<sup>(19)</sup>, once this is proven, the debtor's mistake is realized, and he is obligated to compensate the creditor if the damage he suffered as a result of not implementing the obligation based on Article (1231/1 French civilian, corresponding to Article 215 Egyptian civilian and Article 168 Iraqi civilian).

Proving the error on the part of the debtor in the above cases and his obligation to compensate does not mean his inability to get rid of the responsibility and the compensation. It imposes for proving the error by proving that the failure to implement the obligation and verifying that this was for a reason that has nothing to do with his will, i.e. by proving the reason why the foreigner, who takes several forms, either as a force majeure, or the act of the creditor, or the act of the person for whom the latter is questioned, or the act of a third party. The absence of the error here leads to the absence of the compensatory function of the contractual responsibility, because the moral element of the error is not realized on the part of the debtor<sup>(20)</sup>.

If the principle is that compensation is based on the amount of damage and is not affected by the gravity of the error, except that the legislator has deviated from this principle within the scope of contractual liability, as he made the compensation vary according to the error committed by the debtor<sup>(21)</sup>. So, if the debtor is not liable in contractual liability except for the damage the expected direct, as for the unexpected damage, is not liable for, however, the legislator made the gravity of the error an effect in expanding the compensatory function of the contractual liability, and this is indicated by Article (3/169) of the Iraqi Civil law, which states that: ((If the debtor did not commit fraud or gross error, so the compensation does not exceed what would normally be expected at the time of contracting in terms of a loss that is resolved or a gain that is forfeited))<sup>(22)</sup>.

Some jurisprudence justifies limiting compensation here to expected damage in cases other than fraud and gross error. Because the contract is the result of the will, and it is the one that determines its extent, and the law has assumed that this will has gone out to limit this responsibility to what can be expected by the debtor, and this assumption has been accepted by the debtor, so it is in the form of an agreement clause that modifies the amount of responsibility, provided that this condition is invalidated in both cases of fraud And the big mistake; Because in these cases the debtor is obligated to compensate all direct damage, expected or unexpected<sup>(23)</sup>.

While some other jurisprudence go with the idea the debtor here has exited the circle of contractual relations, and is considered to have committed a harmful act that assesses the tort liability<sup>(24)</sup>. Others held that making the debtor responsible for compensating all direct damage is expected or unexpected in cases of fraud and gross error, as this constitutes - A special civil penalty - stipulated by the law, and not because the responsibility turns into negligence<sup>(25)</sup>.

We see that the latter opinion is the closest to explaining the inclusion of compensation for all expected or unexpected damage in cases of fraud and gross error, as it is considered an application of the idea of punitive compensation, in order to make the debtor comply with the implementation of his obligation and deter him and others from violating it.

Civil Responsibility in Egyptian and French Jurisprudence and Jurisprudence, 2nd edition, Abdel Rahman Press, Cairo, 2007, p. 27.

<sup>(19)</sup> Dr. Ismail Ghanem, In The General Theory of Commitment (Provisions of Commitment and Evidence), Part 2, Abdullah Wahba Abdeen Library, Egypt, 1967, p. 46.

<sup>(20)</sup> See: D. Ismail Ghanem, the same source, pg. 56 et seq.; Dr.. Tariq Kazem Ajeel, Contractual Liability, previous source, p. and beyond 150.

<sup>(21)</sup> Dr. Hassan Ali Al-Dhanoun, Al-Mabsout in Civil Liability, Part 1, (Damage), Insurance Company for Printing and Publishing, Baghdad, under one year, p. 289.

<sup>(22)</sup> Article (3/1231) corresponds to a French civilian; And Article (221/2) Egyptian civil.

<sup>(23)</sup> Dr. Abd Al-Razzaq Al-Sanhouri, Al-Waseet in Explanation of Civil Law, Part 1, (The Theory of Commitment in General - Sources of Commitment), Arab Heritage Revival House, Beirut-Lebanon, without a year, pp. 685-686.

<sup>(24)</sup> Hussein Amer and Abdel Rahim Amer, Civil Responsibility (Tortious and Contractual), 2nd edition, Dar Al-Maarif, Cairo, 1979, p. 423.

<sup>(25)</sup> Considering the presentation of this opinion: d. Hassan Ali Al-Dhanoun, Al-Mabsout, previous source, Part 1, p. 291.

The contractual error may also result in giving the contractual responsibility another function, which is the function of compensation for moral damages, which afflicts the creditor in a non-material interest, such as pain in feeling or affecting his dignity or affection as a result of the debtor's fault. Example: If a contract is made with a famous artist on a work of art, then the contract is arbitrarily terminated, and as a result, the artist suffers moral damage to his reputation<sup>(26)</sup>. So, compensation here has a satisfactory function aimed at alleviating the pain and sorrow of the injured, neither corrective nor punitive<sup>(27)</sup>, and this is what the Egyptian Courts of Cassation went to: (Financial compensation for moral damage does not erase harm in itself, but it gives to the injured a consolation that mitigate that harm)<sup>(28)</sup>.

It must be noted that there is no explicit text in French civil law that limits or authorizes compensation for moral damage, but the prevailing jurisprudential opinion goes to its adoption within the scope of contractual liability<sup>(29)</sup>. While the Egyptian legislator explicitly took compensation for him within the scope of contractual liability as well as tort liability<sup>(30)</sup>, as for Iraqi law, it limited it to tort liability only. Therefore, some commentators argue<sup>(31)</sup>, rightly, that there is no convincing justification for this approach, so it is suggested that the text on compensation for moral damage be moved to the section on the effects of obligation, as the Egyptian legislator did, in order to include the two responsibilities.

These multiple functions of contractual liability make it a distinct system of tort liability and reflect its effects on enforceable contractual damage. Therefore, an accurate understanding of these functions by the judge leads to the proper legal application of them<sup>(32)</sup>.

### CONCLUSION

The study concluded in the subject of research entitled ((the function of contractual responsibility - a comparative study)) to some results and recommendations, which we summarize as follows:

First: the results.

- 1) legal jurisprudence differed in the function of contractual responsibility between limiting it to merely executing the contract in consideration, i.e. The creditor obtains, in the event of a debtor's breach, the equivalent of the expected benefit from the contract, and this trend has been subjected to severe criticism; therefore, some others make its function double between implementation and compensation, and this opinion is the most correct.
- 2) we found that acknowledging the existence of a compensation function for contractual liability requires verification of the material elemental error, which is the breach of the contractual obligation, and the moral element in attributing this breach to the person assigned to it; whereas, the executive function of contractual responsibility is achieved by non-implementation, without the need to prove the error.
- 3) the debtor can get rid of the compensatory functionality of the contractual liability by denying the contractual error by proving the foreign cause that nullifies the moral element of the error.

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<sup>(26)</sup> Dr. Ahmed Sharaf El-Din, *Theory of Commitment*, Part 1, Book One (Voluntary Sources - Contract and Individual Will), without publication, without place of publication, 2003, p. 344.

<sup>(27)</sup> See: Ibrahim Sayed Ahmed, *Moral Harm in Jurisprudence and Jurisprudence*, The Modern University Office, Alexandria, 2007, p. 30; Muhammad Abd Taees, *Compensation for Moral Damage in Tort Liability - A Comparative Applied Study*, Sabah Library, Baghdad, 2008, p. 32.

<sup>(28)</sup> Egyptian Cassation, No. 9632, session 7/11/1932. Referred to: d. Abdel Hakam Fouda, *Encyclopedia of Civil Compensation*, Part 1, *Theory of Civil Compensation*, International Bureau of Legal Encyclopedias, Alexandria, 2005, p. 21.

<sup>(29)</sup> Considering the presentation of this opinion: d. Mahmoud Gamal El-Din Zaki, *Problems of Civil Responsibility*, Part 1, Cairo University Press, Cairo, 1978, pp. 71-72.

<sup>(30)</sup> Article (1/222) of the Egyptian Civil Code stipulates that: ((Compensation also includes moral damage, but in this case it is not permissible to transfer it to a third party unless it is determined by virtue of an agreement, or demanded by the creditor before the courts)).

<sup>(31)</sup> See: D. Hassan Hantoush Rashid Al-Hasnawi, *Judicial Compensation within the Scope of Contractual Liability*, Dar Al-Thaqafa Library for Publishing and Distribution, Amman, 1999, p. 129.

<sup>(32)</sup> See: D. Tariq Kadhum Ajeel, *Contractual Liability*, previous source, pg. 168 et seq.

4) if the assessment of the contractual compensation is based on the damage, but the civil legislations made the gravity of the error an effect in increasing the compensation to include compensation for expected and unexpected direct damage in the case of fraud and gross error, then the compensation here takes a punitive form, and it may also take consolation forms in the case of damage. The moral that befalls the creditor in a non-material interest.

Second: recommendations.

1) we recommend replacing the title (execution by means of compensation) in the scope of the civil law with (compensation instead of execution) since the latter term is more accurate, because the real execution is the real execution, and otherwise it is compensation regardless of whether it has achieved the benefit from the contract from lack thereof.

2) we recommend the iraqi legislator to transfer the text on compensation for moral damage, article (205) an iraqi civilian included in the scope of tort liability, to the section on the effects of obligation in order to apply it to the two responsibilities, as there is no justification for limiting it to one without the other.

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### Second: Laws.

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