



RESEARCH ARTICLE

Abuse of the Right in the Egyptian Civil Code and the Saudi Civil Transactions

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ABSTRACT

The notion of arbitrariness is linked to the notion of the right and its particular value recognized and protected by law. The right to certain exceptional powers conferred on certain individuals, but not others, leads to the placement of individuals in unequal positions. It is not envisaged as an end in itself. rather, it is a means of achieving a certain goal recognized and protected by law, and the use of the right is a means of achieving an end in terms of usage relative rather than absolute and thus are subject to judicial control to ensure that it is prevented from being arbitrary when it fails to do so. Thus, arbitrariness exists if the holder of the right to use it deviates from its intended purpose even if it does not breach the duty of caution and vigilance. human rights ", which separates arbitrariness from wrongdoing and takes it out of the cycle of omission to be a general principle and theory linked to the theory of right.

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INTRODUCTION

If the right is an advantage determined by law for a person, and protected by legal methods. This privilege entitles him to dispose of an asset recognized as an owner or entitled. However, this advantage is not absolute; A person cannot use his right in an absolute manner but must use it within the scope and limits of the law or he is arbitrary. Those who legitimately use their right are not liable for the damage caused; That the liability for damages is an error and that there is no error in the right holder's use of his right to bring the benefit offered by this right. The use of the right is unlawful unless it is intended only to harm others, which is achieved only by the absence of any interest in the use of the right. The right to litigate and defend is permissible. Anyone who pursues the doors of the judiciary shall not be asked for a right he claims to himself, unless it is established that he has drifted from the permissible right to litigation and intransigence with a clear right to harm the litigation.

The importance of research.

The importance of research lies in a presentation of the theory of abuse of the right as a legal officer of individuals' conduct and use of their legally authorized right. The legislature had recognized the notion of rights and guaranteed everyone's rights, but individuals in their use of their rights might be detrimental to others on the pretext of the intended interest in their use of the right. Here, she sees the theory of arbitrariness as an officer for the use of legally established rights.

Search Problem.

The problem with research is that arbitrariness in the use of the right is a departure from the general provisions of contractual liability that determine that a person is liable for his or her fault if he or she breaches the obligations created by his or her contract with the creditor. However, the legislator acknowledged that the error was not only to depart from the limits of the right, but also to abuse it. If the jurisprudence of the past century does not consider that a person may be wronged while using his right. However, the doctrine of abuse of the right has been established and established by the judiciary and recognized by the law.

Research curriculum.

In this study, the researcher relied on the comparative analytical descriptive curriculum as the most appropriate research curriculum for the nature of this topic, addressing the reality of abuse of the right and analysing the legal texts governing it, both in the Egyptian Civil Code and the Saudi Civil Transactions Act.

Research Plan.

We address the topic of the study through the following plan

1. What is meant by abuse of the right.
2. Criteria and controls for abuse of the right.
3. Punishment for abuse of the right.
4. Applications for abuse of the right.
5. Conclusion, conclusions and recommendations.

WHAT IS MEANT BY ABUSE OF THE RIGHT.

The right is an advantage determined by law for a person and protected by legal methods. This privilege entitles him to dispose of an asset recognized as an owner or entitled. or is a voluntary capacity conferred upon a person to enable him or her to perform certain acts of investigation in his or her interest recognized by law (Marks 1987). The right differs from the licence. If the right is the authority of a person recognized by law and empowered to protect it, the licence is an act of tolerance, which responds to the use of a right of others and the law does not entitle the holder to protection against the right holder alone, although it empowers him to protect it against others who are subjected to it in its use (Marks 1987).

Originally, a person who has legitimately used his or her right is not liable for the damage caused, as the liability for damages is an error and there is no error in the right holder's use of his or her right to bring the benefit of that right. The Egyptian Court of Cassation ruled that whoever lawfully used his right was not responsible for the harm caused to others and that the use of the right was unlawful only if it was intended only to harm others, which was achieved only by the absence of any interest in the use of the right. and the right to litigate and defend permissible rights, and only if it is established that he has drifted away from the permissible right to litigation and intransigence with a clear right to harm the litigation (1977 appeal).

CRITERIA AND CONTROLS FOR ABUSE OF THE RIGHT.

The legislature has taken care of the theory of abuse of the right and of making it a general theory mentioned by the Egyptian and Saudi legislators in the preliminary part of the Civil Code. Article 4 of the Egyptian Civil Code and article 28 stipulate that "whoever legitimately uses his right shall not be liable for the harm caused." In article 5, the Egyptian legislator and the Saudi legislature then set forth in article 29 the criteria for arbitrariness, which makes the use of the right illegal. Article 5 stipulates

that the use of the right is unlawful in the following circumstances: (a) if it is intended only to harm others. and (b) the interests it seeks to achieve are of little importance, so that they are totally disproportionate to the harm suffered by others. (c) if the interests to which it purports are unlawful ". Article 29 stipulates that "1. The use of the right shall not be arbitrary. The use of the right is arbitrary in the following cases: a - if the use is intended only to harm others. If the benefit of its use is totally disproportionate to the harm it causes to others. If its use is otherwise or even unlawful ".

According to the explanatory memorandum of the Egyptian Civil Code, the draft text on the determination of the theory of abuse of right had given prominence among the preliminary texts, since it was generally understood to simplify it in all aspects of the law without merely applying the notion of wrongful act. If the judiciary considers that its application should be based on the rules of omission due to inadequate texts civil law ", did not limit this application to a particular aspect of civil law, Rather, it simplifies all aspects and all aspects of the law. and asserts that the theory applies to personal status linkages as it applies to financial linkages, In the case of rights in rem, it would see their application in respect of personal rights. and that it does not stand at the limits of private law but goes beyond it to general law. So the project had the effect of setting this theory a general situation, following the example of the latest and upgraded technologies.

This course of action has helped to establish the Islamic sharia for the theory of abuse of the right as a general theory and the care of Islamic jurisprudence by formulating a wording that conflicts if it does not stand in its accuracy and judgment the latest findings of the scholars' doctrines of the West. In view of this, the draft resolution wished to make use of the rules established in Islamic jurisprudence and inspired by the judiciary in many of its provisions. In fact, the legislature protects the term "arbitrariness" for its capacity and thumb, as well as for all those general formulations because of their ambiguity and lack of precision, and derives from Islamic jurisprudence in particular from the three controls contained in the text. It is investigative that the detailing of controls in this way provides the judge with useful elements of guidance, especially since they are all the product of practical applications that the Egyptian judiciary has concluded through jurisprudence. As such, the draft establishes a constitution for the exercise of rights in which the principles established in the Islamic Shari 'a and the jurisprudence concluded in the theory of abuse of the right, but without adhering fully to the doctrines of this jurisprudence. In doing so, it allowed him to be able to moralize and modern social tendencies and to connect his texts with Islamic jurisprudence in its finest and most allied aspects with elements of resilience and life (preparatory works 1948).

The right, although the owner has the authority to respond to the place of the right, entitles him to benefit from it according to the purpose assigned to him However, this authority is not absolute and is restricted by the three criteria combined by a joint officer who intends to harm others either in the form of intentional harm without benefit to the right-holder's use or in the form of an affront to such serious harm for the benefit of the right-holder so that he can hardly be harmed from being dispensed with (Sinhori 2010).

The legal basis for the theory of abuse of the right lies in the application of the rules of tort liability, since the abuse of the right is an error which requires compensation and compensation here as compensation for the error in its other form, namely the form of derogation from the limits of the right or the limits of the licence, may be in cash and may be in kind. In-kind compensation - such as the demolition of the chimney that blocks the light from the neighbour - does not go beyond the scope of tort, in-kind compensation is permissible in the other form of error, and arbitrariness remains within the scope of tort even if it is arbitrarily contractual. The Court of Cassation held that the theory of abuse of right was due to the rules of liability in civil law, rather than to the rules of justice and fairness (appeal 1946). According to the explanatory memorandum of the Egyptian Civil Code, the first of these criteria is the criterion of the use of the right, which is intended only to harm others. This is a subjective criterion that has established and eliminated Islamic jurisprudence and Western

jurisprudence. The essence is that there is an intention to harm, even if the use of the right results in a benefit to its owner. It must be borne in mind that this intention has been eliminated from the absence of any interest in the right's use to the detriment of others when the right holder is aware of it. The application of the same provision has also been eliminated in the event of an understatement of the right holder's interest in this case (preparatory works, 1948).

Accordingly, the use of the right is unlawful if it is intended to harm others, if the interests it seeks to achieve are of little importance, so that it is totally disproportionate to the harm caused to others and, lastly, if the interests it seeks to achieve are unlawful.

Intent to harm others.

The use of the right is unlawful if it is intended to harm others. If a person has that intention, his or her use of the right is considered arbitrary even if it is of accidental benefit that he or she does not intend. The criterion here, despite its subjectivity, can be included in the general objective criterion of error. It is not sufficient that the right-bearer intends to harm others; moreover, his use of his right must be as such, which is a deviation from the ordinary person's customary conduct. A person using his or her right may intend to harm another person, but for the sake of a legitimate interest of himself or herself, the harm he or she inflicts on others is highly likely. In this case, the intention to harm others is not arbitrary, as the right holder of such conduct has not deviated from the ordinary person's customary conduct. If the intention to cause harm is the principal factor which prevailed at the owner of the right and he uses his right to harm others was considered arbitrary, although this intention was accompanied by an intention to bring benefit as a secondary factor ", whether or not this benefit has been realized and is arbitrary, For a fortiori, the intention is to cause damage not associated with the intention of bringing the benefit even if the benefit is realized by accidental means. Thus, he is arbitrary in using his right, the owner who builds trees in his land with the intention of withholding light from his neighbours even if the trees come back for the benefit of his land, since his primary purpose was to harm others (Ashoush 2001).

It is also arbitrary to build a high wall and paint it black to withhold light and air from its neighbour, as well as the owner who resides a chimney with his rooftop completely facing his neighbour's window in order to harm him (Ibrahim 1996). The injured person must prove that the right holder is using his right to cause harm to him. This intention is confirmed by all means of evidence, including material evidence. It is not sufficient to establish that the right-holder perceives the risk of harm as a result of his or her own chosen use of his or her right, but that the perception of the risk of harm does not serve the purpose of the damage. If a person owns a hunting land, and catches it, and injures another person without intentionally doing so, he has no intention of harming others, even if it is proven to be a perception of the likelihood of such an injury. and is not arbitrary, not because it involves the intent to harm others ". and no other consideration, as it does not fall under one of the three cases of abuse of the right. The judiciary considers the right holder's lack of interest to be his or her presumption that his or her use of this right is intended only to harm others (Sinhori 2010).

The likelihood of damage to the interest is great.

A person is also arbitrary in the use of the right if the use is intended to achieve a personal interest of the person, which is totally disproportionate to the other harm caused by such use, provided that the disparity is widespread (1998 Soror). Arbitrariness is derived from the mere great disparity between interest and harm. The criterion of asymmetry here is an objective criterion of common man's customary conduct, which the trial judge draws from the facts of the dispute and is not subject to the Court of Cassation's control when it is established by the Court that the interests the right holder aims to achieve are of such little importance that there is no inferior proportion to others. s right ", considered that the right holder was arbitrary in using his right on the basis of imbalance (1969 appeal). For example, if a woman built a villa on land she owned and during the construction

in good faith encroached on a small two-metre portion of her neighbour's land, the neighbour's adherence to the need to demolish the building was arbitrary in the use of his right; Because the damage caused by the demolition of a large villa is totally disproportionate to the advantages, which will accrue to the landowner by recovering the easy space to which the lady trespassed, and the court may compel the landowner to accept compensation from the landowner for the value of the occupied portion of his land, thereby entailing the refusal of his insistence on demolishing the villa. A disproportionate disproportion between the interests to be realized and the harm suffered by others is a clear presumption of the illegality of the use of the right and the owner cannot prove otherwise.

An unlawful interest.

Finally, a person is arbitrary in the use of his or her right, if he or she intends to pursue an unlawful interest, because the rights are determined for their owners to pursue interests protected by law, so whoever uses his or her right to pursue an unlawful interest, no matter how great this interest abuses his or her right and is a fault of responsibility. (Sinhori 2010), the criterion here is also objective, although the way to access it is subjectively the right holder's intention. It is in any case a sound application of the error standard. It is not the usual behaviour of an ordinary person to pursue under the guise that he is truly using him to pursue illegal interests. employer who uses his right to dismiss a worker because he enrolled in a trade union, Management that dismisses a staff member for a personal purpose or for a party lust and the owner who places barbed wire within his property so that an airline landing its aircraft in a neighbouring territory may purchase his land at a high price, all of whom arbitrarily use their rights, because they tend from their use to achieve illegal interests. According to the explanatory memorandum of the Egyptian Civil Code, the former is a case of the use of the right in an unlawful interest. The draft's expression here is preferable to the fact that some of the techniques provide for the deviation of the right from the destination for which it was initiated. The interest is not only unlawful if its investigation contravenes a provision of the law but also relates to it if its investigation is contrary to public order or morality. If the criterion in this case is physical on its face, the intention is often the basic yield to preclude legitimacy of interest. The most prominent application of this standard is presented on the occasion of the Government's abuse of its powers, such as the dismissal of employees, for a personal purpose or the lust of the party and the provisions of the Islamic Shariah in this regard, consistent with the established opinion in modern techniques, jurisprudence and the judiciary (preparatory works 1948).

PUNISHMENT FOR ABUSE OF THE RIGHT.

The penalty for the abuse of the right is compensation, which is originally monetary, that is, usually estimated at a sum of money, paid by the abuser to the injured in order to remedy the injury caused by the abuser. However, this does not preclude the award of restitution in some cases, as article 860/1 of the Egyptian Civil Code stipulates that a judge may rule on the demolition of a wall arbitrarily erected by the owner to withhold light and air from his neighbour. and may also order the sale of the bottom to those who undertake to build it (Sinhori2010).

In any way , it must be irreparable to any harm suffered. The rule is that compensation is assessed to the extent of damage taking into account the circumstances. If compensation is not assessed in an agreement or in law, it is the judge who determines it in its nature and extent, in accordance with specific regulations and grounds. Compensation includes the injury's loss and loss of profits provided that this is a natural consequence of the abuse of the right. In assessing compensation, the judge must take into account the circumstances of the injury, as compensation is measured by the extent of the harm suffered in particular. It must be assessed on a subjective rather than objective basis. It is a place of consideration for physical, health and family harm, while the personal circumstances surrounding the abuser are not calculated in the assessment of compensation.

APPLICATIONS OF ABUSE OF THE RIGHT.

The legislature applied abuse of the right in all aspects of the law. Some of these applications contain special legislative provisions in the Civil Code, to which they apply in particular. Some of them were the result of Egyptian jurisprudence, and the judiciary's application of the theory of arbitrariness did not depart from the principles we presented. We provide some legislative and some judicial applications.

Legislative Applications.

Egyptian and Saudi legislators applied the forms of abuse of the right to the provisions of the Civil Code and some other laws. Article (11/1) of the Egyptian Civil Code stipulates that: "The civil status and capacity of persons shall be governed by the law of the State to which they belong by their nationality. However, in financial transactions in Egypt, the consequences of which are, if one of the parties is a foreigner with incapacity and the lack of capacity is due to a reason of invisibility that is not easy for the other party to identify, this reason does not affect its eligibility. "A lack of eligibility here if the contract is requested to be annulled is arbitrary, the intention of which is to reply to it, the right to annul the contract is denied and this invisible reason does not affect its eligibility. The part of the arbitrariness here is to prevent the damage from being done.

Article (695) of the Egyptian Civil Code stipulates that "1. If the contract has been concluded for an unspecified period, it has been annulled by a contractor without regard to the date of notification, or prior to the expiration of this date, the contractor is required to compensate the other contractor for the duration of the date or for the remainder thereof. Compensation above the fixed wage that was due during this period includes all wage supplements that are fixed and fixed, taking into account the requirements of the special laws. If the contract is arbitrarily avoided by one of the contractors, the other contractor, together with compensation due to the contractor for failure to observe the notice date, is entitled to compensation for the damage caused by the contract's arbitrary avoidance. Dismissal is arbitrary if it is caused by a reservation placed under the hands of the employer, or by debts which the worker has committed to others. " Article (77) of the Saudi Labour Code stipulates: "If the contract does not include specific compensation for termination by a party for an unlawful reason, the party affected by termination of the contract shall be entitled to compensation as follows: 1. Fifteen days' remuneration for each year of service of the worker if the contract is indefinite. Remuneration for the remainder if the contract is fixed-term. Compensation referred to in paragraphs (1) and (2) of this article shall not be less than two months' remuneration. " The part of the arbitrariness here is to prevent the damage from being done.

Article (114/1) of the Egyptian Code of Evidence stipulates that: "The judge may direct a decisive oath to the other opponent. The judge may prohibit the oath if the opponent is arbitrary in directing it". (96/3) of the Saudi Law of Evidence stipulates that "the court shall prohibit the oath of office if it is not related to the case, is unproductive or is not admissible. The Court may prevent its direction if the opponent is arbitrary in so doing. " Again, the penalty for arbitrariness is to prevent harm from being done. The Egyptian Court of Cassation ruled that the decisive oath belonged to the adversary, not to the judge, and that the judge must answer her request for direction when her conditions were met unless he had the possibility that her application was arbitrary (1946 Appeal).

Article (818/2) of the Egyptian Civil Code stipulates: "However, it is not for the owner of the wall to demolish it without strong excuse if this harms the neighbour whose property is veiled against the wall." Article (616) of the Saudi Civil Transactions Act stipulates that: "The owner of the wall may not demolish it if the demolition is harmful to the neighbour whose property is veiled against the wall, unless there is a reasonable reason for the demolition." Preventing the wall owner from destroying it is merely an application of the theory of abuse of the right, since the wall owner has purported from demolishing it to achieve an interest of little importance that is totally disproportionate to the

damage caused to the neighbour and all the neighbour's right is not to demolish the wall that is hidden therein. He has no right to the wall other than negative utilization arising from his presence. s right to property (Ghanem 1959).

Article (1029) of the Egyptian Civil Code stipulates that: "The owner of an escorted property may be free from all or part of the easement if the easement has lost every benefit of the escalated property or has not remained of unlimited interest that is totally disproportionate to the burden on the escorted property." Article (726) of the Saudi Civil Transactions System stipulates that: "The easement right shall terminate in the event that the purpose of the easement right of the escalated property is removed, or a limited interest remains incompatible with the burden on the accompanied property." The arbitrariness here is that the esteemed landlord will demand the survival of the easement's right after its benefit. The penalty is to remove the damage in kind by terminating the easement right.

Judicial applications of abuse of the right.

The Egyptian judiciary has applied the theory of arbitrariness in the use of the right to many places, and its application has not departed from the principles we have advanced. It is worth mentioning that there are no applications available in the Saudi judiciary due to the recent promulgation of the Saudi Civil Transactions Law. One of the applications of the Egyptian Court of Cassation is:-

The decision in the Court of Cassation to provide in articles IV and V of the Civil Code that a person who legitimately uses his or her right shall not be liable for harm caused to others and that the use of the right is unlawful if it is intended only to harm others, which is achieved by the absence of any interest from the use of the right (2019 Appeal).

The decision of the Court of Cassation that no person who uses a legitimate right shall be liable for the harm caused to others and for what is stated in article IV of the Civil Code. The limitation on this asset contained in the text of the following article in pursuance of the theory of abuse of right is one of three criteria combined by a joint officer, the intention to harm s right to use it, or in the form of an affront to the serious harm done to that other person for the benefit of the right-holder, so that the right-holder can hardly be dispensed with. right ", the criterion of interest sought in the latter and of harm suffered is to be determined as a material criterion based on an abstract balance of benefit and injury in pursuit of justice considerations based on a balance between right and duty (2016 Appeal).

Employer's right to terminate indefinite employment contracts by individual will. Police. legitimate justification and non-abuse of the right. It is not true to say that the employer terminates indefinite employment contracts in accordance with his will and individual will. The State party's power to do so is constrained by the legitimate justification, coupled with the non-abuse of the right under article V of the Civil Code, If it is established that there is no justification or abuse of the right, the worker may have recourse to the courts to extend his or her supervision and injustice. As this was the case, the contested judgement complied with this consideration and upheld the trial judgement in which it was held that the termination of the challenged employment contract was unjustifiable and arbitrary on the grounds that the mere theft of an air conditioning device from a site where the challenged person was employed and did not fall within his custody did not constitute a serious error requiring dismissal, And that the greatest attributable -- as recommended by the administrative investigator -- is merely negligence, which falls short of gross error and is punishable by up to three days' imprisonment. imprisonment ", which is consistent with and valid by law, especially since the period of work of the appellant has lasted for more than 29 years and that he has not been found to have committed similar facts, which refutes what was provoked by his testimony on the date of 12/7/2017 of previous thefts not reported, A natural or moral person may not take evidence of himself or herself as invoked by others. Since this and the judgement were based on the finding that

the unjustified dismissal of the appeals against him was awarded compensation, which he considered proportionate to the damage suffered by the appeals against him, the law was valid (2018 Appeal).

Decision of the Court of Cassation that article V of the Civil Code provides that "the use of the right shall be unlawful in the following circumstances... (b) the interests to be pursued are of such little importance that they are totally disproportionate to the harm caused to others..." Indicates that the lawmaker considered the theory of abuse of right to be one of the fundamental principles governing the aspects and branches of law and abuse of right not to depart from either the limits of the licence or the limits of the right. In the use of rights as in the form of permits, the ordinary person's customary conduct must not be deviated from (2018 Appeal).

Decision of the Court of Cassation that the original under articles (4) and (5) of the Civil Code - in the light of the preparatory work - is that the legislator has given the judge broad discretion to monitor the use of their rights by the adversaries in strict accordance with the legislature's objective, so as not to abuse them. s discretion in the event of avoidance of contracts and explicitly stipulated in article (148), paragraph 1, of the Civil Code that "The contract must be executed in accordance with its provisions and in a manner consistent with the requirements of good faith." and in article (157), paragraph 2, of the same Act as "The judge may grant the debtor a period of time if the circumstances so require and may reject the request for avoidance if the debtor has failed to meet the obligation as a whole." This is the case that whenever a defence is raised before the trial court, which implies that the lessor is arbitrary in using his right to apply for eviction, the court has had to examine him and include in its judgement a proof of scrutiny of that defence and has examined the circumstances and circumstances of the case and whether these circumstances justify the request for eviction in the light of the good faith required in the performance of the contracts (2018 Appeal).

The decision of the Court of Cassation that, while it is the legislator, as disclosed in the explanatory memorandum of the draft Civil Code, The text of the report on the theory of abuse of the right has given prominence among the introductory texts because it generally has the effect of simplifying all aspects of the law without merely applying the notion of wrongful act. But the legal basis of this theory is only default liability, Arbitrary use of the right is an error in the form of deviation from the licence limits. Compensation is required (2016 Appeal).

CONCLUSION AND RECOMMENDATIONS

By examining the topic, the debtor's contractual liability for the act of others has reached a set of conclusions and recommendations:

Results.

1. A person who legitimately uses his right shall not be liable for the damage caused, as the liability for compensation for the injury is an error and there shall be no error in the right holder's use of his right to bring the benefit afforded by this right.
2. If the right gives the owner authority to take advantage of it according to the purpose assigned to him However, this authority is not absolute and is restricted by the three criteria combined by a joint officer who intends to harm others either in the form of intentional harm without benefit to the right holder's use or in the form of an affront to such serious harm for the benefit of the right holder so that he is hardly prejudiced from being dispensed with.
3. The legal basis for arbitrariness in the use of the right lies in the application of the rules of tort liability. Arbitrary use of the right is an error which requires compensation and compensation here, such as compensation for the error in its other form, namely the form of derogation from the limits of the right or the limits of the licence, may be in cash and may be in kind.

4. The legislature applied abuse of the right in all aspects of the law. It was also applied by the Egyptian judiciary without departing from the principles approved by the legislature.

Recommendations.

1. The regulation outlined by the Egyptian and Saudi legislators regarding the abuse of the right is simple and clear and constitutes an integrated theory.

2. The Egyptian judiciary was represented in the Court of Cassation in great favour of upholding and applying the theory of abuse of the right. The Saudi judiciary has not applied any application of the Supreme Court's recent promulgation of the Civil Transactions Act.

3. There is no need for legislative intervention or amendment of existing provisions of the Egyptian Civil Code or the Saudi Civil Transactions Act on the theory of abuse of the right because it itself constitutes a legal basis on which the judiciary can rely, apply and control its legitimacy in the light of current circumstances and emerging factors.

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