



25 November 2018

Legal Memo on Law on Compensation

Translated from Dari

1. What is compensation?

Compensation is translated as *jibran khesarah* in Dari.

Jibran is defined as payment in the form restitution.

Khesarah is defined as damages.

Compensation is a payment to a person (plaintiff) as restitution for damages suffered as a result of another person's (the defendant) actions or omissions.

Compensation is a form of civil liability. The liability is incurred after the harm is proved and loss is determined. Liability can also be triggered upon non-performance of obligation and a person can be liable for his/her acts and sometimes the acts of others.

Compensation is one of the fundamental rights of an individual against another or the State. Individuals who have suffered damages can apply for compensation under the laws and benefit therefrom.

2. What is the aim of compensation?

The aim of compensation is not to eradicate harm, but to restore a person to his/her original position (as best as is possible). It serves as a "legal consideration" for the harm incurred.

It is also the aim of compensation to hold a person accountable for damages he/she has brought to another person. As such, our laws have created legal obligations for actions/omissions which result in damage. In this view, a person is only released from liability once compensation has been paid.

Ultimately, this remedy is premised on the view that but for compensation, it is otherwise not possible to restore a person from the harm he/she has suffered.

3. Who is entitled to compensation?

Anyone who has faced spiritual and material damages [expense, loss and injury] as a result of person's actions or negligence is entitled to compensation based on our constitutional, criminal and civil laws, namely:

Article 776 of Civil Law

If harm is inflicted on another due to mistake or fault, the perpetrator shall be obligated to pay compensation.

Article 777 of Civil Law

Any assault that causes harm, other than harms mentioned in the above Articles, to another person, the perpetrator shall be obligated to pay compensation.

Article 189(1) of Criminal Procedure Code (CPC) Filing Private Right Claim

(1) A person who sustains a loss due to a crime can file a claim for compensation together with the criminal case before the primary court that is proceeding with the criminal case.

Article 6(4) of Criminal Procedure Code (CPC)

Rights of the Victim and Plaintiff during the Legal Prosecution Stages

During the legal prosecution of the case, the victim and plaintiff have the following rights:
Request for reimbursement in accordance with the provisions of the law.

Article 6(5) of Elimination of Violence Against Women Law (EVAW) The Rights of Victim

The victims of violence have the following rights:
Compensation to damage resulted from the act of violence.

Article 51 of Afghanistan Constitution (AC)

Any individual suffering damage without due cause from the administration shall deserve compensation, and shall appeal to a court for acquisition. Except in conditions stipulated by law, the state shall not, without the order of an authoritative court, claim its rights.

4. When can we apply for compensation?

In criminal cases, the victim should petition to apply for compensation **at the investigation stage** pursuant to Article 189 of CPC.

Article 189(1) of Criminal Procedure Code (CPC) Filing Private Right Claim

- (1) A person who sustains a loss due to a crime can file a claim for compensation together with the criminal case before the primary court that is proceeding with the criminal case.
- (2) In a crime such as murder and battery where the result would be Qisas and Dyat, the plaintiff with a private right has the priority. The court before proceeding with the prosecutor's case shall permit the plaintiff with a private right to file his claim or end it through settlement or withdrawal from the case.
- (3) The criminal private right suit can be filed in the relevant criminal court and the compensation of loss suit and prosecutor's lawsuit shall be filed in the same court as well.
- (4) The plaintiff with a private right cannot file the compensation of the loss in appellate stages after issuance of criminal verdict by the primary court. In this case, based on the related regulations, the plaintiff can file the case in a civil court after the criminal court's decision has been finalized.

In the likely event that a prosecutor has not included the compensation claim in the indictment, the plaintiff (or his/her lawyer) can request the court to order the case file to be sent back to the prosecutor, pursuant to Article 192 of CPC.

Incorporating Private Right Claim in a Referral Order Article 192:

If during the investigation a claimant has already introduced himself/herself as the plaintiff with a private right claim and has filed his/her claim to a prosecution office, then the referral order of the criminal case to the court shall include the private right claim case as well.

For compensation in civil cases, (i.e. compensation for harms caused as a result of non-criminal actions), compensation can be applied for under the Civil Procedure Code. A person seeking compensation can file their claim at the Legal Department (*riyasat-e-huquqi*) or Head of Legal Department of Ministry of Justice. The method of quantifying compensation in under the Civil Code is similar to Criminal Procedure Code, and is described in later sections.

Article 12 of Civil Procedure Code

- 1- A petition for a civil right is made by an official request letter.
- 2- A legal request is directly presented to the courts or through legal bureaus to the courts whereupon proceedings are held regarding them.

5. Who is liable to pay compensation?

A person whose action or omission had caused the damage is liable to pay compensation or in some cases, his/her legal guardian. If the accused does not have legal capacity, the rightful legal guardian for the accused may be liable to pay compensation.

Article 195 of Criminal Procedure Code**Absolute Legal Competency of the Accused Person**

A compensation of loss claim is filed against the accused person if he/she has absolute legal capacity or against the person liable for the private right

In the event that the action or omission was conducted in the course of employment in an administration, then the relevant office of the administration, may be liable to compensate. See Anti-Torture Law and Afghanistan Constitution.

Article 9(1) of Civil Law

A person who transgresses his rights shall be responsible.

Article 776 of Civil Law

If harm is inflicted on another due to mistake or fault, the perpetrator shall be obligated to pay compensation.

Article 777 of Civil Law

Any assault that causes harm, other than harms mentioned in the above Articles, to another person, the perpetrator shall be obligated to pay compensation.

Based on the above articles, a person who transgresses limits and/or cause harm to another person's body, property or other rights, may be held accountable to pay compensation. For example, if a person has placed a big stone in public's way, thereby causing another person to trip and be injured, then the person who is responsible for placing the stone (or his administration) may be found liable for compensation.

Article 14 of Penal Code 2018

- (1) A person who is punished in accordance with the provisions of this law, if he/she has acquired property through crime, shall be sentenced to return the original property and if the property is not available, to return its similar property or its price to its owner.
- (2) A person who inflicts loss as a result of committing a crime shall be sentenced to pay compensation of the inflicted loss, including material and moral, in addition to the prescribed legal penalty. This provision shall be applied in circumstances where the law has not ordered compensation of loss explicitly.
- (3) The amount of inflicted loss and its compensation shall be determined by the relevant experts, appointed by the competent court.

6. What is compensable?

Lawyers are advised to note the different types of harms and be able to distinguish between compensation and punishment by fine.

All kind of damages are compensable, both material and spiritual. Material damage is defined as damage to a person's financial state and includes damages resulting from the body, such as expenses relating to treatment of injuries, loss/damage of property (transferable and non-transferable), loss of income or job and other related expenses such as medical and transportation expenses.

Spiritual damage is defined as damage to a person's "non-financial assets" (such as the human dignity) and pain and suffering (e.g. resulting from insults, accusations of moral crimes, rape, sexual assault, causing damage to a person's relatives, separating mother from child etc).

Compensation is different from a fine. The differences are:

- The objective of a fine is punitive; to punish the defendant (defendant-focused). It can be used together with or as an alternative to other forms of punishment (imprisonment, rehabilitation or community service). The objective of compensation is restorative; to restore the plaintiff to his/her original position, as best as is possible (plaintiff-focused). Therefore even if a court has imposed a fine on the defendant, the plaintiff is still entitled to compensation from the defendant.
- Fine is usually paid to the State. Compensation is paid to the plaintiff.
- The amount of fine is usually a sum determined by law (and/or judicial discretion). The amount of compensation, on the other hand, is determined by a judge to measure in financial terms the extent of harm a plaintiff has suffered because of a defendant's actions.

Material and spiritual damages are both compensable under the following laws:

Article 778 of Civil Law

Compensation shall also include evaluation of spiritual harm.

Article 41 of EVAW

Perpetrators of crimes mentioned in this law shall, in addition to the prescribed punishments, taking into account the circumstances be convicted to compensation.

Article 18 of Anti-Torture Law

Victim of torture is entitled to receive compensation for the pain and suffering inflicted upon him/ her by torture.

As Anti-Torture law and the Afghanistan Constitution was legislated to hold the State to account for its actions, under these laws, a plaintiff is entitled to compensation from the administration itself.

When an individual State official is unwilling or unable to pay compensation, the law protects the plaintiff by ensuring that the plaintiff be compensated, if not from the individual official, then, by his administration. The objective of administrative accountability in the form of compensation is also to ensure that the government is accountable for its staff actions; that its staff are acting in accordance with the law and are not committing acts which may cause damage to another.

7. How is compensation measured?

The role of the justice system is to measure in **monetary** terms the extent of harm, in terms of these three "heads of claim":

- (1) Expenses (such as medical expenses)
- (2) Loss of property or income
- (3) Spiritual damage (such as pain and suffering).

Lawyers are advised to quantify each head of claim separately to help the Court to understand how you have calculated your claim. The clearer you are, the easier it is for a Court to award your claim.

A court will determine the amount based on two principles:

(1) Causation: the lawyer has proven that the plaintiff's expense, loss and spiritual damage was a **direct result** of the defendant's actions.

(2) Proportionality: the lawyer has proven that the amount claimed is **proportional** to the harm caused.

To meet the principle of causation, lawyers are advised to submit that the defendant's actions had caused each of the "three heads of claim": expense, loss and spiritual damage. Once lawyers can prove the three heads of claim, the plaintiff's right to compensation for all three is triggered and secured.

To meet the principle of proportionality, lawyers are advised to collect evidence of receipts of expense, photographs of damaged property and photographs of injury. If the injury resulted in, for example, a loss of work, loss of reputation or absence from school (spiritual damage), lawyers are advised to collect evidence of this (witness statements and other documentary evidence) - to show the Court the extent of the plaintiff's spiritual damage. Again, lawyers are advised to help the Court understand how you have calculated the compensation. The clearer you are, the more difficult it is for a "difficult judge" to refute your calculation, and the easier it is for the Court to award your claim.

Article 779 of Civil Code:

Court shall determine the amount of compensation proportionate to the damage incurred, provided that it is directly caused by the harmful act.

Of note, **Article 778 of the Civil Procedure Code** prescribes that **spiritual damage** is compensable. The use of the word "**also**" connotes that spiritual damage is in addition losses and expense. So lawyers are advised to claim for compensation for spiritual damage **in addition** to losses and expenses.

To prove spiritual damage, lawyers are advised to submit on:

- The type and seriousness of the crime
- The pain suffered at the point of injury;
- The pain suffered from surgery during period of hospitalization (if any)
- The pain suffered as a result of complications e.g. infections or non-union of bones (if any);
- Temporary or permanent limitations on daily activities (if any);
- Temporary or permanent limitations on ability to study or work (if any)
- Temporary or permanent limitations on recreational life (if any)
- The residual pain and suffering of the plaintiff developing at the site of injury in the future (if any)
- Duration of suffering
- Plaintiff's profile: age, sex, disability (if any) etc...

See also Article 14(5) of Anti-Torture Law.

Article 14(5) of Anti-Torture Law Responsibilities of Anti-Torture Committee

Determine the pain or physical or mental suffering and severity of the pain and suffering inflicted upon the victim

8. When is compensation payable?

Compensation is payable when a court order is finalised. Court can also enforce payment by instalment. In that event, compensation is payable when the instalment is due.

Article 781 of Civil Code

Method of compensating, observing the circumstances, shall be determined by court. Compensation may be paid in installments or regular revenue, in which case the debtor may be obligated to give guarantees.

9. In which court do we file a claim for compensation?

In the court that has **jurisdiction** to adjudicate the claim. Lawyers are advised to first determine a court's geographic and subject-matter jurisdiction.

- Geographic jurisdiction (e.g. when a crime is happening in District 11, only the Court authorised for that District 11 has jurisdiction to receive a claim)
- Subject-matter jurisdiction (e.g. the family court processes only family cases)

Lawyers should determine if the concerning act is a crime or tort. If the act is a crime, file a claim for compensation with the criminal court competent to adjudicate the claim. If the act is not a crime, file a claim for compensation with the civil court competent to adjudicate the claim.

Limitation of Criminal Court's Authority in Private Right Claims

Article 190:

Criminal courts shall adjudicate a private right claim only if it is associated with a penal action filed in that court and the claim is filed before issuance of any criminal verdict by the court related to the criminal case.

Lawyers are also advised to take note of the above Article 193 of CPC.

Once we have requested the prosecutor to enter a claim for compensation at the investigative stage, the court is not empowered to reject the claim. The only exception to this is if the claim for compensation would cause a delay to the main proceeding, then, the court is empowered to avoid a ruling on the compensation claim. In that event, we advise lawyers to appeal the court's decision, if it cannot be shown that the compensation claim would cause an **unreasonable delay** to the main proceeding.

Proceeding With a Criminal Case without a Private Right Claim**Article 193:**

If filing a private right claim for compensation causes a delay of the proceedings of the criminal case, the court may proceed without the private right claim and the plaintiff shall be provided with the opportunity to file his/her claim in a civil court after a final order on the criminal case is issued.

Conclusion

In summary, a person who has suffered damages as a result of another person's actions or omissions are entitled to compensation.

Three tips to takeaway:

- When preparing a compensation claim, be precise and attentive to two principles: proportionality and causation.
- In criminal cases, file your claim at the investigation stage to ensure that it is timely entered into the file.
- When quantifying compensation, remember to consider both types of damages; material and spiritual