Considering Fundamentals of Judicial Adjustment of Contract in Iran’s Law

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Abstract
In contracts known as continual contracts in which subject components get realized with time parts, sometimes occurrence of unexpected events such as decrease in bill value (not money value) and severe decrease of means of application of contract subject affects it and by committing the contract the undertaker incurs difficulty. If parties have not mentioned required commitments for re-balancing commitments in the contract context and the legislator has not predicted that in law, this question comes in mind if judge can review the contract based upon on-contract terms, bona fide or any other rule, with purpose of returning financial balance of the contract. Although it has not been identified as a general rule in laws of contracts in Iranian legal system judicial adjustment of contract, it seems that there are some principles, fundamentals, and regulations such as denial of difficulty that can justify acceptance of judicial adjustment.

Keywords: Economic equilibrium, Adjustment, Judicial adjustment of contract, Happening swindling, Distress and constriction

Introduction
Continual contract is a contract where all contract parts are realized in time parts, e.g. leasing contract. In contrast, instant contract is a contract all components of which are realized upon certain times, for example sale contract (Shahidi, 1998, 95). Despite acceptance of the principle of necessity of contracts in Iran’s law and necessity of respect for parties’ compromise, impact of social and economic events on interval between contract conclusion till its enforcement is undeniable (Sharifi and Safari, 2010, 3). Sometimes a case might be encountered in continual contracts, where severe unexpected changes such as reduced bill value (rather than that of money) and severe scarcity of contract enforcement requirements lead to disruption of contract’s financial balance, and fulfilling the commitment of contract might be exceedingly expensive and heavy (Shahidi, 2010, 36); therefore, actual value of exchanges might be other than that agreed upon by parties upon holding of the contract (Hossein abadi, 1997, 122). If these variations were predictable upon composition of the contract by the undertaker, obligating the undertaker to apply contractual commitments will encounter obstacles (Mehdi Shahidi, 2010, 38).

The best way for solving this problem is contract adjustment because choosing this method, i.e. contract adjustment and creating balance and financial balance creates the possibility that on the one hand compensation of expenses on the undertaker gets possible and on the other hand by keeping fairness and justice, continuation of contract becomes possible (Sadeghi Moghaddam, 2011, 88). Adjustment is possible in three ways:

1- Parties have anticipated exceptional terms in their contract so that it automatically matches new circumstances (Bigdeli, 2009, 15).

2- Under certain circumstances, because of variations in economic conditions, legislator identifies exchange of the contract to be unfair and starts to determine the amount of exchange, or he
gives authority to one of the parties to lever the amount of exchange or to lower it (Shahidi, 2010, 39).

3- According to implied terms or to prevent injustice and loss of one of parties, judge adjusts the contents and makes it fit conditions (Katouzian, 2011, 73).

Acceptance of adjustment by parties or legislator is not subject to server problem except in certain cases, but judicial adjustment of the contract is one of the novel legal institutions that has been considered and accepted in some legal systems. Although in Iran’s legal system, legal adjustment of contract has not been identified as a general rule in contract law, it has been attempted in this study to consider principles, fundamentals, and rules, whose acceptance could be justified in Iran’s legal system, and to state that if judicial adjustment of contract is possible in Iran due to variation in circumstances and high cost of contract enforcement, in which legal rule and tool is justifiable.

**Concept of adjustment**

“Adjustment” literally means equating one thing with another, and in today’s Persian, it means reducing severity of one thing or action (Dehkhoda, 1994, pp. 57-59). “The term contract adjustment” means amending a former contract and variation in circumstances and descriptions of exchange or exchanger (Fakhar Tousi, 2001, 1). Therefore, each time initial terms of contract or their compromised contents change somehow in contract, contract adjustment has not been done (Bigdeli, 2009, 16).

Contract adjustment is of great importance in terms of noticeable advantages, most important of which is compatibility with commercial facts and parties’ wants in long-term contracts (Ahmad Pour, 2005, 34). On one hand, parties typically want keeping contractual relations and this request of them is in conformity with commercial facts. On the other hand, enforcement of contract has become so difficult that it is not only unfair to enforce a party to apply the contract with initial provisions, but also it is irrational (Mekki, 2010, 21). Due to adjustment, undertaker becomes free from tiresome conditions and crises, thus fulfilling their commitments like typical terms (Shahidi, 2010, 39).

**Types of adjustment**

Adjustment has been divided into three variations.

**Contractual adjustment**

It involves a type of adjustment where in the contract itself, it is predicted, to change conditions of doing contractual commitments (same), that contract parties are entitled to apply whichever changes they want in their contract and adjust imbalanced commitments with their mutual agreement. Contract adjustment by the parties is possible in two ways (Hossein Abadi, 1997, pp. 217-218).

**Adjustment during application or adjustment during independent agreement**: Sometimes both parties find out during contract that sudden and unexpected events made it hard to apply the contract. In this case, if the contract is silent about its possibility of adjustment, parties achieve an agreement considering the principle of bona fide to reduce work quality and extent of commitment or add to good’s price and services under contract, so that initial balance between exchanges is established in new conditions (Katouzian, 2011, pp. 73-74).

**Adjustment in the form of in-contract provision (adjustment clause)**: Sometimes parties explicitly or implicitly predict a contract’s adjustment in it so that they achieve compromise afterwards. Provisions set for this purpose in contract, sometimes relate to probable fluctuations of
contractual prices and sometimes they relate to fluctuations caused by money value (Shahidi, 2010, 150).

**Lawful adjustment**

Lawful adjustment is realized when legislator imposes his will upon contract parties with pretext of interpreting parties’ will or with purpose of fulfilling social conveniences (Bigdeli, 2009, 345). This adjustment might be performed in two ways:

1. **Direct lawful adjustment**: Whenever legislator embarks upon determination of the amount of exchange or entitles one of the parties to lever exchange value or lower it (Shahidi, 2010, 39), it is called “direct adjustment” of contract. It is similar to the single article regarding rent decrease of residential units ratified on October 29, 1979 which stipulates:
   
   “All lease prices of rented houses offered as residential places for lease, where the tenant uses the very rental as home, will be decreased by 20 percent as of November 22, 1979.”

2. **Indirect lawful adjustment**: Sometimes law predicts adjustment conditions and rules and entitles the defrauded to plea the court for enforcement of such regulations. Here the court is either obligated or fee to adjust the contract (Shafa’ei, 1997, 154). As an example, article 4 of law for relations of owner and tenant in 1977 stipulates:

   “Lessor or tenant can ask for revision regarding amount of rent price based on increase or decrease of living costs, provided that lease period is over and three full years have elapsed since tenant’s use of the very rental or since the date set in certain decree issued based on determination or adjustment of lease price. Court will adjust the lease to just rate of time with consultation of an expert. Court’s decree in this case is certain.”

**Judicial amendment**

In conditions where occurrence of unexpected event leads to change of circumstances of the time of contract and it gets highly difficult to enforce the contract, most Iranian lawyers do not essentially believe in judicial adjustment in the meaning of authority for judge with purpose of altering contract or reducing commitments, beyond articles stated in law (lawful adjustment) or beyond parties’ volition (contractual adjustment) (Shahidi, 2010, pp. 39-40). Some lawyers believe that adjustment by judge on the one hand restricts contractual freedom and on the other hand, courts lack sufficient information and necessary experience to accurately determine what time is appropriate for adjustment (Hillman, 1987, 8).

Judicial adjustment has not been identified as a general rule of law of contracts in the Iranian legal system. There are, however, principles, fundamentals, and regulations that can justify acceptance of judicial adjustment.

Defining judicial adjustment of contract, some lawyers state as follows:

Judicial adjustment actually means adjustment of contract according to interpretation of parties’ volition or legal regulations by judge, which ultimately returns to one of either contractual or legal adjustments. Hence, it should not be considered a third type of adjustment (Shahidi, 2010, 40).

If according to a general decree and as a regulation, legislator permits the lawyer to revise the contract the balance of which has been disturbed due to an unexpected event, this is a type of judicial adjustment (Hossein Abadi, 1997, 207).

**Principle of contract’s judicial adjustment**

In Iran, there are not any certain regulations to cause exemption and adjustment of insolvent person’s commitments. Certain regulations have verified contract revision in certain occasions. This is a kind of legal adjustment and it could not be considered a judicial adjustment (Hossein Abadi, 1997, 149).
Some lawyers have tried to justify changes of conditions that led to difficult condition based on certain theoretical principles, and hence to provide a solution. It is observed with a brief consideration that these are mainly divided into the following categories:

**Principle of volition’s authority**
A group of lawyers believe that legal principle of contract’s judicial adjustment is common intention and volition of the two parties. However, this proponents have not offered a unique and uniform principle for its justification. Some of them have offered the theory of “implicit condition”. Some others have resorted to technical framework of “contract interpretation” and another group have suggested the theory of “cause”.

**Theory of implied term**
This term is used in issues that are potential purport of contract’s words (Katouzian, 2011, 119), that is if authority of volition and understanding of compromise contents is sought, from said and unsaid statements of the two parties, explicit statements or implied hints and evidences, we must exactly find out about the accurate framework of compromise (Sadeghi Moghaddam, 2011, 136).

Identification of potential purport sometimes leads to difficulty. Implied term is the means of interpretation and completion of contract (Katouzian, 2011, 130). In a situation where no word helps discover the truth, it is judge’s job to uncover two parties’ intentions according to conditions, custom, and conscience of conventional, wise and rational man, thus passing a verdict based upon justice and fairness.

In fact, the two parties have held their contract with assumption of preservation and duration of current circumstances and they have implicitly accepted that whenever said conditions change essentially due to unexpected occurrences, contract contents are not obligatory in changed circumstances (Shafaei, 1997, 75).

Opponents of this theory claimed:
First: implied agreement to which this term is attributed does not rely on and relate to any reason.
Second: in all long-term exchange contracts, even in a typical condition, increase and decrease of prices are probable; it is highly possible that each of the two parties expect occurrence of each event with purpose of tapping it (Hossein Abadi, 1997, 135).
Third: if parties wanted to recognize such a right for the other side, they would state this explicitly in the contract (Shahidi, 2010, 140) and would incorporate a term to provide their desired balance, and their silence regarding this signifies, in itself, their decision for considering contract contents and avoiding any kind of breach (Katouzian, 2011, 83).
Fourth: desisting from the important principle of necessity of contracts and declaration of termination requires a more robust reason, and certainly based on a theoretical principle under disagreement (relating to which no doctrine has formed), the Obligation Principle (Arabic: Esalat-o-lozum) cannot be ignored (Sharifi and Safari, 2010, 21).

But, proponents of this theory believe that in such contracts not only two parties address conventional balance of commitments at the time of holding, but also an implied term is always hidden in such contracts based on which, contract contents will continue in case of conventional continuity of the condition, and if unexpected circumstances essentially raise problems for the contract, it [contract] is not obligatory anymore (Shahidi, 2010, 139). In their opinion, existence of such a term is always typically assumed within contracts (Hekmat, 1995, pp. 37-39).
In a deal, each wise person seeks profit, and if parties of the contract find that they will face circumstances in which they not only will achieve no profit, but also they will incur delirious expenses, they will never embark on holding such a contract (Shahidi, 2010, pp. 36-37).

In other words, implied will of the parties is focused on necessity of preserving conditions and circumstances of the contract’s holding time. That’s why pragmatism and permanency is not reflected in contract. With this analysis, current implied term is one of inferential transactional contracts based on rational reasoning, and it originates from intention and volition of the parties. This is a typical topic which is in conformity with initial legal decrees and without secondary decrees such as *no loss*, etc. it can justify why enforcement procedure of contract is forsaken (Rafi’ei, 2007, 132).

In this view, even if condition of preserving circumstances could not be proved with rational reasoning, there should be no doubts regarding this term’s capability of being inferable from “custom” (Shafa’e, 1987, 78).

According to jurisprudential principles and legislation system of the Islamic Republic of Iran regarding implied condition’s acceptance, as a valid agreement, there are no doubts, and *fundamental term* also, if it encounters doubts in jurisprudence, it has been supported explicitly in the law (article 1128, civil law).

**Theory of interpretation of contract**

In views of several legal authors, preserving financial balance of the two parties is one of the encumbrances that parties consider when holding the contract although there might be no mention of it in the contract text. Interpretation of contract and determination of compromise contents are means of unveiling actual volition of the two sides (Qasem Zadeh, 2003, 134).

Whenever judge concludes, considering contractual conditions and special nature of contracts and conventional meaning of the words incorporated in them as well as existing signs and circumstances such as former trading relations between two parties and their usual process in transaction, that common intention of the two parties depends on duration of compromise time’s conditions, he gives the right to the defrauded side for demanding adjustment or termination of the contract. Obviously, decree issued this way is the result of following two parties’ volitions and is aimed at respecting and considering stability principle of the contracts (Katouzian, 2011, pp. 82-83).

**Theory of interpretation of contract** should not be considered the same as the theory of implied term because in interpretation of contract, what matters is to determine common request of the parties, i.e. what the two parties have asked in common and compromise about it. In the theory of *implied term*, however, in addition to actual volition of the sides, assumed volition or typical intention of the sides, is noticed for the purpose of completing the contract, and to determine obligations owing to contract, the judge might go further beyond actual volition of the parties, thus imposing on them what had not been intended by them at the time of holding the contract (Shafa’ei, 1997, pp. 80-81).

Nonetheless, if contract is silent regarding economic circumstances or if the two parties are silent about accepting the mentioned encumbrance (Hekmat, 1985, pp. 69-70) and presence of the implied term that deal is done based on continuity of conditions of holding time and changes of these conditions lead to adjustment or termination of the contract is not inferred from (Shafa’ei, 1997, 82), principle of *stability of contracts* prevents emergence of any fluctuations in contract’s credit (Hekmat, 1985, pp. 69-70).

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Theory of cause

Some legal authors believe that the reason for commitment involves the aim that a contract party commits to achieve and this reason is always the same in relation to all individuals in all instances of contracts (Shahidi, 1998, 233).

In long-term contracts, equality and balance of exchanges until the end of the contract’s period is the main purpose of the contract parties. If for any variation of circumstances during enforcement of the contract, economic balance of the two exchanges is dissolved and hence commitment continuation of one of the parties becomes impossible due to its excessive difficulty and extravagance, commitment of the opposite side is automatically dissolved and the contract will be considered overruled (Alsanhouri, 2003, 635).

Although Iran’s civil law has not named the theory of cause directly in our intended sense of the word, there are cases where there is a law by resorting to which it could be stated that civil right also believes in the theory of cause; for example article 201 of the civil right states:

“Mistake from the side of the opposite person does not insert any flaw into integrity of the deal, except in cases where personality of the opposite side had been the major reason for the contract.”

According to this article, if personality of the opposite side is one of the major reasons for the contract, any mistakes in it will cause breach in the contract. In addition, articles 375 and 1085 of civil right that have predicted some right with terms for two sides of the purchase contract and marriage contract, are not justifiable unless with theory of cause.

This theory cannot be considered a firm foundation to vindicate judicial adjustment of the contract because of the following reasons:

First: the theory of cause is cited when one of the exchanges of the contract disappears or fulfilling of one side’s commitment becomes impossible for the undertaker due to occurrence of unexpected and sudden events. Therefore, if fulfillment of the commitment is possible, thought with many difficulties, the said commitment cannot be considered invalid and commitment of the opposite side cannot also be invalidated. Second: the reasoning just said is used in an occasion where adjustment or correction of the contract for justified reasons such as legal prohibition is not practically feasible or due to duration of unexpected situation it becomes impossible to continue enforcement of contractual commitments even with revision in contract’s cost, and adjustment of contract terms cannot compensate for losses caused by new conditions (Mousavi Hashemi, 2003, 33).

Morality and justice principles

Today, most proponents of judicial adjustment consider its possibility the result of enforcing a secondary decree with purpose of preventing loss, observing justice, fairness, and moral considerations, although these researchers have agreed on a common principle for justifying judicial adjustment.

Principle of keeping commercial order and stability of contract: Commercial order is one of the principles observing of which is required for the parties in commercial contracts and setting commercial contracts is for preserving this principle.

If it is accepted that difficulties of contract’s enforcement has no effect on commitments caused by it, the lost side becomes obliged to give up his commitments, and this will result in termination or dissolution of the contract. Hence, the best way of preserving commercial order is to keep stability of contracts and enforce all commitments thereof, though this might result in adjustment of the contract (same, 39).
Therefore, it should be accepted that judicial adjustment of the contract has no conflicts with the principle of *stability of contracts*, and these two are actually complements for each other, and adjustment is the result and outcome of this important principle (Shafa’ei, 1997, 86).

*Bona fide principles in contracts’ enforcement*: Bona fide has allotted to itself fairly broad discussions, and most authors have deduced that contract should not be interpreted based on literal meaning of words (Shahidi, 2010, 113).

A group of lawyers have defined bona fide as belief in the integrity of a legal act (such as contract and unilateral obligation) or material act which originates from legal effect(s) (Jafari Langroudi, 1993, 200).

Although there is not an explicit stipulation in Iranian law system regarding necessity of observing bona fide in contract, from the criteria of articles 438 to 440 of civil law concerning deception, it can be deduced. Entitling deceiver the right to terminate the contract without specifying the necessity for loss realization caused by deception, is a reason explaining why that legislator considers observation of bona fide necessary in all legal ties, including contractual ones.

Proponents of judicial adjustment of contract believe based on the principle of bona fide that contractors should have a bona fide cooperation with each other in all stages of the contract including the stage of enforcing its contents (Alsanhouri, 2003, 628-634). Enforcing the undertaker to apply the very commitment raised by the contract after occurrence of changes in market rate allows the other party to do high-yielding deal with expenses of the other contract side (a group of authors, 1995, 132).

In fact, the bona fide rule is the result of connection between law and morality. Therefore, it is because of observing this link that the two parties should behave with good faith toward each other (Shafa’ei, 1997, 89).

Against the principle of *bona fide*, there have also been criticisms from opponents: First: the principle of *bona fide* requires that both parties adhere to the contents of compromise and not to refuse from running it and not to change contractual conditions unilaterally. Therefore, requesting contract enforcement in raised conditions and circumstances is not only in agreement with the principle of good faith in performance of contract, but also it is accurately in line and complying with it (Alsanhouri, 2003, 453).

Second: the principle of good faith for revision of contract is non-explicit and vague and it is not enough for limiting realm of the principle of *necessity of contract* (Vahidi, 2008, 102).

Additionally, good faith is a principle and someone who has claims of ill will or behavior opposite to good faith, must prove his/her claim, and proving that warrantee has committed ill faith by requesting commitment enforcement in changed conditions is extremely difficult and/or impossible (Shafa’ei, 1997, 89).

**Abuse of right and unfair enrichment**

This part involves two sections as follows:

*Abuse of right*: A group of authors believe that performing contractual commitments in changed circumstances is opposed to this certain legal rule. Undoubtedly, a debtor that obligates the undertaker according to previous conditions to fulfill commitment and refuses to accept the request for adjustment and correction of contract, he has committed abuse of right (Moa’ddel, 1972, 80).

The concept of abuse of right means that a person uses his right to damage someone else. That is he apparently uses his legitimate right but for the purpose of damaging someone else (Jafari Langroudi, 1993, 367).

Therefore, abuse of right realizes when:

First: the owner of a personal right performs it.
Second: by enforcing the following right, a damage is caused to a party (material element of abusing the right).

Third: when applying this right, there is a purpose (either material or legal) for damaging other party (spiritual element) (Jafari Langroudi, 1978, 89).

In Iran’s law there is no doubt regarding acceptance of the rule prohibition of abusing right, and some of constitutional principles and a group of articles of civil law have explicitly forbidden abuse of right. For example, principle 40 of the constitution and article 132 of civil law exhibit this. Nonetheless, given legal concept of abuse of right and its elements, it can well be understood that this principle also, is not able to justify judicial adjustment of contract, because:

First: origin for the advent of loss involves occurrence of unexpected events and variation of circumstances and by demanding commitment enforcement which is a contractual right, no loss is caused for the other party.

Second: owner of this right does not exploit it with purpose of damaging the opposite party. So we cannot consider it abuse (Mo’adel, 1972).

Unjust or cause-less enrichment: Causeless enrichment or unfair enrichment means that a person becomes enriched without a legal or contractual reason to the damage of another person. In this case, justice and fairness necessitates that the deal must be compensated in a fair appropriate way to the advantage of the lost party (Safa’ei, 1996, 370).

Some lawyers limit causeless enrichment to the following cases:

First, transfer of someone’s possession to another person without legal cause of the possessed item, like winner of a gamble. Alternatively, a person becomes owner of someone’s possession, e.g. a burglar and a usurper (Jafari Langroudi, 1992, pp. 280-281).

Some others believe that if, in a timely contractual relationship, economic circumstances of the contract’s holding time completely changes and financial equation of exchanges gets completely disturbed, the side benefiting from contract enforcement in the new circumstances, makes unjust and unfair use by demanding contract’s enforcement, and the profit he makes in this way is causeless and lacks legal permission, and will be a clear example of unjust enrichment (Mo’adel, 1972, 80).

In Iran’s law system, some legal rules and the legal procedure have confirmed the originality of prohibition of causeless use as source of commitment. For example, article 319 of commerce law have used the phrase use without purpose explicitly.

Also, in decree 39/11/17/3801, the Supreme Court’s General Assembly of the Country has recognized issuer of the check as causeless user against owner of the check (Katouzian, 2011, 556).

Therefore, several conditions and restrictions are required for unjust enrichment to realize, as follows:
- Lack of cause or legal direction
- Enrichment
- Enrichment in other’s account and loss
- Method of compensating the damage raised by causeless use has not been predicted in the contract (Safa’ei, 1975, 10).

It seems that although causeless enrichment has been approved in Iran, it cannot be considered a basis for justifying judicial adjustment of contract, because given the concept and circumstances, it could be claimed that anyone who demands enforcement of contract to his advantage and benefits from the contract, has, from a legal perspective, gained an illegal advantage, or the creditor who demands his right from the contract, has gained causeless profit, as cause of this profit is in the contract (Katouzian, 2011, pp. 88-89).
Principles of judicial adjustment of contract based on objective principles (enacting principles)

In this part, we investigate judicial adjustment of contract which is outside of individuals’ volition and mostly relies on external facts.

Happening swindling: According to this theory swindling does not merely address lack of balance of the two exchanges while holding the contract, but two exchanges’ becoming imbalanced after holding the contract and while performing contractual commitment also, is within the concept of swindling, which is called happening swindling (Shafa’ei, 1997, 97).

In Iran’s law, swindling is considered among general rules of contracts and a means of compensating the damage caused by the two exchanges’ imbalance when holding the contract, and whenever sudden happenings disturb contracts’ balance when performing the commitment, making enforcement of the commitment heavy and unbearable for one party, given the fact that essential element in the deal is financial imbalance of contract and the fact that basis of volition of swindling is considered as implicit term for preventing loss caused by two exchanges’ imbalance, then to eliminate loss off the undertaker, we can give him volition for terminating the contract as basic principle of swindling volition is to prevent inadmissible loss of the swindled (Katouzian, 2011, pp. 100-101).

Therefore, in cases where financial balance of contract gets disturbed due to unexpected occurrences, theory of swindling can be invoked, because there are no doubts on inadmissibility of a loss imposed on one of the two parties due to unexpected events, because the undertaker should pay a value several times as much as that of the contract for delivery of expensive and rare good, and get back the money that has lost its real value. It seems that if we consider the principle of volition of swindling as preventing inadmissible loss that has afflicted the swindler as a result of performing the contract, from inequality of exchanges at the time of compromise, property induction can be done and the loss caused by variation of circumstances can also be compensated relying upon the rule of no harm and/or entitling right of contract termination to the lost (Shafa’ei, 1997, 98).

But the problem in relying upon the theory of happening swindling for justifying contract’s judicial adjustment is that performance guarantee of swindling in Iranian law is to entitle termination right to the swindled, whereas in case of disturbance in exchanges’ financial balance, contract must first be adjusted and next it leads to contract termination. Also, when interpreting law and extending it, the performance guarantee predicted in civil law should be followed. Article 416 of civil law has entitled the swindled to terminate the contract, not to adjust it (Katouzian, 2011, 106).

Another criticism is that swindle should be present when holding the contract, whereas in case of contract’s getting difficult to perform, financial balance of exchanges after holding the contract gets disturbed and shows up when performing the commitment. Therefore, happening swindle cannot be cited as justifying contract’s judicial adjustment and as its basis (Mirza Nezhad Jouybari, 1998, pp. 83-84).

In response to the first criticism, it should be stated that although performance guarantee of swindle in internal law is termination of contract and in article 416 of civil law, adjustment has not been mentioned as performance guarantee of swindle, that is because first, contracts in accordance with civil law that have been mentioned in this law, are generally instant and non-timely. This is the reason why civil law has only spoken of contracts termination at the time of variation of financial balance of exchanges, which is due to the nature of such contracts. Therefore, in this kind of contract, if financial balance of exchanges gets disturbed, at the time of holding the contract which is simultaneous with their enforcement, termination is preferred to adjustment because termination of such contracts causes no issue for contract parties, and as soon as it is held, the contract is
enforced, and adjustment is specific for those commitments that their contracts have not yet been enforced (Mousavi Hashemi, 2003, 52).

Second, in Iran’s law, whenever timely contracts are discussed, at the time of disruption of financial balance in such contracts, adjustment has been discussed. For instance article 4 for relations of lessor and lessee dating back to 1977 in which the legislator, based on lowering or enhancement of life costs, has requested revision of the value of hire cost, and has entitled the court to adjust hire with an expert’s advice (Katouzian, 1997, pp. 479-481).

In response to the second criticism, it should be stated that regulations of civil law have been set regarding volition of swindle in a way that from which attribution of these regulations to the holding time is not inferred. In article 416 of civil right, it is stipulated as follows:

“Each of transaction parties incurring a gross fraud in the deal can terminate the contract once he notices the fraud.”

As seen in this article, contract’s holding time has not been mentioned and the term deal has been used which certainly includes gross frauds that rise after holding the contract. From not mentioning the mentioned constraint in this article it could be inferred that legislator has forbidden termination due to balance disruption of exchanges after holding time of the contract.

**Distress and constriction**

Rule of negating distress and constriction is one of the important rules which have been addressed explicitly by some of Iranian laws, and many other have been enacted with inspirations from it (Bigdeli, 2009, 197).

Literally, distress and constriction means constriction, severity, and arduousness. In Majma’ol-Bahrain it has been translated as severe arduousness (Naraghi, 1408, 60).

This is one of the important jurisprudence laws (Safa’ei and Emami, 2007, 214). Both rational and traditional reasons exist sufficiently for proving this law (Hossein Abadi, 1997, 151).

And, rational reasons for this rule are that constriction decree is a decree beyond toleration and such a decree is inappropriate (Hossein Abadi, 1997, pp. 151-52). And the wise judge on the basis of prohibition of constrictive obligations (Muhaghegh Damad, 1991, 69).

In governing the rule of negating distress and constriction and removing constrictive decrees, no differences exist between obligatory decrees, such as obligation of prayers, fast, and enacting decrees such as responsibility and commitment for performance or abandonment of the deed under contract, contractual obligation and the like (Bojnourdi, 1410, 214), because regardless of using existing reasons, concerning obligatory and enacting decrees and lack of the reason that has proved a difference between two decrees in this regard, criteria and bases of negating distress and constriction in both decree types are the same (Shahidi, 2010, 119).

In Iran’s civil law, whenever enforcing a decree involved difficulty and constriction, the legislator has, somehow, tried to remove the decree and reduce severity and constriction raised by the decree, and thus, it has become a judge’s tool of adjusting contractual law.

Revised civil law’s article 1130 of 1991 stipulates:

“If durability of marriage causes distress and constriction for the wife, she can refer to judge and ask for divorce. If the mentioned distress and constriction is proved in the court, the court can force the husband to divorce, and if enforcement is not possible, the wife is divorced with permission of the judge.”

Basic rule about divorce is that it is within the husband’s discretion. However, whenever durability of marriage causes severe toil for the wife and the husband does not divorce the wife, as a secondary rule, the woman can make a request to the judge and the judge divorces the woman as
representative of the husband, and this recognition of severe hardship is up to the judge (Safa’ei and Emami, 2007, 215).

Article 494 of civil law states:

“Contract of lease is removed as soon as period is expired. If after the expiry tenant keeps the object of lease for a period without owner’s permission, the lessor will be entitled to remuneration for the mentioned period, though the lessee might not have had vindication of profit. And if lessee keeps the object of lease in possession with owner’s permission, he/she must pay the remuneration when vindication of profit happens, unless the owner has given the object of lease to be used for free.”

Article 9 of lessor-lessee relations ratified on 1983 states:

“In cases that the court considers evacuation of the object of lease a cause of distress and constriction to the lessee due to deficient housing, and if not challenging the lessor’s distress and constriction, it can provide a deadline for the lessee.”

Criteria for the abovementioned legal rule, is negation of distress and constriction. Due to this rule, a decree, be it either obligatory or enacted, is dissolved if it requires distress and constriction to the obligator or the undertaker.

In enforcement of the abovementioned decree it should be noted that every individual’s distress and constriction is considered given his/her job circumstances, income, physical and spiritual state. Therefore, evacuation of a lessee with sufficient income and appropriate job condition might not cause him/her distress and constriction, but evacuation of the housing unit might cause distress and constriction for another person (Sadeghi Moghaddam, 2011, 164).

Considering principles of the rule of distress and constriction it could be concluded that by accepting distress and constriction explicitly in similar cases, the legislator has shown his tendency for tapping this institution in solving new social problems and requirements (Bigdeli, 2009, 201).

Nonetheless, results inferred from the rule of negation of distress and constriction involve either contract adjustment or contract termination, which have been criticized in several cases as follows:

Effect of the rule of negation of distress and constriction is solely to negate constractive decree and article 1130 of civil law based on which, wife’s distress and constriction, has caused divorce right for the judge (positive effect) is an exception and the circle of exception rule cannot be extended to suspect cases (Bigdeli, 2009, 202). In addition, several lawyers believe that the rule of negation of distress and constriction removes obligation of contract given secondary decree. However, it should not impose a new order on the two parties (Katouzian, 1999, 543). In contrary to contract adjustment, method of termination is a more appropriate method because in which no new order is imposed on parties and also, it is not as hard as adjustment in practical terms, and this result is more compatible with the rule of no constriction and its jurisprudential reasons and terms (Katouzian, 2011, 106).

These theories are also criticized in the following ways:

First: principle of necessity of contracts requires that no alternative method such as termination gets employed as long as contract enforcement is possible and it should only be prescribed in exceptional cases where adjustment is not possible (Sharifi and Safari, 2010, 13).

Second: contract termination is in contrast to commercial realities because contract parties embark on holding the contract by spending cost and finance in order for their goal i.e. contract enforcement to realize, and noticeable harm is imposed on the parties by terminating the contract (Ahmad Pour, 2005, 34).

To justify judicial adjustment of contract it should be said: First: rule of negation of distress and constriction implies removal of obligation for constractive commitments, and its primary goal...
does not involve altering circle of original decrees, and obligation is taken off the shoulders of the obligated person as long as hardship continues. Therefore, due to obligation’s being left in place, it must be practiced in other days (Bigdeli, 2009, 205). Second: obligator must try to obviate hard situation to practice his initial obligation, and he can use the rule of no harm once he has made his attempts and practical removal of the difficult situation is not possible (former, 205).

Judicial adjustment of contract involves long-term contracts that have caused difficult situation for the undertaker due to unexpected external incidents, and due to the fact that enacting decree of the obligation of contract enforcement leads to imposing constriction on the undertaker in difficult circumstances, it should be considered within the realm of secondary rule of distress and constriction.

However, since the rule of distress and constriction does have no opposite effect and inference of contract adjustment by judge is not possible via this rule, inferring contract termination also opposes obligation of contract, and since many of the events leading to difficulty lose their effect after a while, undertaker’s delay in performing the commitment and giving him/her deadline, removal of constriction will be possible (former, 206).

This is, of course, in case performing the commitment is not considered for the warrantee in a certain date and delay in practical operations does not cause loss for him/her (Safa’ei, 1975, 130).

A solution that can be considered for the warrantee in this deadlock is to take the solution of revision and correction of contract (Alsanhouri, 2003, 647). If no result is obtained by bona fide of the parties, or no attempt is performed by the warrantee to provide a suggestion, there will, no doubt, be no choice but giving “permission to terminate” to the undertaker.

“Permission to terminate” is different from “volition to terminate” because it is not inherited and it is not transferrable, and … The reason for this is that the rule of distress and constriction has no constructive force, because it is beyond power of the rule of distress and constriction to create “volition to terminate”; it can only negate obligating decree of the contract (Kho’ei, 1995, 295).

As a conclusion it can be stated that contracts that cause distress and constriction for the undertaker, first we suspend the contract to the advantage of undertaker, and there will be no volition for the undertaker or judge to dissolve the contract, as predicted in article 277 of civil law.

However, if suspension of contract is not possible, for example delay in performing the commitment makes it useless, for the contract to enforce with no distress and constriction to the undertaker, we ask the warrantee to offer a suggestion so that in addition to deducted unconventional pressure imposed on undertaker, the contract is also enforced. (Shahidi, 2010, 38).

**Conclusion**

Investigations showed that adjustment is the best way that can be used in continual contracts where financial balance of contract has been disturbed due to factors such as decreased value of bill (not value of money) and severe deficiency of enforcement means of the job under contract. On the one hand, accepting the adjustment by parties or by legislator does not face serious problem except in certain cases, but judicial adjustment of contract has not been recognized in Iran’s law system as a general rule in contracts law. However, given theoretical fundamentals of judicial adjustment of contract in Iran’s law it was found that the rule of negation of distress and constriction has a higher power compared to other principles brought up by lawyers to justify judicial adjustment of contract, because in terms of effectiveness of the rule of negation of distress and constriction in the subject under discussion in legal perspective, this not only faces no oppositions, but also numerous existing examples of legislators’ use of the rule of distress and constriction and changing the fate of constrictive contracts, are endorsements on possibility of using this institution. In one perspective, distress and constriction is more compatible with basic principle affecting contracts, i.e. obligation
of contracts. On the other hand, compensation of loss by the warrantee or suggestions destroying constrictive situation of the undertaker, negates possibility of negation of contracts and besides observing internal legal regulations, it causes movement toward responding contemporary needs of legal changes.

References
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