

AN INTRODUCTION TO THE  
LAW OF OBLIGATIONS  
OF AFGHANISTAN



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An Introduction to the

# Law of Obligations of Afghanistan

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Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP's mandate and goals are to research, write, and publish high-quality, original legal textbooks, and to build an equally high-quality law curriculum at the American University of Afghanistan (AUAF). The ALEP curriculum is developed by Stanford Law students under the guidance of ALEP's Faculty Director and Executive Director with significant input from AUAF faculty and other Afghan scholars and practitioners.

*An Introduction to the Afghan Law of Civil Obligations* is ALEP's sixth textbook. ALEP previously published five textbooks, among the first to specifically address Afghanistan's post-2004 legal system: *An Introduction to the Laws of Afghanistan* (3rd ed.), *An Introduction to Commercial Law* (2nd ed.), *An Introduction to Criminal Law* (2nd ed.), *An Introduction to Constitutional Law*, and *International Law from an Afghan Perspective*. Two additional textbooks addressing Afghan Professional Responsibility and Property Law are forthcoming. Many of the ALEP textbooks have been translated into the native Dari and Pashto languages and are available for free at [alep.stanford.edu](http://alep.stanford.edu). Additionally, ALEP has undertaken professional translations of the Afghan Civil Code and Afghan Commercial Code, both of which are available on its website.

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ALEP looks forward to continuing the collaboration that made this book possible. Please share your feedback on the *Law of Obligations* with us on our website, [alep.stanford.edu](http://alep.stanford.edu).

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## CHAPTER 1: INTRODUCTION

### 1. WHAT IS THE LAW OF OBLIGATIONS?

The law of obligations is part of the private law system in the civil law tradition. Obligations are created when contracts are formed, or when civil wrongs have been committed by one person against another person. The meaning of obligation has changed throughout time, but “today, the technical term ‘obligation’ is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance.”<sup>1</sup> The party that is required to do something is called the **debtor** and the party that is expecting the other party to do that thing is called the **creditor**.<sup>2</sup> In cases where physical harm is done to someone, the victim has the right to “redeem” compensation for that harm.<sup>3</sup>

As you may have already learned, the law of obligations governs contractual liability as well as liability arising from causing harm to the person or to the property of someone else. Obligations are enforceable as actions in civil cases.<sup>4</sup> We must note that these are not criminal cases where the state is a party to the action. Here, in cases where obligations are involved, private parties sue one another in civil actions to seek damages (or in some cases ask for the specific performance of a certain contractual obligation). Therefore, there are two main obligations: contractual and delictual. Basically, the law of obligations is divided into four subcategories, which will be discussed in detail in this book: contract law, quasi-contract law, delict, and quasi-delict.

### 2. HISTORY AND SOURCES OF CIVIL LAW OBLIGATIONS

To understand the place of the law of obligations in Afghanistan, it is important to study the basics of the history of obligations. The 1977 Civil Code of the Republic of Afghanistan has a general structure that in many ways can be traced back to the structure of Roman law. Moreover, if one reads any civil code in the world, belonging to a civil law country such as France, Germany, Japan, or Mexico, one will often find a very similar structure and substance. This section will cover the history of obligations in the civil law through Rome, France, and Egypt, and will also discuss other sources of obligations like Islam, custom, and alternative systems like common law.

#### 2.1. Personal rights in Roman Law

The first code of the civil law tradition was produced in the sixth century A.D., in Rome.<sup>5</sup> Civil law in many ways had its origins with Justinian’s code, known in Latin as the *Corpus Juris Civilis*, and the first three sections of Justinian’s textbook, the *Institutes*: “Of Persons,” “Of Things,” and “Of Obligations.”<sup>6</sup> As we will see, the *Institutes* and the *Corpus Juris Civilis* helped form the basic structure for the French Civil Code, the Egyptian Civil Code, and eventually the Civil Code. In fact, al-Sanhuri, the author of the 1948 Egyptian Civil Code, studied the Roman law extensively.

Justinian was a Roman emperor living in Constantinople, which is now Istanbul in modern day Turkey. He created this civil law code to simplify the law and make it unnecessary to write what were called **jurisconsults**, or long explanations of the law which we now call commentaries, or treatises.

#### Justinian’s *Institutes*

##### 3.13.pr.

An obligation is a tie of law, by which we are so constrained that of necessity we must render something according to the laws of our state.

The earliest Roman law was the law of property, which governed the relationship between people and things. Later, the law of obligations developed to govern relationships between people and other people.<sup>7</sup> The debtor and creditor—in the case of obligations also known as the **obligor** and the **obligee**—were bound by a **vinculum**, the Roman word for a chain, or a legal bond or link between people. The obligor can also be called a debtor; and the obligee can also be called a creditor. These terms are often used when repayment of money is part of the obligation. An obligor is one who owes a debt or duty to someone else, and an obligee is the one who is owed by the obligor. These concepts eventually led to the modern conception of a contract. The idea of the vinculum was to replace vengeance with payment of money, also known as monetary restitution. But, in Rome, if the debtor could not pay the creditor, the debtor could still accept punishment instead.

### Discussion Questions

1. Why do you think that systems for contracts were formed? Why do we not just rely on our natural social interactions and relationships?

## 2.2 The four Roman categories of obligations<sup>8</sup>

“Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict.” – Institutes of Gaius, 161 A.D.

The law of obligations originally included contracts and delicts, but was extended to quasi-contracts and quasi-delicts by Justinian.

### 2.2.1 Contracts: *nuda pacta* and enforceable agreements

Justinian’s *Institutes* divided contracts into four categories. What connected the four categories was the idea of **consensus**, or agreement. But the Roman jurist Ulpian famously said “*nuda pacta obligationem non parit*,” or, “no obligation arises from a bare pact.” A mere agreement was not necessarily a contract creating obligations for the parties. Any pact that fell outside of the four categories was considered to be an unenforceable agreement. In Roman terminology, it was a *nuda pacta*, a bare pact, as opposed to the enforceable agreements that fell within the categories of Roman contract law.

The modern meaning of a contractual obligation is similar. A contract is formed when two or more parties voluntarily make an agreement in order to create legal obligations between them, and punish the person who breaks the agreement.<sup>9</sup>

### 2.2.2 Delicts: *Lex Aquilia* and culpa

Just as contracts were divided into four categories, Justinian, in his *Institutes*, identified four types of delicts: theft, robbery, causing a wrongful loss, and “outrageous behavior.” Theft and robbery are now part of criminal law, but causing wrongful loss and “outrageous behavior” are categorized as contemporary delicts. The idea of causing a wrongful loss<sup>10</sup> was based on the *Lex Aquilia*, a law written in the third century B.C. which called for compensation for damaged property. This law was applied narrowly at first, only applying to actual property damage and only when that damage was caused directly by the alleged obligor. But its application soon became much broader. By the time Justinian wrote the law on delicts, it applied to indirect wrongdoing as well (situations where the obligor did not *intend* to cause damage to the obligee, but caused damage through his actions), and to forms of financial loss that went beyond damage to physical property.



Wrongdoing was tied to the idea of *culpa*, or blameworthiness. It was never specifically defined, as opposed to our more precise modern understanding of negligence. *Culpa* was simply the Roman idea of what constituted wrongdoing in a given situation. It contained our understanding of negligence, but also other forms of blameworthiness.

The fourth delict, *iniuria*, or “outrageous behavior,” was anything that deliberately offended the honor of a victim, who would then be the obligee. This meant that it encompassed a wide range of behavior—a variety of types of offensive language and offensive conduct. This delict created an obligation for the person who caused the offense.

Today, the law of delicts deals with categories of actionable injuries. One could include assault, battery, and trespass to the list. In short, the law of delicts allows private parties to seek damages for the harm that has been caused to them. There are certain doctrinal issues that are important in understanding the law of delicts. For instance, the concepts of fault, damage, cause, and foreseeability are among key doctrinal issues that will be discussed further in later chapters.<sup>11</sup>

The law of delicts, according to some, can have a very broad reading. Sometimes, the law of delicts overlaps with criminal law, where the government brings charges against the obligor instead of the victim. What distinguishes between delicts and criminal law is that delicts are private rights of action brought by private citizens, not the government. These are actions undertaken by private parties in order to seek damages. However, there can be simultaneous criminal proceeding and private suits concerning the same matter.

#### Discussion Questions

1. Why do you think that law distinguishes between criminal actions, and actions that create delicts or quasi-delicts?
2. Think of a few examples of delicts. In each of those situations, why should the person owing a delict to another person have to fulfill his later obligation to the obligee of the delict?

### 2.2.3 Quasi-Contracts: quasi ex contractu teneri (“as if there had been a contract”)

Quasi-contracts developed as enforceable obligations that resembled contractual agreements, but lacked genuine agreement between the parties. There was no consensus and no wrong, so these obligations developed separately from contracts and delict.

Though the Roman jurists didn’t formalize the concept of unjust enrichment, it is in many ways the connection between the different situations that could lead to quasi-contractual obligations. Unjust enrichment is when a person profits from a situation in which the law says that this person did not deserve to profit. For example, money paid by mistake could be recovered through an action called a *condictio indebiti*. And expenses paid by someone who had intervened in the affairs of another person for the sole interest of that other person could be recovered as well. In modern law, a quasi-contract is an obligation created by courts to try to address issues of equity and fairness between the parties. As an example, a quasi-contract can be used when a contract should have been formed, but was not. In order to address the grievances of the parties involved, the court constructs what we call a quasi-contract.

### 2.2.4 Quasi-delicts

Quasi-delicts developed in Roman law as a theory of **indirect liability**, or liability for actions that were not intended to cause harm, or caused harm by accident. Indirect liability could be for damage caused by

persons one is responsible for (such as children or guests in one's restaurant or inn), or by things in one's keeping (such as pets, livestock, or stored fuel tanks). Under quasi-delicts, a showing of fault, or *culpa*, was not necessary as it was under theories of delict. For example, under quasi-delicts, the occupier of a house was liable without proof of fault for things thrown or falling from his house on the public way. And innkeepers were liable for their guests' property if it was lost or stolen in the inn. This category of obligations even included liability for a judge to take over the liability of a party whose lawsuit was incorrectly dismissed before judgment was rendered. Due to the variety of actions that fell under quasi-delict, it is not easy to find a unifying principle.<sup>12</sup> Because the categories of delict and quasi-delict were never fully distinguished in Roman law, later civil law used the terms differently, as we will see in our section on the French Civil Code.

### 2.3 French Civil Code

After the French Revolution the leader of the French Empire, Napoleon, set out to replace local and royal customary law with one rational legal code for all of France. The result was the French Civil Code, also known as the Code Napoleon of 1804. Despite his talents as a military leader, before his death Napoleon said that "my true glory will not result from the forty battles that I have won. These will fade away because of Waterloo. My true glory will reside in my Civil Code, which will never be forgotten. It is my Civil Code, which will live eternally."

Instead of simply codifying existing French laws, the new code looked back to Justinian's *Corpus Juris Civilis* as a model. And while the Roman code is divided into sections on People, Things, and Acts, the French Civil Code is divided into sections on People, Property, and Acquiring Property.

Though Justinian's code listed categories of enforceable agreements, The French Civil Code expanded on this with a general theory of contract: "*Les conventions legalement formées tiennent lieu de loi à ceux qui les ont faites,*" or "Agreements legally made have the force of law between those that have made them."<sup>13</sup> And "A contract is an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something."<sup>14</sup>

In addition to its treatment of contracts, the French Civil code also created a different understanding of quasi-contract and non-contractual obligations.

#### French Civil Code

##### Article 1371

Quasi-contracts are the purely voluntary acts of the party from which results any engagement whatsoever towards a third person, and sometimes a reciprocal engagement of two parties.

##### Article 1382

Every action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof.

##### Article 1383

Every one is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence or by his imprudence.

While delict and quasi-delict in Roman law were generally distinguished based on whether the obligation was a direct or indirect theory of liability, the French Civil Code distinguished between the two based on **intention**—whether the person was determined to act in a certain way—or **negligence**—whether the person failed to exercise the care that a reasonable person would exercise in the circumstances.<sup>15</sup> Though

the French Civil Code uses the Roman phrases, it is different from the Roman understanding of those legal categories. Under Roman law, for example, if an employee caused damage, the employer would be legally **culpable**, or legally to blame, based on a theory of indirect liability, because the employer is responsible for his employee's actions. But under the French Civil Code, that same employer would be liable based on a theory of negligent supervision, because he didn't exercise reasonable care in making sure the employee was acting appropriately.

## **2.4 Egyptian Civil Code**

Using the French Civil Code as a model,<sup>16</sup> Abd al-Razzaq al-Sanhuri, a lawyer and politician, drafted the Egyptian Civil Code in 1948, with the help of Edouard Lambert, a professor of law at the University of Lille, in France.<sup>17</sup> Sanhuri was able to follow the French code, but also integrate Islamic law as needed. That is because civilian law is not a rigid system that requires particular substantive provisions. Instead, civilian law is a tradition that can be adapted to suit the needs of a particular country.

### **Egyptian Civil Code**

#### **Article 1**

In the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity.

Discussing a draft of the Egyptian Civil Code at a meeting in 1942, Sanhuri said the following: "Article (1) of the code requires the judge to fill the gaps and lacunae that exist in the code by resorting to the principles of Islamic law. Occasions where the judge will be faced with such gaps in the code are bound to be numerous, and so the judge will be required to decide various disputes in accordance with the principles of Islamic law. The code is a great victory for Islamic law, especially if we keep in mind that all its articles could easily be argued to represent principles of Islamic law. And so, notwithstanding the existence of gaps in the code, our judge only has two options: either he applies codified articles that do not conflict with Islamic law, or he applies the very principles of Islamic law. In addition to all that, the draft code has also directly incorporated Islamic law by codifying both its general theories and its detailed normative solutions."<sup>18</sup>

Several other countries drafted civil codes that are patterned on Sanhuri's Egyptian Civil Code. These include Iraq, Libya, Kuwait, Jordan, and the United Arab Emirates. In Iraq and Kuwait, Sanhuri himself helped write the new codes. In Syria, the new Civil Code of 1949 replaced the *Mejelle*, the Ottoman civil code that had been used until then. For the Iraqi Civil Code of 1951, Sanhuri blended elements from the Egyptian Civil Code with elements from the *Mejelle*. Sanhuri's Iraqi Civil Code incorporates more of *shari'a* than the Egyptian Civil Code or the Syrian Civil Code, because the Iraqi Code retains more articles from the Ottoman *Mejelle*.<sup>19</sup>

#### **2.4.1 Civil contracts and commercial contracts in Kuwait, Qatar, and Afghanistan**

In Kuwait, Sanhuri took a different approach. Instead of creating an entire new civil code, he drafted the Kuwaiti Commercial Code of 1961, including a section—Book Two—on the law of obligations. For two decades, Kuwait operated with a hybrid system where Book Two governed commercial obligations issues, and the *Mejelle* continued to govern questions of civil law. In 1981, Kuwait ratified a civil code to complement its commercial code, similar to Afghanistan. Qatar, as well, in its Civil and Commercial Law of 1971, adopts Book Two of the Kuwaiti Commercial Code, on obligations.

It is important to understand the difference between civil codes and commercial codes when it comes to the law of contracts. Within the broad tradition of civil law, there is a divide between Roman civil law, which we discussed in this chapter, and commercial law, which developed separately. Civil contracts and commercial contracts developed as two separate fields, with civil contracts developing from Roman civil law, and commercial contract law developing in medieval Italian towns that became centers for trade on the Mediterranean Sea. While Roman civil law was developed by scholars, commercial law was developed by merchants as a practical necessity. This practical commercial law was adopted by civil law countries around the world, and some common law countries, too. It began to be codified in specialized commercial codes in the eighteenth and nineteenth centuries.<sup>20</sup> The different history of these two traditions within civil law—the Roman civil law and commercial law—is largely responsible for the different current treatment of commercial contracts and civil contracts. This explains why Afghanistan has two different codes that govern contracts: a civil code and a commercial code.

How do we know whether the Commercial Code or Civil Code applies to a particular contract? The Civil Code generally applies as the default. The Commercial Code is specifically limited in scope to commercial transactions, as defined in Articles 14-23 of the Commercial Code. Articles 18 and 19, for example, provide lists of transactions that qualify as commercial transactions. Such transactions include agreements to transport goods and people, bank transactions, and the distribution of water, gas, electricity, and telephone communications.

It is important to understand how the overlap works between the Commercial Code and the Civil Code. In commercial contracts, the general rules of the Civil Code still apply, but so do the specific rules of the Commercial Code. That is why, for example, the Commercial Code does not address matters like offer, acceptance, and other principles that are already covered by the Civil Code.

## 2.5 Other sources of obligations

### 2.5.1 Islamic law

Islam is the official religion of the Islamic Republic of Afghanistan.<sup>21</sup> While other divine religions are respected in Afghanistan, and their followers are permitted to practice their religions<sup>22</sup>, no law shall be passed that is not in accordance with Islam.<sup>23</sup> The Hanafi school of Sunni Islam is recognized by the Afghan constitution as the dominant school of jurisprudence.<sup>24</sup> Most Muslims fall in one of the two following two sects: Sunni Islam and Shiite Islam. The Sunnis are divided into four schools: the Hanafi school (dominant in Afghanistan), the Shafeie school, the Maliki school, and the Hanbali school.<sup>25</sup>

Before the first Afghan constitution composed in 1923, the main source of law in Afghanistan was the Shari'a; divine laws of Islam mainly derived from the Quran, the Hadith, Ijma or consensus, qias or reasoning, and the Sunnah.<sup>26</sup> Customs, local, and tribal traditions also played an important role, while some decisions made by local councils, or the provincial Jirgas, were treated as sources of law.<sup>27</sup>

The Quran and Sunnah discuss the importance of fulfilling contractual obligations. “O ye who believe! Fulfill your undertakings.”<sup>28</sup> Two of the most basic principles underlying Islamic contract law are **riba** and **gharar**.<sup>29</sup> Riba is usually associated with **usury**, but can also stand for the much broader idea of **unjust enrichment**. Usury is the lending of money and requiring the borrower to pay high amounts of interest, and unjust enrichment is when by chance one person is enriched at the expense of another person regardless of wrongdoing. Gharar, on the other hand, is a forbidden form of contract where details about the sale item are not known. Although the Quran outlines these principles and the importance of keeping promises and agreements,<sup>30</sup> it does not offer a comprehensive theory of contract, and specific contractual provisions differ between countries as we will see.

The Mejlle, or Hanafi Islamic Code, was in effect in Afghanistan until the Civil Code was drafted in 1977. The Civil Code also mimics the Mejlle in many ways, including sale (bai'), pledge (rahn), guarantee (kafala), hire (ijara), and gift (hiba).

### 2.5.2 Custom

In cases where there are no laws, and where the Shari'a is silent, the Afghan Civil Code permits the courts to issue rulings based on public customs, or Urf-i Umoomi, as long as these customs are not in violation of the law or against the principles of justice.<sup>31</sup>

Custom can be understood in two ways. First, there is the custom of particular communities, for example Pashtunwali of the Pashtoons, as well as all of the various other local customary law traditions throughout the country. This is one form of custom. Second, custom may also be understood as the generally accepted practice of a particular segment of society. For example, imagine that there is a custom in the computing industry in Kabul that when you buy a computer, you are also necessarily buying the printer alongside it. In that case, we would say that the customary norm is that printers should come with computers. Articles 720 through 724 of the Civil Code talk about custom, and will be addressed in more detail later in the book.

### 2.5.3 Common law

Though Afghanistan follows the civil law tradition, it is important to understand a little bit about how common law countries think about obligations. The common law, just like the civil tradition, recognizes certain rights and interests that ought to be protected. Rather than calling them obligations, common law countries refer to the law of contracts and the law of torts (delict).

While not all promises are enforceable, contract law is concerned with those promises that are treated as contracts.<sup>32</sup> But there are other actions that can also give rise to expectations such as misrepresentation.<sup>33</sup> Understanding expectations in contract law is important because expectations determine whether remedies, specific performance, restitution, or other types of damages are appropriate.

A key concept in the formation of common law contracts is the notion of **consideration**. Consideration is what one promises to give, or to pay, in return for another promise. For example, Ali would like to build a wall in his house. He asks Omar to build the wall. The amount of money that Ali agrees to pay Omar for the performance of this contract is called consideration. This view of consideration emphasizes that consideration must be something of value.<sup>34</sup>

The modern view of consideration is rather different from the earlier view. In the modern view, "the presence of a good consideration serves to demonstrate the seriousness of the parties to a relationship."<sup>35</sup> When parties agree to bear some financial risk or responsibility for a promise, it shows that the parties are interested in fulfilling that promise. For example, if Ali asks Omar to build a wall at his house, but does not promise Omar any consideration, Omar will be left without an incentive to build the wall.

In the common law tradition, delicts are referred to as torts. In the law of torts, we use terms such as negligence and strict liability to determine how or when a party is responsible for his actions. In cases of negligence, plaintiffs are allowed to recover damages only if the defendant acted with insufficient care.<sup>36</sup> This means that the defendant had a duty to behave in a certain manner, or display a certain level of care but failed to do that. In strict liability situations, the defendant is responsible if the plaintiff is in any way harmed by his actions.

### 3. THE CIVIL CODE

The Afghan Civil Code can be difficult to understand, especially with regard to the law of obligations. When interpreting the Code, it is often helpful to refer back to theories of obligations in the French Civil Code, and the later Egyptian Civil Code of 1948, discussed earlier in this introductory chapter. Thinking about how those codes operated—and were supposed to operate—can help us think about how the Afghan Civil Code should be understood, especially because the French Civil Code influenced the Egyptian Civil Code of 1948, and the Egyptian Civil Code was highly influential on the current Civil Code.

The Civil Code (CCA) was written in 1977 during the republic of Daoud Khan, between the monarchy of King Zahir Shah and the period of communist control. It is still in effect today. The Bonn Agreement said that all codes remain valid unless otherwise barred by a separate international legal obligation. And the Constitution of Afghanistan provides that laws enacted before 2004 continue to be in force unless **repealed** or **superseded** by other laws. To repeal means to revoke by legislative enactment, and to supersede means to displace in favor of something newer.

The Civil Code primarily covers issues of private law, including such areas as family law, personal status, property law, and obligations. It serves as the default law (the law that people apply when no other law applies directly), though legislation may be passed that provides more specific regulations.

The Civil Code codifies elements of other countries' civil codes, scholar's law and Hanafi fiqh, and customary Afghan law. But the Civil Code prioritizes these differently than the Egyptian Civil Code does. While the Egyptian Civil Code encourages looking at custom before Islamic law in cases where the code has no provision, the Civil Code tells its readers to consult Hanafi jurisprudence before custom.

#### Civil Code

##### Article 1

(1) In cases where the law has a provision, the practice of religious jurisprudence is not permitted. Provisions of this Act are applicable in letter and spirit.

(2) In cases where the law has no provision, the court shall issue a verdict in accordance with the fundamental principles of Hanafi jurisprudence of Islamic shari'a to secure justice in the best possible way.

##### Article 2

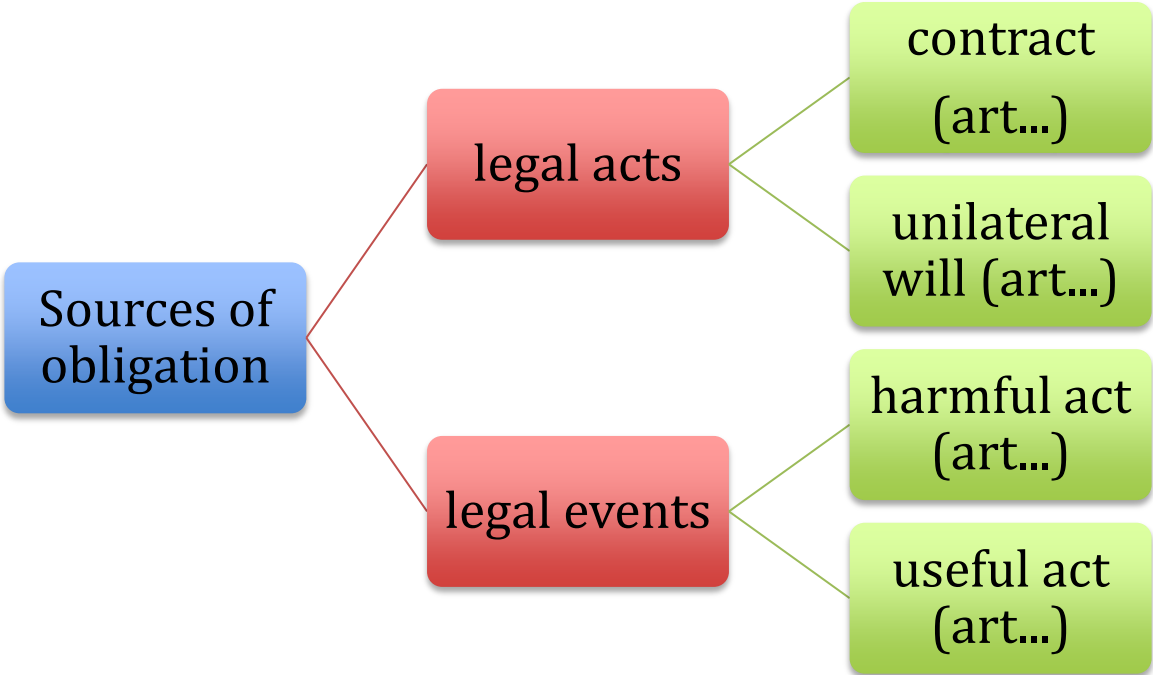
Where there is no provision in the law or in the fundamental principles of the Hanafi jurisprudence of Islamic shariat, the court issues a verdict in accordance with the public convention, provided the convention does not contradict the provisions of the law or principles of justice.

#### 3.1 Obligations in the Civil Code<sup>37</sup>

The Civil Code lays out the general field of obligations, after which it specifically addresses civil contract law and delict, or what is known in the Civil Code as civil responsibility. The Code's treatment of these subjects is unquestionably civil in nature. For example the contract law portion includes the issues of subject (or what's referred to as "object" in many civil law jurisdictions) and cause, which are civil law concepts. Common law doctrines such as consideration are not present in the Civil Code, and the Civil Code explicitly allows for unilateral contracts (those that do not require consideration from both sides).

The Civil Code first covers innominate contracts, which are contracts with no particular name. The Civil Code then details various nominate contracts, which are contracts that do have names like sale, profitable contracts, work contracts, and several others.

Articles 492 to Article 812 detail the sources of obligations. The first two broader categories are legal acts and legal events. Legal acts are further divided into contracts and unilateral will. Legal events are divided into harmful acts and useful acts.



The Civil Code is partitioned in a way that reflects the familiar categories of private civil law. Obligations in Afghan law, like in other civil law traditions, is divided into roughly four categories: contract, quasi-contract, civil responsibility (which is often used interchangeably with delict and extra-contractual obligations), and quasi-civil responsibility.

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- <sup>1</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.1
- <sup>2</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.1
- <sup>3</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.3
- <sup>4</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.7
- <sup>5</sup> JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO; THE CIVIL LAW TRADITION (3<sup>rd</sup> edition, 2007) Stanford university press, Stanford, CA, p.2.
- <sup>6</sup> Some scholars date the origins of the civil law to the Twelve Tablets in Rome, in 499 B.C.
- <sup>7</sup> D. J. Ibbetson, A Historical Introduction to the Law of Obligations, Oxford University Press, Oxford, 1999, p.6
- <sup>8</sup> D. J. Ibbetson, A Historical Introduction to the Law of Obligations, Oxford University Press, Oxford, 1999, p.6-10
- <sup>9</sup> Contracts: Cases and Doctrine, Fourth Edition. Barnett, Randy.
- <sup>10</sup> Justinian, *Institutes*, 4.3.
- <sup>11</sup> Law of Obligations. Samuel, Geoffrey. Edward Elgar Publishing. P.19
- <sup>12</sup> Geoffrey Samuel, Law of Obligations, Edward Elgar Publishing, Cheltenham, 2010, p.21.
- <sup>13</sup> French Civil Code, Art. 1134.
- <sup>14</sup> French Civil Code, Art. 1101.
- <sup>15</sup> Geoffrey Samuel, Law of Obligations, Edward Elgar Publishing, Cheltenham, 2010, p.22.
- <sup>16</sup> The French Civil Code was translated into Arabic by Youssef Wahba between 1881 and 1883.
- <sup>17</sup> Nabil Saleh, Civil Codes of Arab Countries: The Sanhuri Codes, Arab Law Quarterly, Vol. 8, No. 2 (1993), pp. 161-167
- <sup>18</sup> *Preparatory works*, vol. I, 20, and *al-Wasit*
- <sup>19</sup> see Law as a Social Force in Islamic Culture and History, *Bulletin of the School of Oriental and Asian Studies*, 20 (1957), 32.
- <sup>20</sup> JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO; THE CIVIL LAW TRADITION (3<sup>rd</sup> edition, 2007) Stanford university press, Stanford, CA, p.13-14
- <sup>21</sup> Constitution of the Islamic Republic of Afghanistan, Cha.1, Art.2
- <sup>22</sup> Ibid
- <sup>23</sup> Constitution of the Islamic Republic of Afghanistan, Cha.1, Art.3
- <sup>24</sup> Constitution of the Islamic Republic of Afghanistan, Cha.7, Art.15
- <sup>25</sup> Farq bayna al-firaq, Moslem Schisms and Sects, Ibn Tahrir Baghdadiah.
- <sup>26</sup> Afghanistan, A Country Law Study, Gholam Vafai, 1988, p.10
- <sup>27</sup> Ibid
- <sup>28</sup> Holy Quran (Sura V:1).
- <sup>29</sup> See, e.g., Noor Mohammed, "Principles of Islamic Contract Law," *Journal of Law and Religion*, Vol. 6, No. 1 (1998), pgs. 115-130.
- <sup>30</sup> Holy Quran (Suras V:1; IV:33; XVI:91).
- <sup>31</sup> Afghan Civil Code, Cha.1, Art.2
- <sup>32</sup> Contracts: Cases and Materials, Seventh Edition, E. Allan Fransworth...P.1
- <sup>33</sup> Ibid
- <sup>34</sup> Ibid
- <sup>35</sup> The Common Law of Obligations, Cooke, P.J; Oughton, D.W. P.80
- <sup>36</sup> Cases and Materials on Torts, Epstein, R, P.101
- <sup>37</sup> See, e.g., ANDREW BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS (1998); GEOFFREY SAMUEL, LAW OF OBLIGATIONS (2010); GEOFFREY SAMUEL & JAC RINKES, LAW OF OBLIGATIONS AND LEGAL REMEDIES (1996); Gerhard Bowering, editor, "Rights," pg. 477, The Princeton Encyclopedia of Islamic Political Thought, 2013, Princeton University Press, Princeton, NJ; Hisham M. Ramadan, pg. 103-104, Understanding Islamic Law: From Classical to Contemporary, Rowman Altamira, 2006.



## CHAPTER 2: WILL THEORY—AUTONOMY OF THE WILLS

### 1. THE WILL THEORY

Will theory is one of the primary foundations from which the private law of contracts is deduced, though it is certainly not the only one.<sup>1</sup> The **will** is a property of the mind, and is defined as one's desire and ability to do something. The will theory states that bodies of law like contracts exist to protect the **autonomy** of the will, autonomy being the quality of internal self-governance and moral independence. So autonomy of the will is the quality of having individual control over one's own moral and mental inclinations.

The will theory says that contractual obligations are based on promises (because they express each party's will), but because the will theory is such an abstract and general idea, there are many situations where it does not provide for a clear rule of contract. The will theory is often supplemented with another related general principle, the **freedom of contract**, which means that parties are free to enter into contracts without government restrictions and interference. Freedom of contract allows the parties to decide whether or not to contract, with whom to contract, and the terms of the contract. These freedoms are one of the underpinnings of a *laissez faire* (French for "letting people do what they want") capitalist free market economy, and are intertwined with the fundamental philosophy behind the will theory. These theories are partially reflected in the Civil Code.

#### Civil Code

##### Article 509

Expression of will takes place orally, in writing, or by customarily used signs. Will can also be expressed through transactions which clearly connote the reality of a contract.

##### Article 510

Expression of will may take place implicitly, unless the law or the contracting parties make its explicitness a condition.

##### Article 511

Expression of will shall be effective when the opposite party acquires knowledge of it. Arrival of expression of will to the opposite party indicates acquisition of knowledge of it, unless a reason contrary to it exists.

##### Article 512

Expression of will shall be void in the state of unconsciousness—though temporary—or mental disorder that forfeits the distinctive ability.

##### Article 513

The will expressed contrary to one's conscience shall not be considered void except when the opposite party has the knowledge of contradiction of the person's expressed will or his intent.

Article 509 says that will can be expressed in various ways. Article 510 indicates that will can be expressed implicitly (through signals that are meant to indicate will) unless a particular contract specifically requires explicit (stated) expression of will. Article 512 says that expression of will is unacceptable if a party is not in a conscious state of mind, or if the person expressing it is suffering from the effects of a mental disability. And perhaps most importantly, Article 513 states that will contrary to one's conscience is not actually void *unless* the other party was aware of the issue.

Article 513 touches on an important distinction between subjective and objective intention and motivation in contracting. An **objective intention** is one that “a reasonable person” would understand. Did the individual express herself in a way that a reasonable person would believe she intended to be bound by the contract? As indicated in Articles 509 and 510, objective intent is always required to form a contract. A **subjective intention** refers to what the particular individual was actually thinking at the instant of the statement – regardless of how or what he communicated. Did he actually intend to be bound by this contract? As you can imagine, one’s subjective intent may be hard for others (including the court) to discern or assess. One’s subjective intent not to be bound only prevents the contract if the other party was aware (or should have been aware) of that missing intent. If this is the case, one might argue that objective intent is also absent.

For the Shafi’s and Hanafis, only objective motive is relevant, whereas for the Hanbalis-Malikis, subjective motive is also relevant.<sup>2</sup> An example that is often used is the sale of grapes to be used to make alcohol. For the Shafi-Hanafis, the sale is valid because grapes are legal even if the motive is ultimately for an illegal purpose. For the Hanbalis-Malikis, the sale is not valid because subjective motive is taken into consideration. In this respect, the Civil Code seems to be more closely aligned with the Hanbalis-Malikis.

### Discussion Question

Farhad is selling bolani that Fahim has agreed to buy. What should happen in a contract dispute where Farhad’s subjective intent about the bolani he is selling —Farhad’s will—is different from the objective form of Farhad’s agreement with Fahim? According to Article 512 of the Civil Code, is Farhad’s intent more important than Fahim’s reasonable and objective interpretation of the terms of the agreement? The will theory might resolve this in favor of Farhad. Is there any way to argue within the Civil Code that Fahim should win the lawsuit based on the objective interpretation of the agreement? Does the administration of a functioning system of contract law require that parties consent to using the outward appearances of the contract being used to resolve disputes, even if subjective intent to the contrary is later discovered?<sup>3</sup>

The will theory is individualistic because it allows people to define their own obligations to each other through promises, as opposed to more **collectivist** theories of contract. Collectivist theories view contracting parties as owing special duties to deal with each other in good faith and to act with a view towards the other party’s well being. Under collectivist theories, the individual no longer has complete autonomy to push his advantage to the legal limit. The Civil Code strikes a middle ground, creating a blend of the will theory and collectivist limits on the autonomy of the will.<sup>4</sup>

#### 1.1 The decline of will theory

Among scholars there is an acknowledgment of a decline in will theory based on three main points. First, in the Civil Code, the provisions addressing the will emphasize objective over subjective will (Article 513). However, many argue that this goes directly against traditional will theory. Second, contracts of adhesion, which will be discussed later in the book, are very much limits on individual behavior and choice. Adhesion contracts involve one party with most of the bargaining power with the contract written primarily to that party’s advantage. Because the second party is in a position of weakness and usually must accept the contract, the second party is not able to freely exercise his or her will. Third, all societies place limitations on contracts. Sometimes those limits are for public policy reasons. For example, in countries that have a minimum wage, even if the employer and the employee both agree, it is not legal to pay the worker below a certain minimum amount of money for his or her work.

Islamic law also provides certain limits on the freedom to contract. There are some types of contracts that some may consider acceptable from a personal will or choice standpoint, but that are forbidden by Islam. For example, Islam forbids the practice of **riba**, which is usually understood as **usury**, or the lending of money at extremely high interest rates. Broadly interpreted, *riba* is associated with unjust enrichment. There are also Islamic prohibitions against duress, fraud, and **gharar**, a forbidden form of contract where details about the sale item are not known, thereby introducing undue uncertainty into the transaction. Defects in contracts have to be measured against these Islamic standards, and not just a rigid conception of freedom of contract.

### Common Law Comparison

Just as the freedom of contract is modified by *fiqh* and *shari'a* in the Afghan civil law, the freedom of contract is moderated by the doctrine of **consideration** in common law regimes, where something of value must be offered by each party. Non-promissory principles of contract like reliance, benefit, and consideration, are all difficult to fit into the purest form of the will theory of contract because they do not always accurately express the will of each party. Those non-promissory principles can co-exist with the will theory, if we can accept that the will theory is not exclusive, but merely dominant, in contract law.

Different schools of *fiqh* limit contractual agreements to different degrees. The Hanbali school, for example, says that if the will of a party was affected by duress, the contract is void. In Afghanistan it is slightly different, since the country largely follows the Hanafi school. The Hanafi scholars rule that if the will of a party was affected by duress, the contract is **voidable**, meaning it is not automatically invalid as it is for the Hanbalis, but must be voided by the party whose will is affected.<sup>5</sup>

To keep out *riba*, to obtain justice, and to avoid **jahallat**, or ignorance, the juriconsults of the first centuries of Islam designed limitations on contract, made rules governing the structure of the contracts, limited freedom of contract, adopted the possibility of opting out of contracts, and allowed the nullification of a contract based on simple defects of consent and formality.<sup>6</sup> These protections by the juriconsults are in many ways antagonistic to the idea of autonomy of the will. It is possible in some cases, however, to reconcile will theory with Islamic prohibitions against certain types of commitments, by looking at the Islamic principles of intent and knowledge. One way to consider this is to say that Islamic contract prohibitions incorporate some elements of will theory into the Islamic principles on contracts. For example, if one party's knowledge about the contract's real lack of value is obscured, then it cannot actually be said to be an exercise of the autonomy of will.<sup>7</sup>

As you interpret the Civil Code, think about how far these Islamic principles of fairness and equity extend.

## 2. REQUIREMENTS FOR THE FORMATION OF A CONTRACT

We will see that contracts are versatile legal instruments: they can address a variety of different subjects and take a variety of different forms. But a contract must satisfy certain requirements if it is to create a legally binding obligation. Article 502 lays out those requirements.

### Civil Code

#### Article 502

(1) The condition for establishing a contract is the existence of two willing parties, communication indicating intent for contract, and the subject upon which the contract is executed.

(2) The conditions for the validity of a contract are the legal capacity of the two contracting parties, an enforceable subject for the contract, its usefulness, and its agreement with the public order and morality.

Article 502(1) lists three requirements for the conclusion, or creation, of a contract: (1) consenting parties, (2) offer and acceptance, and (3) the subject of the contract. Just because the parties have created a contract does not mean that it is legally binding. To be enforceable, a contract must also be **valid**. **Invalid** contracts are not enforceable. Article 502(2) identifies three conditions for validity that a contract must satisfy in addition to the conditions for conclusion in Article 502(1). The conditions of validity are: (1) the capacity of the parties, (2) a valid subject for the contract, and (3) a valid cause for the contract. These conditions of conclusion and conditions of validity will be discussed in detail in the chapters that follow.

Article 502 resembles a provision in the French Civil Code.

### **French Civil Code**

#### **Article 1108**

Four requisites are essential for the validity of an agreement:

- The consent of the party who binds himself,
- His capacity to contract,
- A definite object which forms the subject matter of the undertaking,
- A lawful cause in the obligation.

Note that Article 502 sets out the minimum requirements to establish a contract. For some contracts, the Civil Code or the parties themselves impose additional requirements for the establishment of a legally binding contract.

#### **2.1 Unilateral will**

While this textbook focuses on contracts, contractual obligations are not the only kinds of legal obligation. **Unilateral will** is a non-contractual legal obligation created by an offer that does not require acceptance.<sup>8</sup> The offer itself, independent of the offeree's acceptance, creates a legal obligation for the offeror. Unilateral will may also be referred to as a unilateral promise. Civil Code Articles 751 to 757 address unilateral will.

### **Civil Code**

#### **Article 751**

Unilateral will is subject to all provisions (rules) regarding contract, except in cases where the existence of agreement of will of two sides is essential for creation of pledge.

#### **Article 753**

Under certain circumstances a unilateral will creates an obligation or promise, and sometimes causes gain or loss of property, or causes gain or loss of permission for executing a legal action (or transaction), and sometimes causes using one of options (choices).

#### **Article 756**

A person who has promised a prize for performing a certain action shall be obligated to grant the promised prize to the person who has accomplished it, even if the action has been accomplished without consideration of the promise.

**Article 757**

If the promisor has not fixed a time period for the performance (accomplishment) of the action, he can revert from his promise before the person has performed (completed) the certain action. Demand for the award (prize) shall not be heard after 3 months from announcement of reversion.

Article 751 indicates that all of the rules that apply to contracts also apply to unilateral will, except those rules that involve acceptance of the offeree. According to Article 753, unilateral will can be used to generate civil obligations, transfer property, grant one person the power to create legal obligations for another person, and execute options.

Two examples of unilateral will are wills (i.e. testaments) and offers of reward. A **will**, or **testament**, is the “legal expression of an individual's wishes about the disposition of his or her property after death.”<sup>9</sup> A will is often a written document. A will binds the **testator**, or person who creates the will, even without any of the individuals who stand to inherit property upon the testator’s death taking any action.

Another example of unilateral will is an **offer of reward**, in which the offeror makes a public declaration that he will award a prize in exchange for some specific act.<sup>10</sup> In Afghanistan, the offeree, or the person who performs the requested act, is entitled to the prize even if that offeree did not know about the offer of reward (Article 756). The offeror can set an expiration date for the offer. If he has not set an expiration date and he reverts from the offer, offerees have three months to claim the prize. If three months pass after the offeror’s reversion, offerees can no longer claim the prize. The Code does not specify whether offerees who are aware of the offeror’s reversion at the time of their performance can still claim the prize (Article 757).

Imagine that Amanullah posts signs in the street promising 5000 Afghanis to the person who finds and returns his phone which fell out of his pocket as he biked home from school. After a few weeks, Amanullah gives up hope and takes down his signs. 2 months after Amanullah removes the signs, Amanullah’s friend, Rohullah, returns the phone even though he never saw the signs. Amanullah must pay Rohullah 5000 Afghanis.

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<sup>1</sup> Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy*, 100 COLUM. L. REV. 94.

<sup>2</sup> Oussama Arabi, "Intention and Method in Sanhuri's Fiqh: Cause as Ulterior Motive," *Journal of Islamic Law and Society*.

<sup>3</sup> See Randy E. Barnett, A Consent Theory of Contract, *Columbia Law Review*, March 1986, p. 269-321

<sup>4</sup> Anthony T. Kronman, Review of "A New Champion for the Will Theory Contract as Promise: A theory of Contractual Obligation" by Charles Fried, *Yale Law Journal*, Vol. 91 No. 2 (Dec. 1981), p. 404-423; see also Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, Harvard University Press, Cambridge, Massachusetts, 1981.

<sup>5</sup> Abdul Karim Aldohni, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia*, Routledge, New York, 2011, p.87-89.

<sup>6</sup> Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East*, Kluwer Law International, 1996, p.206.

<sup>7</sup> Lawrence Rosen, p. 145, *The Justice of Islam*, Oxford University Press, 2000.

<sup>8</sup> Pablo Lerner, *Promises of Rewards in a Comparative Perspective*, *Annual Survey of Int'l & Comparative Law* vol. 10 issue 1, Art. 4 2004, 53, 58-9.

<sup>9</sup> Black's Law Dictionary.

<sup>10</sup> Lerner, *supra* note 17, at 53, 61-65.

## CHAPTER 3: OFFER & ACCEPTANCE

### INTRODUCTION

The formation of a contract consists of connecting an **offer** and its **acceptance**, legally, so that the will of each party is perfectly clear to the parties involved – and those who must enforce it. In this chapter, we will examine these two basic elements of a contract: offer and acceptance. We will then consider the different forms each may take, and what conditions must typically be present for both components to be considered valid, and lead to formation of a contract. We will begin with the basic principles underlying offer and acceptance, and then discuss exceptions and special circumstances to their formation as a contract.

#### Civil Code

##### Article 506

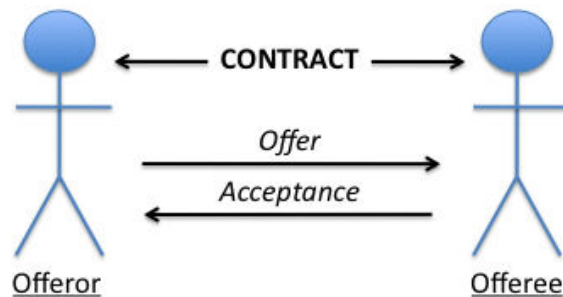
- (1) Contract shall be concluded with offer and acceptance of the two parties.
- (2) Offer and acceptance are the terms used customarily in authoring contract.

Article 506 states that offer and acceptance are necessary components of every valid contract. Offer and acceptance are the two actions that join two or more parties in a legally binding agreement. While each may act be carried out or conducted in a variety of valid ways, depending on the context and culture, any conduct that can be understood as either an offer or acceptance should generally be defined as such. As we will discuss in the following chapters, though, Afghan contracts require additional elements in order to be enforceable, including the proper capacity, subject, and cause.

The Mejele also defines a contract as the concept to which parties bind themselves in undertaking a particular matter together; under that regime, a contract is similarly comprised of offer and acceptance.<sup>1</sup>

#### Diagramming a Contract

*As we work through this chapter, keep this basic picture in mind:*



Contracts will certainly get more complicated, but those will be easier to manage if you always think about these basic required elements.

## 1. OFFER

An **offer** is the expression of someone's willingness to enter into an agreement. It allows another person to understand that if he or she agrees to the terms of the offer, the proposed arrangement will go into force between the two people. It is a proposal from one person to another, where, if the second person accepts the proposal, it creates an **obligation** between them. An obligation is legal duty or liability owed by one party to another. The offer is an indication that the person extending it will do something (such as pay money) or refrain from doing something he has a right to do, in exchange for another particular thing in return. The offer is the first step to a contract. The critical aspect of any offer is the intention or determination to follow-through on what is proposed. This is related to what the previous chapter discusses in the section on Will Theory. An offer is the first official expression of one of the parties' wills. With the sale of goods, the MeJelle defines an offer as the first statement made with a view to making a **disposition** of property, when that disposition is proved or completed. A disposition is a change in ownership.

We see offers made every day. Consider the following statements, each of which is a valid offer:

- *Aatifa says to Brishna: "I will sell you this book for five-hundred Afghanis."*
- *Aatifa says to Brishna: "I will pay you ten-thousand dollars if you do not build a dam upstream from my business."*
- *Aatifa posts a sign: "I will pay five-hundred Afghanis to whoever finds my watch."*

### The Handshake as a Symbol

In Western culture, a handshake is a simple gesture that often signals an agreement between two people (traditionally, it showed that neither person was carrying a weapon and meant the two people agreed to a peaceful interaction). The handshake can be viewed as a traditional, or societal, expression of agreement or acceptance of an offer.

An **offeror** is someone who makes the offer (Aatifa in the examples above). An **offeree** is the party to whom the offer is made (Brishna in the examples above). Both an offeror and offeree are necessary for a contract – one role does not exist without the other. It is possible to have multiple offerees at once, although the offeror usually must be able to specifically articulate to whom the offer applies in order for it to be valid. For instance, the reward Aatifa posts is an offer to anyone who may find and return her watch; if someone sees her sign, finds the watch, and returns it to her, Aatifa will owe that person 500 Afs. An offeror always bears an obligation in a contract.

When someone makes an offer, she creates **the power of assent** in someone else. If the other party agrees to the **proposal** as stated by the first party, then offer and acceptance are valid, and the first step of a contract is formed. If the elements of capacity, subject, and cause are also proper, a contract will result. The power of assent gives someone receiving an offer the ability to confirm the agreement as it is described, and create the contract. Since a contract exists inherently in two parts, the offer is necessarily the first half. An offeror has a responsibility to frame offers carefully, because these are the terms and expectations which will be used to govern the arrangement in action, and she may not change the terms of the offer after it has been accepted.

In the handshake analogy, when someone extends her hand, it is taken as an offer. Once the hand is extended, it has social implications. If the other person sees it and agrees to what she believes the offeror is offering, she can complete the handshake by grasping the first person's hand. In this case, the power of



assent gives the offeree the ability to agree to the social implications of the gesture by completing the handshake.

The intentions, or will, of both the offeror and the offeree must be considered when evaluating whether a particular act amounts to an offer. The offeror starts that process, but the offeree's response reflects her own understanding of the interaction. The offeror is typically the "master of her own offer." This means she can shape the terms however she sees fit. The offeree does not have to agree to those terms, however, in which case no contract will be formed. Since the offer defines the terms of the agreement, the offeror may have the flexibility to phrase it to meet her own needs. The offeror has that ability to compose the initial terms of the agreement. Because of this, courts may be inclined to interpret ambiguities against the offeror – or favor the offeree's position if a term is unclear. What is the reasoning behind this tendency? Perhaps, if the part they don't agree on was important to the offeror, she should have been more deliberate in constructing the terms to reflect that. It is also a warning to offerors to use precise language, so they do not mislead potential offerees. In Islamic jurisprudence, we give emphasis in contracts to intention and meaning more than words and phrases.<sup>2</sup> How do we interpret a party's meaning? How might this shape the way a court judges an offer?

#### Civil Code

##### Article 514

Every person shall be liable for his offer, unless he clearly expressed negation of his liability, or the lack of liable intent is evident from the apparent indicators or the nature of transaction.

Offers are assumed to be binding.<sup>3</sup> A person who extends an offer to enter into a contract can be held to the terms she states, unless she (a) **revokes** or withdraws the offer before she knows the other party has agreed to it or (b) clearly states in advance that she is not yet bound by the proposal, or (c) it can be readily determined from the circumstances that the offer has extinguished. In the second instance, it is not always clear whether an offer was actually made. The term "offer" inherently encompasses that person's intention to be bound by the terms she proposes. An action without that objective can be seen as a **solicitation** – just an expression of *interest* in making a contract opposed to an offer to do so. We will reconsider this idea of solicitation more below. Generally, as smoke evidences fire – so also, an offer denotes an intention to be bound.

In a contract dispute, a court may have to determine whether the initial proposal formed an offer, and whether that offer was binding on the offeror. If the initial proposal was not a valid offer, a binding contract will not result. As you will see through the examples in this book and in your own experience, a party's intention to be bound may not always be straightforward. Courts may have to analyze the context of the parties' interaction in order to decide whether either party was reasonable to assume a proposal was intended to be binding. What factors might persuade you that the contract was in force? Would it matter if the arrangement was commercial or personal?

#### Civil Code

##### Article 516

- (1) Whenever a period is fixed for acceptance, the offeror cannot withdraw his offer before the end of the determined period.
- (2) In case of absence of stipulation of the period, acceptance can be specified from the apparent indications or the nature of the transaction.

### Article 517

Contractors, after the offer and until the end of the contracting session, have authority to either accept or reject it. If the offeror, after sending the offer and before acceptance of the offeree, reverts from his offer, or one of the parties acts or says such a thing that indicates relinquishment of (withdrawal from) acceptance, such an offer shall be void and acceptance after that shall be void as well.

Article 516 identifies how long – if at all – an offer must remain open for an offeree to accept.

**Revocation** is the withdrawal or cancelling of an offer – it is a statement by the offeror that she no longer intends to be bound. If an offer to contract states that it can be accepted within a certain period of time, it cannot be revoked until that time period has expired. If no time period is stated in the offer, courts and parties must use the context of the exchange to interpret how long the power of assent should reasonably extend. This may involve reviewing common practice or the nature of the agreement to decide how long a similar offer would logically stay open. We would expect offers for perishable products (such as vegetables) to expire quickly, while offers for durable items (such as steel or plastic) may be held open for longer periods. Likewise, we may expect offers for relatively costly or complicated exchanges to be available longer, as interested parties probably need to save money or consider more significant tradeoffs before they can accept. For instance, an offer to sell fruits at a certain price might only be applicable for a short period (perhaps a day), while the offer to hire a new school teacher at a particular salary would reasonably last longer (perhaps months). Article 517 further specifies the particular revocation rules for offers made to contractors: by default the offers remain open for acceptance for the duration of the season relevant to the contractor's craft.

### Discussion Questions

In the common law, offers themselves are less binding and may be withdrawn or changed until they are accepted. How does the more binding nature of offers in the civil law system facilitate the purposes of contract? Think about how this variation between civil and common law might influence someone making an offer.

Most offers are assumed to **expire**, or cease being valid, eventually. Once an offer has expired, it is no longer in effect and there is no power of assent. It cannot be revived or re-issued unless the offeror makes the same offer again. In many countries, an offeree can keep an offer open longer (sometimes indefinitely) if they give an assurance in exchange upfront. This is essentially a contract to defer a contract to a later time without risking the terms as stated in the present. In international law, this is called an option contract because the offeree is paying to have the **option**, or choice, to agree to this contract later.

### Discussion Questions

1. Why do we assume that offers expire?
2. In what circumstances might you be willing to hold your offer open?

### Civil Code

#### Article 518

Whenever the offer, before acceptance, is sent repeatedly, credibility shall be given to the last offer.

If new offers are made before a previous offer is accepted, only the terms of the most recent offer are typically valid. The content of a previous offer may be considered when analyzing the more recent offer, but the older terms no longer form an offer, and may no longer be accepted. Since the wording was changed, they do not reflect the offeror's current intent to be bound. For instance, if Aatifa initially offers Brishna a goat for 5000 Afghanis, and later changes the price to 6000 Aghanis and then 7000 Afghanis. We assume she only intends to be bound by contract if Brishna accepts the higher price of 7000 Afghanis. The changes indicate that she did not misspeak when she raised the price – it was intentional. Moreover, we may guess that the goat is more valuable now (perhaps other buyers are willing to pay more, or there are fewer goats for sale elsewhere).

In Islamic jurisprudence, the offeror's descriptions of items for sale are less important when the item in question is actually present.<sup>4</sup> If the item is not available to be reviewed by the offeree, though, the potential contract is based on the details of the description. For instance, if I am offering to sell you a bicycle that is blue, but I've described it as red – the offer is valid if the bike is in front of us (and you can see that it is blue). The offer may not be valid, though, if you have not seen the bike, and I've incorrectly described it to be red.<sup>5</sup>

### Civil Code

#### Article 509

Expression of will takes place orally, in writing, or by customarily used signs. Will can also be expressed through transactions that clearly connote the reality of a contract.

#### Article 510

Expression of will may take place implicitly, unless the law or the contracting parties make its explicitness a condition.

#### Article 513

The will expressed contrary to one's conscience shall not be considered void except when the opposite party has the knowledge of contradiction of the person's expressed will or the his intent.

Recall that in the last chapter we discussed how the will of a contracting party may be conveyed in many forms: oral, written, signal, or action. An offer is essentially a conveyance of will by the instigating party. The offer conveys the party's intention to be bound to the terms as specified – both to the intended recipient, and to others whom the offer affects.

### Comparative Note: International systems

How is the Afghan definition of an offer similar and different from conceptions in other countries? What factors might influence how offers are defined or interpreted? Compare the international definitions of valid offers below with the Afghan law:

#### UNIDROIT Art. 2.1.2<sup>6</sup>

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.<sup>7</sup>

#### European Contract Law Article 2-201

(1) A proposal amounts to an offer if (a) it is intended to result in a contract if the other party accepts it, and (b) it contains sufficiently definite terms to form a contract.

(2) An offer may be made to one or more specific persons or to the public.<sup>8</sup>

## 1.1 Offer or mere solicitation?

The basic concept of an offer may be straightforward, but there are more complex variations of similar actions that may or may not qualify as offers. One important distinction to draw is between an offer and a solicitation. A solicitation is a simpler request; it lacks the intention to be bound. It could be the first step in engaging a potential offeree, but the act itself is less formal than necessary to establish a contract. It lets other parties know that someone may be willing or interested in entering into a transaction, but is not yet committed to particular terms. This distinction is not always clear, and you should go back to the components and purpose of an offer when differentiating between an offer and a solicitation. Can you think of an example of a solicitation that is not a clear offer?

### Are Advertisements Offers?

Is a business advertisement a valid offer? Under the United Nations Convention on the Contracts for International Sale of Goods, “[a] proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.”<sup>9</sup>

In both civil and common law systems, mass catalogues or store-window promotions are theoretically not considered binding offers because there are not specific offerees. However, there are often exceptions in both systems. In France, Belgium, and Luxembourg, prices listed on displayed goods in a store are traditionally interpreted as offers, whereas in England and Germany they are solicitations for offers.<sup>10</sup>

Whether an advertisement is an offer may depend on many factors, including how specifically the advertisement is phrased, to whom the promotion is conveyed, and the nature of the exchange. In *Johnson v. Capital City Ford Company*, a case from the United States of America in the 1950s, the court decided that a specific advertisement could be an offer.<sup>11</sup> In the case, a car dealer’s newspaper advertisement said that people who bought a car before a certain date could exchange it for the next year’s model when the new line came out. The company later claimed that this was an invitation to bargain along such lines, but the courts found that the detailed constraints listed in the advertisement conveyed the intention to be bound by those words.

A classic case in common law is *Carlill v. Carbolic Smoke Ball Company*, an English case from 1893. In this case, a business offered £100 to anyone who got sick with the flu after using its product. A customer brought a lawsuit after buying the product, following the instructions, and then still falling ill with the flu. The lower court found that the advertisement was a valid offer. The offer was specific, because it only applied to those people who actually bought the product. Moreover, buying the product and using it correctly invoked the power of assent. The consumer paid money based on this offer, and the company profited. The company also claimed it had guaranteed the £100 with funds at an established bank, which conveyed its intention to be bound by the advertisement.

## 2. ACCEPTANCE

**Acceptance** of an offer is the manifestation of assent to the terms made by the offeree, in a manner invited or required by the offer. Simply put, this is the act of agreeing to someone else’s proposed arrangement. If extending one’s hand is an analogy for an offer in the Western handshake metaphor, grabbing hold of that hand is the analogous acceptance. In the portion of the Mejlle on sales, acceptance is the second statement made with a view to making a disposition of property; it completes the contract.<sup>12</sup>

An offer may only be accepted by the person to whom it is directed (an offeree). The offeror had to intend to create the power of assent in the person who accepts it, and intend to behave according to the terms of the agreement, for a valid contract to exist. As we've discussed before, one offer can be extended to many offerees – but we still have to be clear about the criteria that defines any legitimate offeree. Logically, someone can only accept an offer if it was actually intended for them. After all, wouldn't someone think it was odd if anyone other than whom she extended her hand toward reached in and grabbed her hand to complete the handshake?

### Civil Code

#### Article 519

The person to whom the offer is directed, can reject the offer. If the offer is sent at his own request, he cannot reject it, except when he has reasonable reason for its rejection.

If a person towards whom an offer was made can accept it, she may also reject it. Otherwise the initial proposal would instead be a command; without the independence to agree or disagree, there is no capacity to contract. If a person rejects the offer, there is no contract between the offeror and the offeree.

The latter part of Article 519 is more complicated, though. Why can someone not reject an offer he requested to be sent? Practically, think back to the value of contracts in a society. Technically, requesting an offer may itself actually be an offer to contract. If the request does not propose specific terms, it is at least a solicitation for a contract.

#### Case Example: An Offer for an Offer

Consider the following example<sup>13</sup>: Poya requests a set of wheels from Badria, a wheel manufacturer whom he had read about but had never done business with before. No price was mentioned in his inquiry. Badria is in the business of regularly selling wheels and sends the number desired to Poya, the buyer. Poya then uses or resells the wheels as a part of his own business. Badria sends the bill for the order, but Poya disagrees because he had expected to pay a discounted price per wheel since he was buying so many.

The original inquiry could be considered an offer. Since the standard price was available, Poya (the buyer) should have made different terms clear in his initial letter. Badria (the seller) was logical in assuming the request was an offer, accepted it, and fulfilled her part of the arrangement. Even if the original request was only a solicitation, sending the goods was an offer; Poya accepted this offer in keeping the wheels. If he didn't agree to the price Badria openly publicized, he should have immediately rejected the wheels.

As we discussed Article 509 above with reference to offers, acceptance can come in many forms. It is generally valid if in writing, by words, or customary signs. In Islamic jurisprudence, a sign may be as binding as written acceptance; if that arrangement is recognized by custom, it is regarded as a complete contractual obligation.<sup>14</sup> Affirmative, explicative, or written acceptance is often preferable because it makes the intent of the parties more clear. While form has some flexibility, you should note that certain legal system may require the terms of certain types of contracts to be in writing. Why might this be important? In what contracts might you require explicit acceptance in writing? In the previous chapter, we briefly mentioned the article 502 **formality** concerning the formation of a contract. Below we shall cover a few further formalities relating specifically to offer and acceptance.

Acceptance may also be conveyed by an act that clearly communicates that an offer exists. When might this happen? Suppose Fila tells Negar that she will sell her laptop for seven-thousand Afs; Negar does not say anything, but immediately hands Fila seven-thousand Afs. Is there a contract in force for the sale of this laptop? Yes. Although Negar has not said “I accept”, her actions clearly indicate acceptance. Note that such acts conveying acceptance can be broad, but the offeree must always act in a way that shows she has accepted the specified terms and believes the contract to be in force.

Accordingly, one such format of conveying acceptance would be for the offeree to commence the obligations on her side of the contract. This is an instance of implicit acceptance that is called performance, meaning that the offeree can accept the offer by performing her part of the agreement. For example, suppose Fatima tells Mujib that she wants to lease her stall to him at the weekend market for eight-thousand Afs per month; the next Friday morning, Mujib sets up in this stall. Has he accepted her offer? Yes – he is acting as though the contract exists, and thus we can assume he understands and has accepted her terms. Similarly, in scenarios where the matter is discrete or time-bound, performance may be adequate acceptance. If an offeror invites acceptance by performance, and the nature of the agreement implies that the task will be finished once it is started, then an offeree accepts the contract when she starts performing her obligations. Be careful to recognize the various components of this type of contract: the offer’s terms should make clear that it can be accepted by performance and the performance should be one where starting it indicates it will be completed. Can you think of performances that match this criterion? Consider everyday examples (e.g., a baker mixing ingredients for someone who has requested a specific dessert) and more complicated business transactions (e.g., quitting one’s current job or investing in an expensive new facility). Once the offeror is informed the offeree has commenced performance, the offeree has accepted the offer.

Acceptance may take place implicitly, unless the offeror says that the offer must be explicitly accepted before it is effective. Does this fit with what we have already discussed regarding offers and contracts? What problems would result if an act of assent by the offeree was always sufficient to convert an offer into a contract? Should an act be sufficient expression to convey the party’s intent?

### Civil Code

#### **Article 525**

No words shall be attributed to the silent person. In a situation that silence needs explanation, it shall be considered acceptance.

#### **Article 526**

Silence shall be considered acceptance when there are prior transactional relations between the two parties, and offer, as well, is made based on these relations, or the offer is in sole benefit of the opposite party.

In Article 525, the Code holds that silence carries no affirmative meaning. This is the default. However, Article 526 explains that there are scenarios in which silence can be sufficient for acceptance.

This more broadly reflects that principle that an act may qualify as acceptance, even if that act is to remain silent. While affirmative acceptance is normally required, there are circumstances in which silence carries the specific intent required for contract. Silence is more readily interpreted as acceptance in two general situations. The first is when the contracting parties have made many contracts in the past, and it is logical to assume they are familiar with the other’s terms and practices. In this case, the offeree would theoretically voice her opposition to the terms before continuing with a fresh contract, because there is



less doubt that she was aware of any offending terms. When we have continuing relations with the party or are in the habit of **renewing** an agreement at certain times, we might not think to affirmatively accept the offer every time we want to accept it. The second situation in which silence can constitute acceptance is when the offer is made to benefit the offeree. If the individual would gain without compromising or losing anything else, we more readily assume his acceptance unless he voices opposition. Moreover, if something in the contract were to be contested later, it would be problematic if he could suddenly deny that a contract existed in order to suit his convenience. Of course, there are always exceptions to these generalizations. Can you think of other instances when the courts should accept silence as acceptance?

### Should Silence Be Considered Acceptance?

In Afghan law, courts may be more willing to accept silence as acceptance if the offeror and offeree have arranged many contracts between them in the past. This tends to be the trend internationally, but courts do not have to recognize silence as acceptance between two familiar businesses.

In 2007, an appellate court in the Netherlands heard a case brought between the buyer and seller of a large industrial machine.<sup>15</sup> The parties had been contracting regularly with each other on commercial matters. With this machine, the seller included a notice that the machine belonged to the seller until it was fully paid for by the buyer (who was paying for it in installments). This meant it was not to be resold or used as financial insurance for a loan by the buyer. However, before paying the full price of the machine, the buyer leased it to a third company. The seller brought a lawsuit against the buyer, arguing that the buyer had unlawfully used the seller's property for profit.

By accepting the machine but not commenting on this aspect, did the buyer properly agree to the offer?

The court ruled that this particular term was not common amongst businesses, and therefore was not accepted by silence. The seller should have made these terms clear in the original offer if it wanted to enforce such a condition on the buyer – the notice on the machine was too late to be a binding part of the contract.

### A Common Example: Act as Acceptance

When we rent property from someone else, there are often many terms involved in the agreement. If someone moves in or continues to live on the property, we may assume they have accepted all the terms of the offer. The act of inhabiting the place may be considered sufficient to communicate that a contract exists. Likewise, a tenant might believe a contract to stay continues to exist as long as the landlord cashes rent checks. If a tenant is living somewhere and paying the rent, and the landlord is accepting checks without protest, we readily assume a contract is in force between the two parties.

In *Arms v. Rodriguez*<sup>16</sup>, The Supreme Court of Louisiana, a state in the United States of America, held that by cashing checks written by the tenant for rent, the landlord accepted the tenant's offered rent, and implied through his actions that their contract remained valid.<sup>17</sup> Even though the landlord asserted that the tenant was in violation of the contract, his act of repeatedly cashing checks did not effectively communicate that the contract was suspended. Therefore, he could not evict the client until he gave him proper notice that their rent contract was no longer in effect.

While offers are generally binding, they are **irrevocable** (i.e. they cannot be withdrawn or cancelled) if a time period has been established for acceptance (until that time has expired). As an offeree, when might you pay to be able to accept the terms of an offer at a later time?

### Comparative Note: International systems

Reconsider what constitutes acceptance under Afghan Law. When is acceptance valid? How might this be influenced by culture and history? Compare the Articles 509, 510, 519, and 526 with the following international provisions related to acceptance:

#### UNIDROIT Art. 2.1.6

- (1) A statement made by (or other conduct of) the offeree, indicating assent to an offer is an acceptance
- (2) However, if by virtue of the offer or as a result of practices that the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.<sup>18</sup>

#### Principles of European Contract Law Article 2:204

- (1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer
- (2) Silence or inactivity does not in itself amount to acceptance<sup>19</sup>

## 2.1 Reception theory

Acceptance forms a binding contract, but exactly when does a contract generate legal effects? Contract timing can depend on more than when an offer is made and accepted. It may also matter when news of revocation or acceptance is sent, and when that news reaches the other party. This is particularly important when the offeror and offeree are not in the same location, and the communication is not simultaneous. This is an increasingly common and complicated issue, given the increasing number of international contracts and the global nature of transactions. As we approach the next section, keep in mind the different components of contract that we've discussed:

### Civil Code

#### **Article 511**

Expression of will shall be effective when the opposite party acquires knowledge of it. Arrival of expression of will to the opposite party indicates acquisition of knowledge of it, unless a reason, contrary to it, exists.

#### **Article 523**

- (1) Contract between two absent parties shall be considered complete whenever and wherever the offeror acquires knowledge of acceptance of the opposite party, with the condition that neither the parties nor relevant provisions of law have specified otherwise.
- (2) Acceptance, at mere moment of arrival to the offeror, shall be assumed such that the knowledge of it has been acquired.

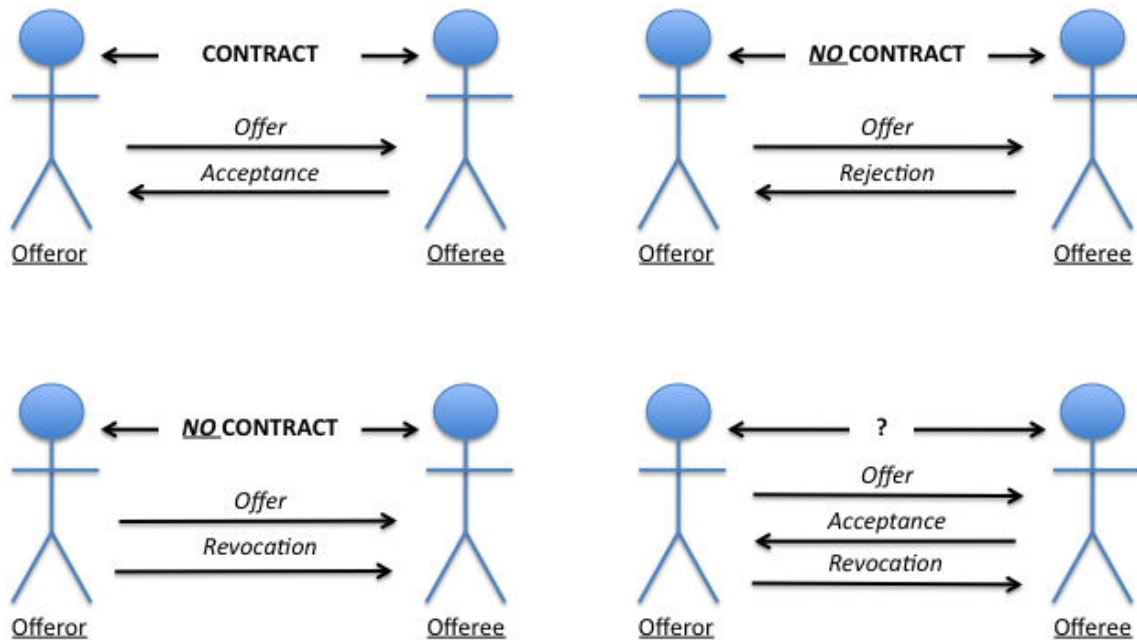
#### **Article 524:**

Contract through telephone or similar means shall be considered, with respect to time, as contract between two present parties, and with respect to place, as contract between two absent parties.

Offers and acceptances are officially binding when received by the other party. Timing is important. The ability to accept an offer is based on when the offeree receives it, and whether she knows if it was revoked after being made. Likewise, the withdrawal of an offer depends on if the offeror knows it has reached the offeree and she has accepted it.



Let's return to our original diagram to keep track of the various acts each party may take, and whether that means that a contract exists:



If it takes many days for communications to reach the other party, how do we determine when an offer or acceptance has been received? What if the offeror sends a notification to withdraw an offer on the same day an offeree sends notice of her acceptance of the original terms, but neither gets the other's news until many days later?

In Afghanistan, and many other civil law systems, we follow **reception theory**. This means that an action in a contract is binding only when the other party receives notice, and is actually aware of the will of the other party. An offer is valid when the offeree receives it, as is any revocation of that offer. Likewise, an acceptance is valid once received by the offeror. Once a party receives the news, we assume they are aware of the contents and the consequences (even if they have not actually read it). A contract is complete on the date the offeror receives the other party's acceptance.

Let us return to our example from the previous chapter of founding your own law office. Consider the scenario where you find a building you that would like to rent. The person who uses it now mails you an offer on January 1st, but writes that other buyers are interested and she will rent it to the first confirmed buyer. You receive her letter on January 5th. Her offer has the terms you are willing to accept, but no guarantee those terms will remain available. On January 6th, you accept the offer, and send the offeror a letter by mail. On January 7th, someone else goes to see the office in person and agrees to the offered terms immediately. That evening, the current owner sends you a note politely revoking her original offer, and informing you the office is no longer available. You receive her revocation on January 11th. She receives your acceptance letter on January 12th. Do you have a binding contract? Can you take her to court for giving your office to someone else?

Here is a summary of the exchanges that have taken place between the parties:

- 1 January: Landlord sends offer
- 5 January: You receive the offer
- 6 January: You accept the offer

- 7 January: The offer is revoked
- 11 January: You receive notice her revocation
- 12 January: The landlord receives your acceptance

Technically, the offer was withdrawn before it was accepted. This is because you received her revocation on January 11<sup>th</sup> – at which point the offer ceased to exist. Thus, no contract would have formed between you and the landlord. She did not receive your acceptance until January 12, after revocation has become effective. If you felt this was not right, what arguments might you make to a judge?

### Case Example: Cancelling a Lease

The reception theory applies to forming and breaking contracts. Consider facts similar to that of a German leasing agreement<sup>20</sup>: A lease on warehouse space had to be cancelled one year in advance, if rent was not going to be paid. The individual renting a warehouse sent a note to the landlord on June 29, 1995 explaining that he would be terminating the contract from June 30, 1996. The letter arrived at the landlord's house that day, but the landlord and his family were away on vacation. The renter failed to pay rent for July 1996, and the landlord brought a lawsuit for the money.

The court found that the renter had validly cancelled the contract, and was not obliged to pay rent after July 1996. Even if the other party were not present, the notice was considered received after it entered his **zone of control** – if the landlord had been at home, he would have been able to read the notice. The sender reasonably expected that the note would arrive at the address it was sent to, and should not have expected that the landlord would be absent. It is not the renter's fault the landlord did not receive note, as he had officially received it under the reception theory.

An increasing number of contracts are being proposed, negotiated, and affirmed over the internet. How should reception theory apply to emailed communications? How should a court determine when an email has entered the other party's zone of control? Should it be when the note reaches the other party's data server? When it is downloaded into the other party's inbox? When the email is actually opened? Electronic mediums can lower the cost of transactions and expand the reach of parties who can connect through contracts, but our legal systems will also need to adapt to changing definitions that will emerge with advancing technology. Keep this challenge in mind as you work your way through the contracts concepts in this book.

### Comparative Note: Alternatives to Reception Theory

For countries that do not follow the reception theory, what alternatives are there on contract formation? At what other point, besides reception of acceptance by the offer, might you consider a contract binding?

There are at least three other ways of determining when a contract is formed<sup>21</sup>:

- A) Externalization/ declaration theory: when the offeree decided to accept
- B) Dispatch/ transmission theory: when the offeree sends her acceptance
- C) Information/ knowledge theory: when the offeror knows the offeree has accepted

Many common law systems consider a contract binding once the offeree sends news of her acceptance (B, above). In the United Kingdom, this is referred to as the postal rule – the acceptance is valid from the point it is posted to the offeror; this is an exception to the reception theory carved out for submitting acceptances. The United States uses the same system, but calls it the mailbox rule – the acceptance is valid once it is dropped in the mailbox. Practically, this means that an acceptance posted by the offeree is effective, even if a revocation has been sent but not received (unlike our example of the landlord, above).

The United Nations Convention on the Contracts for International Sale of Goods tries to follow a balance: Acceptance is effective when it reaches the offeror, but an offer may not be revoked if the revocation reaches the offeree after it has dispatched acceptance.<sup>22</sup>

In addition to Afghanistan and other civil law countries (e.g., Germany<sup>23</sup>, the Netherlands<sup>24</sup>), UNIDROIT and CISG tend to use reception theory. What are the merits and challenges of each in not only making a contract, but later judging if one existed between two contending parties?

## 2.2 Counter-offers

### Civil Code

#### Article 520

If an acceptance brings increase, criticism, or modification in an offer, such acceptance is considered rejection of the offer, and shall be considered as a new offer.

#### Article 521

Conformity between offer and acceptance shall be achieved when the two parties agree on all basic issues of the contract. Agreement on some of those questions does not suffice for binding the two sides.

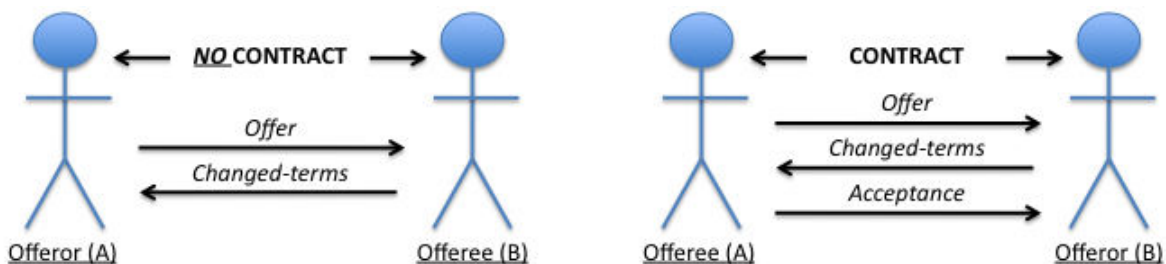
#### Article 522:

(1) Whenever both parties agree on all basic issues of the contract, and postpone the detail of issues to the future, such a contract shall be considered complete, unless completion of the contract is conditioned to agreement on detail of issues.

(2) If parties have a dispute over issues that they haven't previously agreed upon, and file lawsuit, in such circumstance the court shall decide the suit with consideration of nature of the transaction according to provisions of law, custom, and justice.

If an acceptance changes the terms of the offer, it is considered as rejection of the original offer. The altered terms are now a new offer, a situation known as a “counter-offer”. In this situation, the original offeree becomes the offeror.

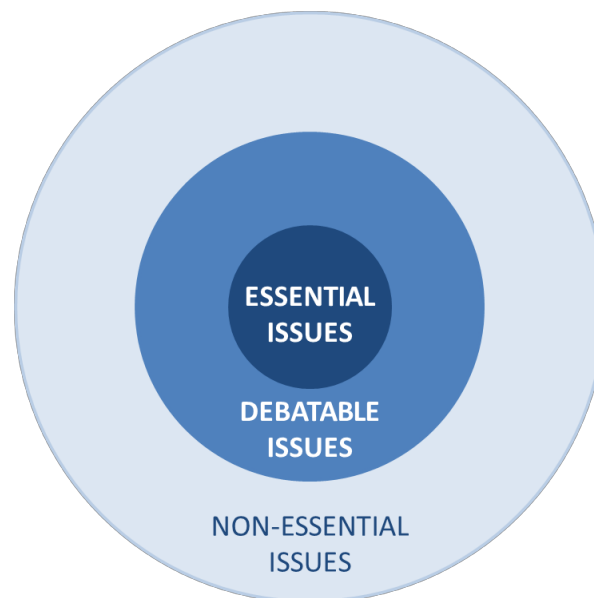
Remember, the new offeror (the party altering the terms) is the master of its own offer. The other party (the initial offeror) does not need to accept the terms of this new arrangement. The original offer is no longer valid, unless one party offers it again and the other party decides to accept. This debate over terms can go back-and-forth many times; it can occur within moments or over long periods; it can happen more casually in spoken conversation or in written documents. When analyzing these more complicated contracts, remember to order each counter-offer as a separate offer that resets the potential arrangement; if you keep track of who is making the offer at each point, it is easier to judge the governing contract. Let's consider how this alters our basic diagram:



In more complicated contracts, there are many terms on which the two parties can disagree. More than just the good or service to be exchanged and the price to be paid, more sophisticated contracts cover other factors, such as the acceptable methods/ timing of payment or the court(s) which will hear disagreements in the terms. These may seem small or immaterial, but disagreements on such matters could be found to affect the validity of the contract. Under Afghan law, we evaluate whether the term is a basic or essential issue of the contract to decide whether the contract has been properly constituted. Only if there is agreement on all of the essential issue is the contract binding on parties.

#### Discussion questions

1. According to Article 521, how would you define basic issues in a contract?
2. Should every difference in terms constitute a new counter-offer? Alternatively, is it better to instead interpret a variation as general acceptance (with further details to be agreed)? To what degree should the language of acceptance exactly match the offer?
3. If a party can always claim that a small difference had nullified the contract, would that affect our public policy motivation for contracts?
4. What factors should a judge consider if a lawsuit arises under Article 522?



While the notion of agreement on the essential issues may seem straightforward in theory, in practice the line between essential and non-essential issue is certainly far from clear. This is because parties often have different reasons for entering into a contract. Thus, what one party deems essential may be viewed as inconsequential by the other party, and vice-versa. Parties may choose to enter into a basic contract by agreeing on the essential issues but agreeing to leave additional terms open for debate. This is a binding arrangement for the parts to which they have agreed, unless one of the parties initially clarifies that it would like all the terms confirmed before it considers the contract valid. When and why might this flexibility be useful?

### Case example: Changed Terms as Counter-Offer

In many commercial contexts, buyers send offers to purchase a certain quantity of a good at a certain price from a seller who is known to produce the good. Depending on the relationship of the buyer and the seller, the seller may accept by returning a signed copy of the contract or simply send the goods with a bill for payment (the invoice).

In 1995, the German Court of Appeals held that returning an order of a different quantity from that originally requested was rejection of the original offer and a counter-offer on new terms. An Italian company ordered 3,240 pairs of shoes from a German shoe manufacturer. The German shoe manufacturer sent back 2,700 pairs of shoes. The Italian company sold these, but then sued for the remaining number they had requested. The court found that delivery of a different quantity of the good materially altered the terms of the offer. Accordingly, the seller's delivery had to be interpreted as a rejection of the offer by the buyer and constituted a counter-offer. Since the Italian company had accepted this offer by receiving the goods, the contract only extended to the 2,700 shoes. The seller was not obliged to fulfill a request for more shoes.<sup>25</sup>

### 3. FORMALITIES FOR OFFER AND ACCEPTANCE

As discussed earlier, according to Article 502, the minimum requirements for the creation of a contract are the consent of the parties expressed through offer and acceptance, the capacity of the parties, a valid subject, and a valid object. In some cases the Civil Code or the parties themselves impose additional requirements which must be satisfied in order to create a valid contract. Requirements relating to the visible form of a contract are called **formalities**. Examples of contractual formalities include putting a contract in writing and having people who are not parties to the contract witness its formation. As the following articles illustrate, the Civil Code does not impose strict guidelines regarding formalities.

#### Civil Code

##### Article 506(2)

Offer and acceptance are the terms used customarily in authoring contract.

##### Article 507

Offer and acceptance shall be in past tense; and is also permitted to be in present tense or imperative provided that the present tense is intended.

##### Article 508

Contract shall be concluded in future tense when the contracting parties have intended to author a contract in the future tense.

##### Article 509

Expression of will takes place orally, in writing, or by signs customarily used. Will can also be expressed through a transaction which clearly connotes the reality of a contract.

Articles 506, 507, and 508 relate to the form in which offer and acceptance should occur. Article 506 expresses the Code's preference that parties use the terms "offer" and "acceptance." Articles 507 and 508 establish grammatical rules for offer and acceptance. But Article 509 has broader implications. It allows parties to use a variety of ways to create a valid contract. Spoken words, written words, actions, and even silence can result in legally binding obligations. Under most circumstances, the Civil Code does not

impose strict requirements regarding formalities. As long as the parties' intent is clear, the Code is usually not concerned with how they express that intent.

Consider this example. Masood approaches his cousin Abdul and says, "I will give you 100,000 Afs for your car." Abdul responds, "Ok. That is a fair price." Masood pays Abdul and drives the car away. Later that week, Masood decides that he does not need a car, and he wants his money back. He tells Abdul that because their agreement was not in writing, it was not an official contract and that Abdul must accept the car and return Masood's money. Is Masood correct? Now imagine that after Masood makes his offer Abdul does not say anything but only nods and shakes Masood's hand. Does this set of facts change the outcome?

In both cases, Masood and Abdul have made a binding contract, and Masood cannot get his money back. According to Article 509, a contract can be formed through spoken words and actions. A written contract is not required.

### Civil Code

#### Article 1180

The ownership of an endowed property shall be proven when the property is completely detained. In case the endowed property is immovable, writing the contract on a formal paper shall be essential in order to conclude the endowment contract.

Article 1180 describes a contract for which the Code demands formalities in addition to the minimum requirements of Article 502. Article 1180 indicates that a gift of immovable property is not valid unless the parties create a written contract.

Parties can also condition the validity of performing certain formalities not otherwise required by the Code. Why would parties choose to make it more difficult to create a legally binding agreement? Formalities can serve at least three purposes: evidentiary, cautionary, and channeling.<sup>26</sup>

First, if a dispute arises after the formation of a contract, formalities provide evidence of the existence and terms of the contract. A written contract or witnesses to the contract's formation can help resolve contract disputes in which the outcome would otherwise depend solely on the testimony of the parties themselves. To return to the previous example, if Abdul refuses to return Masood's money, Masood might sue and claim that their oral agreement included a condition allowing Masood to return the car within a certain amount of time. Masood is less likely to prevail on his claim if Abdul can show the court a written agreement or produce witnesses that disprove Masood's story.

Second, formalities can encourage the parties to exercise more caution before assuming legal obligations. By introducing a degree of ceremony into the process of contract formation, formalities may prompt the parties to take their promises more seriously. Formalities also take time and money. They act as legal speed bumps, forcing the parties to slow down and consider the wisdom of the agreement that they are pursuing. If Abdul had required Masood to sign his name to an official document or to finalize their agreement in the presence of community leaders, Masood might have realized that he did not actually need a car before he entered into the contract, and both parties would have saved time and money.

Third, formalities help parties express their intentions in ways that will be understandable to others – particularly the court. Formalities help parties to speak the language of the law. Abdul, for instance, wants a judge to treat his agreement with Masood as a legally binding commercial transaction, not a favor to a

family member. A written contract that uses terms typically employed to create a contract would help clarify the legal nature of the agreement.

### **3.1 Formalities and evidence**

As mentioned above, one important function of formalities is to help prove a claim in court. Articles 991-1030 of the Civil Code and Articles 272-357 of the Code of Civil Procedure regulate the court's use of documents, witnesses, and confessions. This section does not attempt to provide a comprehensive review of these rules. Instead, it briefly discusses the Civil Code's distinction between official and customary documents. The Holy Qu'ran and the Majalla also contain rules relating to contract formalities and evidence.

#### **Civil Code**

##### **Article 991**

(1) An official document is a paper in which the general (public) officer or public services staff, according to provisions of law and within the limitations of their specialized authority, registers and saves anything that is reported to them or anything they obtain from related persons.

(2) If the said paper lacks the attribution of an official document, but interested (involved) persons have signed, stamped or has put their fingerprint on it, it shall have the status of customary document.

#### **Code of Civil Procedure**

##### **Article 287**

Edicts, official documents, absolute decisions and rulings of the court, if they are clear of forgery and falsification, and if they have been safely recorded in the government office of a judicial tribunal, such documents are recognized as bases of proof and they shall be binding.

##### **Article 289**

The customary documents that have been written and signed by the parties and their seal or fingerprinted have been placed on them, and in case the two sides confirm their seal, signature and fingerprint, such documents are of the same validity as the official documents.

Civil Code Article 991 defines official and customary documents. What differentiates the two? According to Article 991, an official document is a document that a government official has certified and filed according to their normal course of business. A customary document is a document that people who are not government officials have signed, stamped, or fingerprinted.

Civil Procedure Code Articles 287 and 289 instruct courts on whether the courts should view the documents as proof of the statements that the documents contain. Article 287 indicates that judges should treat official documents as proof of the information that they contain. Customary documents, on the other hand, must be accepted as valid by both sides to be legally binding.

Islamic law allows for three types of evidence related to contracts: documents, witnesses, and voluntary acknowledgement. Islamic law encourages parties to create written contracts where possible. Chapter 2 verse 282 of the Holy Qu'ran states:

O you who believe! When you contract a debt between you for a fixed term, record it in writing. Let a scribe write it down between you justly, and let no scribe refuse to write it down: as God has taught him (through the Qur'an and His Messenger), so let him write.



The same verse also recommends that parties obtain witnesses for commercial transactions: “If it be a matter of buying and selling concluded on the spot, then there will be no blame on you if you do not write it down; but do take witnesses when you settle commercial transactions with one another.”

Article 1736 of the Majalla states that when a writing “is free from any taint of fraud or forgery” no other evidence is required to prove the facts contained in the writing. When it is not possible to create a written contract, the parties may rely upon witnesses in the event of a dispute.<sup>27</sup> Finally, a party may acknowledge his own obligation, an act known in Arabic as *ikrār*. This last form of evidence is weighed less than written documents and witnesses.<sup>28</sup>

### Comparative Perspective: France

A notary is a person, usually not trained as a lawyer, who is authorized to perform certain legal formalities. Notaries play an especially important role in the legal system of continental Europe.<sup>29</sup> For example, Article 1341 of France’s Civil Code states that non-commercial contracts valued over a particular amount must be put into writing and notarized. This article is an example of a **statute of frauds**, a law that requires additional formalities for certain types of contracts.

Article 1341 provides a legal protection to contracting parties: recording a contract in writing and review by a notary make it more likely that both contracting parties will assume only those obligations which they intend to assume. But Article 1341 only applies to non-commercial contracts – contracts between merchants and consumers. It does not apply to commercial contracts – contracts between two merchants. Why do you think the French legislature chose to apply this rule only to non-commercial contracts?

Merchants enter into contracts on a regular basis. The average merchant is more familiar with the rules regulating contracts than the average person. Merchants’ legal sophistication means that they are less likely to be taken advantage of in their contractual dealings. Consumers, on the other hand, use contracts less frequently, are less familiar with the rules, and are therefore more likely to be taken advantage of – especially when dealing with merchants. Article 1341 uses contract formalities as a shield to protect consumers.

### Discussion questions

1. Article 1180 indicates that gifts of immovable property must be made through written contracts. Should the Civil Code require written contracts for any other types of contracts?
2. French Civil Code Article 1341 relies on notaries, who are familiar with the law but do not have full legal training, to protect consumers. Can you think of examples of non-lawyers who play a similar role in the legal system of Afghanistan?

### CONCLUSION

To review: In this chapter, we discussed the basic concepts of offer and acceptance. An offer is an expression of someone’s willingness to enter an agreement. Acceptance is an act that conveys agreement with the specific terms proposed in that offer. Changing the terms of the initial offer creates a new offer. A contract is formed when both the offer and acceptance carry the parties’ intent to be bound by the arrangement. Offer and acceptance come into effect when they are received by the opposite party. The resulting contract creates a legally enforceable obligation or duty between the parties.



As you can see, offer and acceptance are crucial components during the formation of contract – but they are not always simple. Even when you are analyzing complicated transactions, however, you should return to these concepts and ask yourself a few clarifying questions. Who is the offeror at this stage? What are the terms of their offer? Who is the offeree? Have they accepted those terms as offered?

In the next chapter we will further analyze the details and technicalities of contract formation. We will build on these principles to better understand the processes necessary for an offer or acceptance to take full legal effect. We will also consider who can enter into contracts, and any limitations on contract enforceability based on the parties who are interacting. We will also consider different types of contracts and the nature of obligations that attach with each.

<sup>1</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.

<sup>2</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.

<sup>3</sup> Pejovic, Caslav. "Civil Law and Common Law: Two Different Paths to the Same Goal." *Victoria University of Wellington Law Review* 32.3 (2001): 817-41. Web. 10 Feb. 2013 (citing sect. 145 of the German Civil Code, article 1328 of the Italian Civil Code, article 3 of the Swiss Code of Obligations, article 521 of the Japanese Civil Code).

<sup>4</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. [http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html).

<sup>5</sup> This point will be discussed further in the chapter on the subject of the contract.

<sup>6</sup> UNIDROIT is The International Institute for the Unification of Private Law. It is an independent intergovernmental organization that works to coordinate laws across international borders— particularly commercial laws.

<sup>7</sup> Levasseur, Alain A. *Comparative Law of Contracts: Cases and Materials*. Durham, NC: Carolina Academic, 2008. 70-77. Print.

<sup>8</sup> *id.*

<sup>9</sup> United Nations Convention in Contracts for the International Sale of Goods, Article 14 (2).

<sup>10</sup> *Principles of European Contract Law*. The Hague: Kluwer Law International, 2000. 159-70. Print.

<sup>11</sup> Louisiana is a civil law jurisdiction influenced by common law

<sup>12</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.

<sup>13</sup> Transaction based upon a case between two businesses in "SWITZERLAND: Cantonal Court of the Canton of Valais, 27 April 2007 (Oven Case)." *CISG CASE PRESENTATION*. Pace Law School Institute of International Commercial Law, 22 Oct. 2010. Web. 10 Feb. 2013. <http://cisgw3.law.pace.edu/cases/070427s1.html> (simplified).

<sup>14</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.

<sup>15</sup> "Netherlands 29 May 2007 [Appellate Court] (Machine Case)." *CISG CASE PRESENTATION*. Pace Law School Institute of International Commercial Law, 22 Oct. 2010. Web. 10 Feb. 2013. <<http://cisgw3.law.pace.edu/cases/070529n1.html>>.

<sup>16</sup> *Arms v. Rodriguez*, 232 La. 951, 953, 95 So. 2d 616 (1957).

<sup>17</sup> Remember, Louisiana is a civil law jurisdiction within the US that has been influenced by common law.

<sup>18</sup> Levasseur, Alain A. *Comparative Law of Contracts: Cases and Materials*. Durham, NC: Carolina Academic, 2008. 70-77. Print.

<sup>19</sup> *id.*

NOTE: The Principles of European Contract Law are model rules written by academics on the Commission on European Contract Law in an effort to further consistency amongst national legal regimes.

<sup>20</sup> Levasseur, Alain A. *Comparative Law of Contracts: Cases and Materials*. Durham, NC: Carolina Academic, 2008. 70-77. Print.

<sup>21</sup> Nafay's translated book and [http://blogs.warwick.ac.uk/swidereka/entry/the\\_postal\\_rule/](http://blogs.warwick.ac.uk/swidereka/entry/the_postal_rule/) -- need MLA CITES

<sup>22</sup> United Nations Convention in Contracts for the International Sale of Goods, Articles 16 and 18.

<sup>23</sup> See Article 130 of the German Civil Code.

<sup>24</sup> See Article 3:37 of the Dutch Civil Code.

<sup>25</sup> "Germany 23 May 1995 Appellate Court Frankfurt (Shoes Case)." *CISG CASE PRESENTATION*. Pace Law School Institute of International Commercial Law, 22 Oct. 2010. Web. 10 Feb. 2013. <<http://cisgw3.law.pace.edu/cases/950523g1.html>>.

NOTE: Germany and Italy are both civil law systems.

<sup>26</sup> Adapted from Lon Fuller, *Consideration and Form* 41 *Columbia Law Review* 799 (1941).

<sup>27</sup> *Id.*; *Majalla* Article 1685.

<sup>28</sup> *Id.* at 548.

<sup>29</sup> See Economist, Notaries: Breaking the Seal, Aug 11 2012, <http://www.economist.com/node/21560242>.

## CHAPTER 4: CAPACITY

### INTRODUCTION

Not everyone can enter into legally binding contracts. The Civil Code limits some peoples' **capacity**, or right to form legal relationships. For example, the Code restricts the ability of minors and the mentally ill to create valid contracts. These individuals can still enter into economic agreements. They can, for instance, make purchases. But the Code does limit the legal enforceability of agreements made with individuals who lack complete capacity.

Capacity may also be understood as an individual's ability to freely choose to assume a legal obligation or enter into a contract. Some people may not be able to understand or anticipate the consequences of entering into a contract. Unethical people may use contracts to take advantage of minors, the mentally ill and disabled, and other vulnerable members of society. It would be unfair to enforce contractual obligations against people who were unable to understand and freely choose these obligations during contract formation. One way the law can help protect vulnerable citizens is by refusing to enforce their otherwise valid legal obligations. The Civil Code accomplishes this goal by making capacity a requirement for a valid contract.

#### Civil Code

##### Article 502(2)

The conditions for the validity of a contract are the *legal capacity of the two contracting parties*, enforceable subject of a contract for conclusion of a contract, and its usefulness and agreement with the public order and morality.

##### Article 542

Every person has the capacity to conclude a contract except when his capacity is withdrawn or limited by law.

Article 502(2) indicates that the capacity of all parties is a requirement for a valid contract. As discussed in previous chapters, the parties' mutual consent, or agreement, is the core of contract. If a person lacks the ability to understand and to freely choose to assume a legal obligation, then the Code does not empower that person to create such an obligation. Article 542 expresses the Code's assumption that most people under most circumstances have **complete capacity**. Compare Article 542 with Article 947 of the Mejele: "A person of mature mind is a person who is able to take control of his own property and who does not waste it to no purpose."

In addition to complete capacity, the Code lays out two more categories of capacity: **lack of capacity** and **incomplete capacity**. People who lack all capacity can never assume obligations. Minors below the age of seven and persons registered by a court as mentally ill lack all capacity. The Code also refers to them as **undiscerning** individuals. People who have incomplete capacity can only assume obligations under certain conditions. This category includes minors between the ages of seven and eighteen and persons registered as financially inept (people who cannot handle money responsibly). These individuals are said to be **discerning**.

<b>Type of Capacity:</b>	Complete Capacity	Incomplete Capacity	Lack of Capacity
<b>Discerning/Undiscerning:</b>	Not applicable	Discerning	Undiscerning
<b>Categories of individuals:</b>	Healthy adults	Minors aged 7-18; persons registered as financially inept	Minors younger than 7; persons registered as mentally ill

These rules, discussed below, can be distinguished from the Code’s provisions on fraud, coercion, and mistake covered in Chapter 8. The rules on fraud, coercion, and mistake protect people who normally possess legal capacity but who, because of unusual circumstances, cannot exercise that capacity. For example, a person forced into a contract by threat of violence does not freely consent to the contract. Similarly, a person who enters a contract based on a fraudulent misrepresentation (a lie or a trick) cannot have full capacity because he is not aware of the truth. The key point to remember is that the validity of a contract might be affected by either the characteristics of the parties (age, mental illness, etc.) or because of what is happening to them during contract formation (fraud, duress, or mistake).

Below, we address the rules for minors, the mentally ill, the financially inept, and imbeciles.

## 1. MINORS

Children have a special status under the law. A lack of experience and education make it less likely that a child will fully understand the legal consequences of his actions and more likely that others will seek to take advantage of him. The Civil Code does not allow children to enter into contracts on the same terms as adults.

### Civil Code

#### **Article 39**

A person is mature after 18 Shamsi years. A mature person, while healthy minded, shall be recognized to have complete legal capacity in performing transactions.

#### **Article 40**

If a person is undiscerning because of minority of age, . . . he cannot perform any legal transactions. A person before completing 7 years of age shall be recognized as undiscerning.

#### **Article 543**

A transaction by an undiscerning juvenile shall be void, even if permitted by his guardian.

The Code considers persons over the age of eighteen to be adults and places no age-related restrictions on their capacity to contract (Article 39). Persons under the age of eighteen are minors, and the Code limits their ability to contract. The Code creates two categories of minors: undiscerning minors and discerning minors. Undiscerning minors are persons under the age of seven (Article 40). Discerning minors are persons between the ages of seven and eighteen (Article 41). Different rules apply to these two categories.

The Civil Code prevents undiscerning minors from entering into valid contracts under any circumstances (Articles 40 and 543). Minors under the age of seven can engage in commercial transactions, but these agreements cannot be enforced in a court of law. In such transactions, a valid contract does not form and thus legal obligations do not arise, since the requirement of full capacity of both of the parties is not met. For example, if six-year-old Mohsen orders a birthday cake from a bakery and then never returns to pick it up, the baker cannot ask a court to force Mohsen or his parents to pay for the cake because Mohsen never had the capacity to agree to such an agreement.

## Civil Code

### Article 41

A discerning person who has not completed the age of maturity . . . shall be considered having incomplete capacity.

### Article 544

(1) A transaction by a discerning juvenile shall be permitted when it is entirely to his benefit, even if not permitted by his guardian. When it is entirely to his harm, it shall be void, even if permitted by his guardian.

(2) Contract entailing profit and loss, with the permission of the guardian within the limits of [the guardian's] authority, or with the permission of a person with incomplete capacity, shall be suspended until his legal age.

### Article 637

(1) A suspended, unenforced contract lacks legal effect, and shall not state proof of ownership, except with the permission of the person who exercises authority on the subject and possession of the contract, and that his permission entails all valid conditions.

(2) A contract of the following persons shall be considered suspended: . . .

11. Discerning minor
12. A discerning person registered as insane
13. A person registered as financially inept
14. A person registered as an imbecile

The rules for discerning minors, or children older than seven and younger than eighteen, are slightly more complicated. According to Article 544(1), if a contract is totally to a discerning minor's benefit, then it is valid. The approval of the minor's guardian is not required. A gift of money or property to the minor would be totally to her benefit. If the contract is totally to the minor's loss, then it is void even if the minor's guardian approves it. A gift of the minor's property to another person for nothing in return would be totally to her loss.

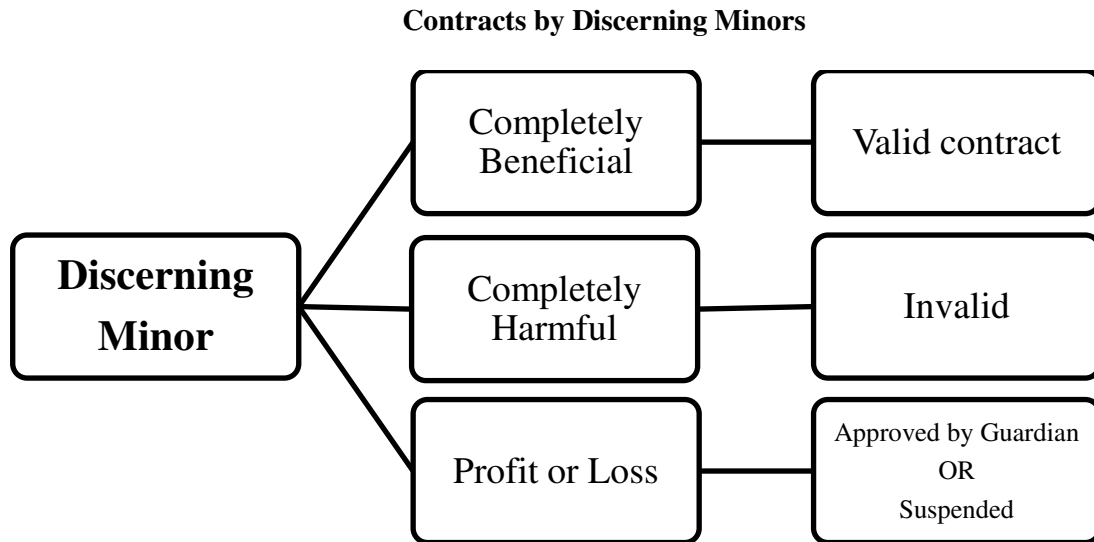
Other contracts, such as a sale of the minor's property or the minor's purchase of property, involve profit and loss. When the contract involves profit and loss, there are two possibilities. If the minor's guardian approves the contract, it becomes valid. Otherwise, the contract is **suspended**. A suspended contract has no legal effect until "the person who exercises authority on the subject" – in this case the minor – grants permission for the contract to take effect (637(1)). The minor can **disaffirm**, or reject, the contract any time before she turns eighteen or within a reasonable amount of time after she turns eighteen.

Alternatively, if the minor does want to assume the contract's obligations, she can **ratify**, or approve, it after she turns eighteen. Some contracts involving persons registered as mentally ill, financially inept, or imbeciles are also suspended. They are discussed in later sections.

One month before his eighteenth birthday, Bilal purchases a TV. The week after he turns eighteen, he decides that he would like to return the TV and get his money back. Can he? Yes. Bilal's contract with the electronics store is suspended. He is permitted to disaffirm the contract after he becomes an adult.

A minor does not need to go to court to disaffirm or ratify a contract. If an adult party to a disaffirmed contract wants to challenge the disaffirmance in court, he would have to show that the other party was not a minor at the time the contract was formed, or that the minor's guardian approved the contract at the time. The Code does not specify the length of time that a discerning minor's contract may remain

suspended. Do you think that a court would interpret Articles 544 and 637(1) as placing any limits on the length of a suspension?



## 2. PERSONS WITH MENTAL DISORDERS

In some cases, a mental disorder may prevent a person from understanding the nature of legal obligations. A mental disorder is an illness or disability which impairs an individual’s intellectual, emotional, or psychological functioning. The Civil Code uses the terms “mental retardation” and “insanity” to refer to mental disorders.

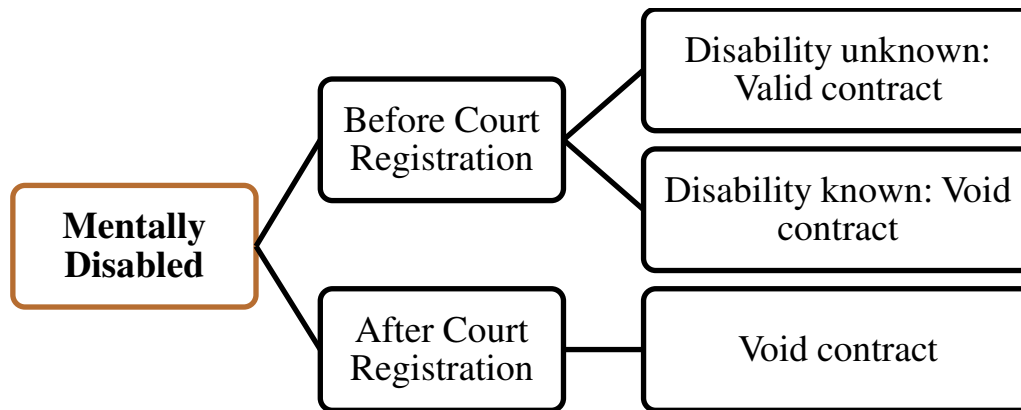
**Civil Code**

**Article 40**  
If a person is undiscerning because . . . [of] mental retardation[] or insanity, he cannot perform any legal transactions....

**Article 545**  
(1) Transaction of an insane and mentally retarded person, after registration of the ruling regarding his protection, shall be considered void.  
(2) Transaction (of insane or mentally retarded) before registration of ruling regarding his protection shall not be considered void, unless the insanity or mental defect is prevalent (obvious) during contracting, or the opposite party has knowledge of it.

Just because a person actually suffers from a mental disorder does not mean that he automatically loses his legal capacity. First, a judge must register the person’s mental disorder under Civil Code Article 545. Once registered, mentally disabled individuals can no longer enter into valid contracts on their own. Is Article 545(1) consistent with Article 637(2)(12)?

Contracts with unregistered mentally disabled persons are valid unless their mental disorder was “obvious [to the other party] during contracting” (Article 545(2)). Why do you think the Code adopts different rules depending on whether one party knows that the other is mentally ill? If one party is aware of the other’s unregistered mental illness, the contract is invalid even if that contract benefits the mentally ill person.



### 3. PERSONS WHO ARE FINANCIALLY INEPT OR IMBECILES

#### Civil Code

##### Article 41

A discerning person who has . . . completed the age of maturity but is financially inept or forgetful in workplace . . . shall be considered having incomplete capacity.

##### Article 546

(1) Actions taken by prodigal or imbecile shall be, after registration of order of incapacity, subject to provisions on discerning minor.

(2) Actions taken before registration of order of incapacity shall be valid and shall not be voidable, unless they are taken as a result of exploitation or conspiracy.

The rules regarding financial ineptness and imbecility are similar to those for mental illness. A financially inept person is irresponsible with money. Similarly, an imbecile is a person who, though not suffering from a mental illness, cannot responsibly handle money or personal affairs without assistance.<sup>1</sup> A person who is financially inept or an imbecile may, however, enter into valid contracts as if he possesses full legal capacity. The only exception is if the financially inept person or imbecile enters into a contract “as a result of exploitation or conspiracy” (Article 546(2)). A person is exploited when she is used unfairly by another person for that other person’s advantage. In that case, the financially inept person or imbecile has the option of voiding the contract.

A judge may register a person as financially inept or as an imbecile. Once registered, financially inept persons or imbeciles have incomplete capacity. Their contracts are subject to the same rules as discerning minors. They are valid if they are totally to the financially inept person’s or imbecile’s benefit, void if totally to their loss, and suspended pending approval by their **executor**, or court-appointed legal representative, if the contracts involve profit and loss.

### 4. THE ROLE OF THE COURT

Judges play an active role in applying the Code’s rules on capacity. First, judges have the authority to register a person as mentally disabled, financially inept, or imbecile at any time, including during the course of a legal dispute. For instance, a person who is sued for breach of contract might claim that the contract is void because she is financially inept and the plaintiff exploited her. The Code does not contain precise definitions of mental illness, financial ineptitude, or imbecility.<sup>2</sup> How is a judge likely to decide

whether or not someone in his court should be within one of these categories? Do you think judges have the expertise to make these decisions? Does the potential for abuse of this power by judges concern you?

### Civil Code

#### Article 42

A person with incomplete capacity or a person who lacks it shall be subject to provisions of executorship, guardianship, and representation (procuratorship), according to conditions and rules predicted by this law.

#### Article 549

If a judicial counselor is appointed for a person, after registration of the ruling regarding appointment of the counselor, all of his transaction shall be void without participation of the counselor.

The Civil Code also authorizes judges to appoint legal representatives – known as executors, guardians, or procurators – for persons without complete capacity. Such an appointment enables minors, the mentally ill, the financially inept, and imbeciles to assume legal obligations, but only with the approval of their legal representative.

## 5. PENALTY FOR DECEIT

### Civil Code

#### Article 550

A person with incomplete capacity can demand the invalidation of a contract. In case he deceptively concealed incompleteness of his capacity, this order does not disoblige him to compensate.

The Civil Code's capacity rules protect vulnerable citizens from unethical people who might try to take advantage of them. The Code also gives individuals with incomplete capacity considerable discretion over whether or not to assume obligations in suspended contracts that entail profit and loss. In Article 550, the Code does place an important restriction on the activities of persons who have incomplete capacity. A person who secures a contract by "deceptively conceal[ing]" his incomplete capacity can still invalidate the contract. He pays a penalty for his deceit, however. He must compensate the other party.<sup>3</sup>

Fifteen-year-old Najib gets into a taxi cab and tells the driver to take him to a movie theater. The driver, remembering something that an attorney passenger once told him about the capacity of minors, asks him how old he is. Najib responds that he is eighteen. The taxi driver takes Najib to his destination, but when they arrive, he says he has no money and will not pay. Does the taxi driver have any legal options? Does it matter how old Najib really is?

Najib has exercised his right as an undiscerning minor to disaffirm his contract with the taxi driver. The taxi driver can, however, demand compensation from Najib because Najib lied to conceal his status as a minor. If the taxi driver had not asked about Najib's age and Najib had not said anything about his age, then it would be more likely that a court would find that Najib had not deceptively concealed his incapacity. In this case, the taxi driver would have no legal recourse.

### Capacity in the Mejelle

The Mejelle's capacity rules, contained in Articles 941-1002, are very similar to those in the Civil Code. Courts may look to them to inform their interpretation of the Civil Code. There are some differences, however. Here, we highlight two of those differences.



Similar to the Civil Code, the Mejlle divides minors into two categories: minors of imperfect understanding and minors of perfect understanding, who are subject to the same rules as undiscerning and discerning minors, respectively (Mejlle Articles 943, 966). Instead of dividing these two categories according to age, however, the Mejlle distinguishes between minors of imperfect and perfect understanding according to their ability to comprehend the nature of a basic commercial transaction and to recognize obvious lies (Mejlle Articles 943, 982-89). Review the Civil Code’s articles pertaining to the capacity of minors. What are the advantages and disadvantages of the Mejlle’s approach to minors’ capacity compared to the Civil Code’s approach? Is either approach better suited to the economic roles that minors play in Afghanistan’s economy?

The Mejlle also provides for judicial registration procedures to strip individuals of their capacity. Unlike the Civil Code’s rules, the mentally ill (“lunatics” and “imbeciles”) are presumed to lack capacity and are not required to be registered (Mejlle Article 957). Prodigals may be registered, in which case the court acts as their guardian (Mejlle Articles 958, 990). The Mejlle also allows the limitation of debtors’ legal capacity through judicial registration (Mejlle Articles 959, 998-1002). This process is initiated by debtors’ creditors when they fear that the debtor may dispose of her property in a way that prevents them from being compensated.

## CONCLUSION

The Code’s capacity rules both protect vulnerable members of society and limit their rights. The rules protect them from unethical parties and from their own impaired judgment. They do this by refusing – at least in some circumstances – to bind individuals who lack complete capacity to agreements that might go against their best interests. On the other hand, these rules limit their rights to engage in fundamental legal and economic relationships. A businessperson is less likely to enter into a commercial agreement with someone who would not be legally bound by the agreement. Do you think the rules strike the right balance between protecting vulnerable members of society and limiting their rights to assume obligations and participate in the economic life of society (and the rights of those who wish to do business with them)?

### Summary of Rules for Capacity

Contracting Party	Capacity Status	Code Sections
Undiscerning Minors (under 7 years old)	Complete incapacity	40; 543
Discerning Minors (7 to 18 years old)	Incomplete capacity, unless they “deceptively concealed” their incapacity	41; 544; 637(2)(11)
Mentally disabled	<u>Pre-registration</u> : Complete capacity unless disorder is obvious <u>Post-registration</u> : Complete incapacity	40; 545; 637(2)(12)
Financially inept or an imbecile	<u>Pre-registration</u> : Complete capacity unless other party used exploitation <u>Post-registration</u> : Incomplete capacity unless they “deceptively concealed” their incapacity	41, 546; 637(2)(13), (14)

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<sup>1</sup> In English, the term “imbecile” is generally considered impolite, equivalent to calling someone stupid.

<sup>2</sup> The Mejlle does contain definitions of related concepts. Article 944 identifies two classes of “lunatics”: those “who are continuously mad” and those “who are sometimes mad and sometimes sane.” Article 945 defines “imbecile[s],” a category that may be similar to the Code’s “imbecile,” as “a person whose mind is so deranged that his comprehension is extremely limited, his speech confused, and whose actions are imperfect.” Article 946 states, “A prodigal person is a person who by reckless expenditure wastes and destroys his property to no purpose. Persons who are deceived in their business owing to their being stupid or simple-minded are also considered to be prodigal persons.”

<sup>3</sup> The Afghan Civil Code does not specify the measure of the damages. Article 142 of the Civil Code of Egypt requires that the party invalidating the contract because of incomplete capacity “refund such profits as he derived from the performance of the contract.”

## CHAPTER 5: SUBJECT, CAUSE, AND CONDITIONS OF CONTRACT

### INTRODUCTION

So far in this book you have learned the origin and legal meaning of the term “obligation” in the Civil Law tradition as well as the concept’s more specific foundations in modern Afghan Law. Once this foundation was established, we discussed in detail the process and components of contract formation, as well as various subcategories of contract. In this chapter we will progress to necessary internal components of contract; including subject, cause, and specific conditions in the contract itself. While much of this chapter will be concerned with defining and understanding these concepts, drawing largely on the Afghan Code and scholarship from other civil law traditions, each concept will be accompanied by a series of examples that demonstrate how it is employed. These examples will show how these concepts are important to many kinds of transactions. Consider the situation below.

#### Reading Focus

As you read the chapter, think about the role of subject and cause in defining the boundaries of a contract. Think about something you want to own and what conditions you would want in the sales contract to ensure that you get what you are expecting.

Abdul has a vegetable garden on his property. He enjoys working in his garden and likes to look out the windows of his house to see how his vegetables are growing. Unfortunately, animals have started coming out at night to eat his vegetables, and he is in danger of losing his entire crop. Abdul wants to build a fence around his garden to protect his vegetables but he does not have the tools or skills to do so. A neighbor tells Abdul about a man named Hamid who has built excellent fences around several homes in the area. Abdul does not have much money, but he grows many vegetables, including onions, spinach, tomatoes, and eggplant. Hamid enjoys tomatoes and spinach so he makes an agreement with Abdul to accept three kilograms of vegetables a week for the next three months in exchange for building a fence that can keep out wild animals. Abdul must leave town for a few days to attend a wedding, and Hamid promises him that the fence will be complete by the time he returns. Together, they quickly write a contract of the agreement.

When Abdul returns from the wedding the fence is indeed complete, but it is not at all what he expected. The fence is 1.5 meters high and made entirely of mud brick. What’s more, it has no gate. Abdul can no longer see his garden from the windows of his home and must use a ladder to get into it. He is very upset, and when it comes time to pay Hamid the onions and eggplant he gives him are of very bad quality. Hamid is obviously disappointed and after several more weeks receiving wilted vegetables for his hard work both men are furious. Hamid sues Abdul in the local court, claiming that he is not being paid as promised. What is the likely outcome?

#### Discussion Questions

1. What are the best three arguments Hamid could make before the court?
2. What are Abdul’s likely responses?

### 1. SUBJECT

Think about the story of Hamid and Abdul as you learn the concepts in this chapter. When you learn each one, consider how it worked in the example. The concept of **subject** of contract is relatively simple, but it is vital to the existence of a contract.

## Civil Code

### Article 579

For every kind of obligation resulting from a contract, existence of a subject to which the contract is attributed, and is eligible for conclusion of contract, is essential. An object, debt, benefit, or other financial rights can form the subject of a contract. Also, execution of an action or refraining from execution of an action can be subject of a contract.

In more direct terms; for a contract to create an enforceable obligation, something of value must be given by the person on each side of the agreement. This thing of value is the **subject**. The value could be a tangible object, like a house or a car, or it could be purely financial such as when one person loans another person money or when one person trades the right to collect a debt to another person. The subject can even be a promise to perform a service, such as building a fence to prevent livestock from escaping. It could also be a promise to refrain from certain activity, if, for example, one person obtains a promise from another not to build a fence, so that the first person will be able to cross the second person's property.

Articles 580 through 590 simply enumerate additional conditions on what can or cannot be a subject of a contract. They also address what to do when a subject is impossible, unclear, or morally repugnant. This chapter will avoid going through the code article by article, but these conditions on subject of contract do merit additional discussion.

An **impossible subject** is one that can never occur, either because it is physically impossible, or perhaps because the technology required to deliver on the subject of the contract does not exist, and is not a part of the contract. For example, a person cannot contract to sell a person a tree that produces golden leaves, because such a tree does not exist, and it is therefore impossible for that person to fulfill his side of the contract. In this situation, the contract would be void and could not be enforced. If, however, the contract is for something that is generally possible, but is only impossible for the particular party to the contract, then the contract is both valid and enforceable. The party who is unable to fulfill his or her obligation must compensate the other party. A person who borrows money but is unable to repay it at the appointed time is still bound by a valid contract and must deliver some sort of adequate compensation to their creditor. It may be impossible for the person to fully perform his obligation at the moment, but he promised to live up to the contract and is technically able to do so.

A subject is **ambiguous** where it is clear in general terms what the object or service is, but there may be much variation in the final form the subject takes. This leaves the subject of contract open to interpretation, and is likely to be a common point of disagreement in legal disputes. Returning to the example used earlier in this chapter, Hamid and Abdul agree that Hamid will build Abdul a fence in exchange for vegetables. If no further detail is provided, this contract is so ambiguous that there is likely to be disagreement. Nothing is said about where the fence is to be built, how long it will be, how tall it will be, what it will be made of, or any number of other details that could have been included in the contract. It is possible that not all of these details would be needed, but the important thing is that the subject of the contract is clearly determined or is otherwise determinable by the parties, with readily accessible information. If the contract requires that the fence completely encloses a property and is able to keep livestock from leaving it, this is probably sufficient if it communicates the goals of person desiring the fence to person performing the service of building it.

The prohibition against subjects of contract that are **repugnant to public order and manners** is also a potential matter of concern. These are two separate concepts. First, is the prohibition against allowing subjects that are against "public order." In practice, this refers to any obligation in which the subject or

proposed disposition of the subject is against established law. It need not be against the Civil Code specifically; it could be against the criminal code, inheritance law, or any other body of governing law. This means that one cannot make an enforceable legal contract to perform an illegal act. For instance, a contract to gamble on the outcome of a football match would not be valid.

The prohibition against contractual subjects that are “repugnant to manners” is less well defined. It is a broad principle designed to prohibit the creation of obligations that conflict with the moral values that society considers important. This would include gambling and other vices, as well as the practice of **riba**, where the interest charged on a loan is so high that it can be considered unjust enrichment.

There are also significant legal problems surrounding **future subjects**, subjects of contract that do not exist currently, but are reasonably certain to exist later at a known time. For example, a farmer promises to sell a given amount of his next crop to a particular grocer. Article 653 of the Civil Code makes reference to contracts for “advance selling or payment” which can include contracts for future subjects. In this case the subject is still determinable, and the contract is valid. Where ambiguity does result in a dispute, the code outlines what persons are authorized to determine what the subject is, or whether the contract must be void. While the Civil Code appears to endorse some acceptance of future subjects in this passing reference, many scholars believe Islamic law forbids this practice. Under most interpretations of Islamic law, the subject must exist at the time the contract is formed, and delivery of the subject must be certain, rather than dependent on chance. The reason for this prohibition is a concern that allowing contracts for uncertain future subjects can lead to excessive speculation on the outcome of events, a practice that is very close to gambling. Hanafi scholars have interpreted this prohibition to mean that a contract for a future subject is legitimate but not binding, until the offeror comes into possession of the subject, and has the legal authority to transfer it.<sup>1</sup>

## 2. CAUSE

You now know that the subject of a contract is the service, property, or promise transferred under that contract. The **cause** of a contract is the goal that the service, property, or promise is expected to fulfill for the person conveying it.

There is a relevant distinction between cause as it relates to the creation of a contract versus the creation of an obligation. The specific reason that an individual chooses to enter into a contract is the **subjective cause**. If a person wishes to buy a car, the subjective cause for the purchase contract may be that he wishes to use it to transport goods for his business. The formation of an obligation does not depend on the subjective cause involved in making a legal promise. All that matters for this purpose is the **objective cause**. The objective cause is—in the most general sense—the reason that people choose to enter into a sale, lease, service or other type of contract.

### Civil Code

#### Article 591

Cause constitutes the principle objective for which the contract stands as a legal attainment instrument

You can see how each contract could have many subjective causes. A person who obtains a lease for a building could potentially envision many different uses for it, or reasons for buying it. However, a contract can generally only have one objective cause. In this case the lessee’s objective cause for paying money is to secure the rights written into the lease and use the building.

To reiterate, in a transfer contract, the subject of the contract would be the physical goods, but the objective cause of the contract would be the transfer of rights related to the goods.

Under the code, a contract must have an objective cause or it will be rendered void. Generally, an objective cause is presumed to exist, and it is presumed that the actual objective cause of the contract is the cause that appears most obvious when looking at the contract itself. In practice, the objective cause is one of the necessary elements for forming an obligation, but often the subjective cause determines the structure of the obligation and forms the basis for dispute. This affects how parties would determine the validity of a contract in a dispute. Say, for example, that one person contracts to transfer a car to another person. The objective cause is the basic commercial transaction, and as long as the promisor received some reasonable economic value in exchange for the car there would be no reason to question this cause. However, if the promisor received nothing of economic value in exchange for the car, there can be no commercial objective cause. It is possible that the car was given as a gift, which would also be a legitimate objective cause, but it is also possible that this contract was made under duress or that there was another unlisted objective cause that was repugnant to public order. If there is no legitimate commercial or gratuitous objective cause then no obligation was formed in the contract.

To provide a different example, one person buys a car from another person for cash, expects that car to be functional, and intends to use the car for reliable transportation. The subject is the car itself, the objective cause is the transfer of rights to the car, but the subjective cause is the car's usefulness as a means of transportation. The commercial exchange is the objective cause that forms the obligation, but the subjective cause—the use the recipient expects to get out of the car—establishes the requirements that are necessary to fulfill the obligation. If the car is broken and cannot provide transportation, then the obligation has not been fulfilled. The transferring party is obligated to compensate the receiving party for the expected benefit not received. Of course, if both parties were aware that the car was broken at the time that the contract was made, then immediate acquisition of useful transportation could not be the subjective cause of contract, and some other cause would have to be expressed or presumed. It may be that the receiving party intends to repair the car, use the parts, or sell them off piece by piece.

If a defect in the subject of a contract that would prevent one potential subjective cause from being fulfilled is known and disclosed to all parties, then the subjective cause must be something else. Like ambiguity regarding the subject of contract, disagreement about the subjective cause of contract is likely to be a major source of legal disputes, and frequently can result when one party possesses more information about the subject than the other. Some tools to quickly resolve disputes arising from asymmetric information will be discussed in the contractual options section found later in this chapter.

Finally, cause of contract must also be examined to determine whether it is repugnant to “public order and manners” under the same standard as subject of contract.

### **3. CONDITIONS, SUSPENSIONS, AND POSTPONE-TO-FUTURE CONTRACTS**

Conditions are statements that add detail to the scope and execution of a contract. They are usually used to specify when, how, or under what circumstances the contract is to be executed. Conditions are typically written as numbered sentences or paragraphs, called **articles**, devoted to a specific contractual issue. Well-conceived conditions can clarify subject and cause of contract, thereby helping to ensure that all parties to the contract receive what they are expecting to receive. Poorly conceived conditions can lead to legal disputes, or invalidate contracts in their entirety. Basically, the clearer a contract is in defining all of its elements and conditions, the less likely it is to result in a legal dispute. It is in everybody's best interest to ensure that both sides to every contract fully understand the contract and the obligations it creates. This section of the chapter will discuss several categories of conditions, and the next will discuss several problems that arise when conditions are poorly written.

## Civil Code

### Article 595

1. A condition is a pledge for future action regarding a circumstance that is mentioned in special terms.
2. Suspension is reserving, by one of the conditioning instruments, a future circumstance from occurring until another future event or action occurs.

### Article 602

A postponed-to-future contract is a contract whose execution is attributed to a time in the future. Such a contract is concluded immediately but its execution is suspended until a specified time.

A general explanation of these articles is provided below.

1. **Contract with a condition:** Article 595(1) talks about a contract that contains a condition relating to the future. This is often done when a transaction requires multiple steps. One step, the payment, can be done in the present, but another must be done in the future. For example, a contract can be created where somebody buys a television from somebody else, but requires that the seller agree to fix it if it breaks in the future.
2. **Contract with a suspension:** Article 595(2) relates to a contract that is suspended until the occurrence of a future event. Until the event occurs, the contract is suspended. An example of this would be a contract where one person says that he will sell his car to his cousin if, and only if, he buys a new car in the next year.
3. **Postpone-to-future contract:** Article 602 describes contracts whose effects are postponed to a future date. For example, this could be the sale of a house which is concluded in the present, but the effects of the sale (i.e. transfer of ownership, and moving into the house) do not commence until next week.

Contracts with a suspension (Article 592(2)) can be particularly difficult to understand. The example below provides will illustrate how a contract like that might work.

Ahmad agrees to sell his car to Walid for \$1000 in the event that he leaves the country in the next year. Ahmad says that he is planning to leave the country in 30 days, at which point Walid would be able to give Ahmad the money to buy the car. However, on day 20, Ahmad sells the car to Farishta for \$1500. If Ahmad then leaves the country on day 30, the suspension event will have occurred, and the contract with Walid would have effect *from the day Ahmad and Walid agreed to the contract*. What this means is that Walid could sue Ahmad, since the car should have been his because Ahmad did indeed leave the country within the year.

What policy reasons justify this? By signing the contract with Walid, Ahmad has eliminated some future uncertainty regarding his car in the event that he leaves the country. Since Ahmad is not fully sure whether he will be leaving the country (i.e. his plan is still tentative), he would have to sell this “possibility” of owning the car at a lower price than the price of the actual sale of the car. For this reason, Ahmad sells the car to Walid for just \$1000. Ahmad should not be allowed to then sell the car to Farishta (another buyer) before leaving, since then he is acting in bad faith towards Walid. By selling the car to Farishta, Ahmad is betraying Walid so that he can get an extra \$500. The law does not want to encourage such behavior. Rather it seems to help parties that act in good faith, in this case, Walid. However, if the parties agree in advance that the effects of the contract only start once the suspension has occurred, instead of reverting back to the date of contract once the event has indeed occurred, then Ahmad would not be liable.

The discussion above speaks to contracts with a suspension. However, this chapter mostly discusses **contracts with a condition**. This is probably the most important of the three mentioned contracts above.

**General conditions** are used to establish the circumstances under which the contract is meant to be interpreted, amended, or terminated. They can also be used to compel an action to take place before performance of a contract, or prohibit an action from taking place until performance of a contract. By compelling or prohibiting certain actions, conditions can suspend formation of an obligation until these conditions are met.<sup>2</sup> Broadly speaking, general conditions can be used to determine the time or circumstances under which an obligation will be created, and often the time or circumstances under which it will be enforced.

A condition precedent is a condition that comes into being after some even occurs. For example, if you purchase a fan, but secure a promise from the seller that, if the fan breaks, he will repair it, the condition of his repair only becomes active if the fan breaks.

A condition subsequent is almost the opposite. It is a condition that terminates a specific element of an agreement. For example, in a contract, two parties could agree that Party A will only buy gasoline from Party B until the price of gasoline goes over a certain amount of money per liter. Once the price goes above that amount, Party A no longer has to buy gasoline only from Party B.

A condition concurrent is when two obligations happen at the same time, and depend on each other. For example, Abdul could promise Fahim that he will play soccer with Fahim two Saturdays a month. However, he insists that Fahim promise to cook him lunch every time they play. Therefore, every time Abdul plays soccer with Fahim on Saturday, Fahim must cook him lunch.

### **3.1 Validity of a condition**

A condition can exist in one of three states as it relates to its enforceability. It may be valid, meaning completely enforceable in the contract. It may be vitiated, meaning that it is unenforceable—but fixable—in its current state. Or it may be void, and therefore both unenforceable and unfixable. The state of the condition may affect the validity of the entire contract (which will be discussed in the section on unenforceable contracts).

### **3.2 Vitiating conditions**

#### **Civil Code**

##### **Article 607**

A condition is considered valid in a contract if it is a) a condition suitable for the contract; b) a condition required by the contract; c) a condition that emphasizes the rules of the contract; d) a condition compatible with common custom; OR e) a condition that does not negate requirements of the contract.

##### **Article 608**

A condition which does not entail the interest of the two contracting parties is null, but contracts associated with it shall be considered valid.

##### **Article 609**

Where an element or a condition of a contract is absent, it shall be considered void.

##### **Article 610**

A condition shall be considered vitiated if it, a) is an unsuitable condition to the contract; b) is a condition not required by the contract; c) is a condition that does not emphasize the rules of a contract; d) is a condition that is not compatible with common custom; OR e) is a fraudulent condition.



Sometimes, a condition can be inserted into a contract that does not make sense within the context of that contract. For example, if Party A contracts to buy Party B's house, it does not make sense for Party A to insert a condition into the contract that says; "before I will pay you for the house, you must drive around Kabul three times." This condition does not bear any discernible relationship to either the objective or subjective cause of the contract, so this condition would likely be ignored. When we ignore a condition like this, we say that the condition is "**vitiated**." Contracts can remain valid and enforceable even if some of their conditions are vitiated. In this situation, Party A could still purchase Party B's house, but Party B would not be forced to drive around Kabul three times. Vitiating conditions may or may not be objectionable in a general sense, but a condition is always deemed vitiated where it is inappropriate to the contract in which it appears (Article 610). A vitiated condition will have no legal effect, and cannot give rise to an obligation. A vitiated condition may also affect the validity of the overall contract. This point will be discussed in the section on unenforceable contracts.

### 3.3 Options

In most systems of contract law, for all contracts, the offeror is generally the master of the offer, and can choose to alter or withdraw the offer at any time until the other party accepts it officially.<sup>3</sup> In an **option contract** however, the offeror creates a condition surrendering the right to alter or withdraw the offer for a specified time. The offeree can freely choose to accept the offer during that time, often for a fee. In the Afghan context, options are typically incorporated into contracts to give one party an opportunity to rescind a contract that was recently executed.

There are some very powerful economic reasons for creating these options. They can be used to defer the formation of an obligation. Options shift economic risk from the holder of the option to the individual granting the option. If, for instance, a grocer could not refuse to receive a fruit shipment that arrived spoiled, then he may have to spend more time and resources selecting fresh fruit each day. The additional expense and uncertainty may even force him to close his business. In this scenario, shifting the risk from the buyer to the seller lowers transaction costs and increases economic activity. The buyer (the grocer in this example) is more likely to place orders because he is assured of a quality product, and the seller is more likely to ensure a quality product because he bears the risk of refusal if the product is not up to standard.

When a party to a contract holds an option, it creates significant restrictions on the subject until the option is closed. No action can be taken that would make it impossible to exercise the option. For example, if someone sells a building and holds an option that gives them the ability to rescind that sale contract for up to six months, then the buyer is not free to lease, sell, destroy, or otherwise materially alter that building until the option expires six months later.

The following types of options are mentioned in the Civil Code.

#### 3.3.1 Option to rescind

Unless it is expressly stated in the contract that "all sales are final," or something similar, most contracts can be **rescinded** (Article 653). The **option to rescind** is a right for either party to rescind, or withdraw their offer to participate in, a contract. If the parties expressly choose to include an option to rescind, they can state when the period of the option begins or ends (Article 652). Most often, the option will begin either at the conclusion of contract negotiations (when the contract starts to take effect) or when the subject of the contract is transferred. With few exceptions, the option to rescind cannot be active for more than three days. Parties may choose to include an option to rescind in their contract where it is not clear that the subject will meet their needs, or where the parties place significant value on the ability to rescind for some other reason.

The option to rescind may be granted to one or both parties in a contract (Article 654), but the exercise of this option by one party obviously precludes its exercise by another, because the contract would no longer exist. However, if the option expires without any party exercising it, the contract becomes normally binding and an obligation is formed.

### Civil Code

#### Article 652

1. The two contracting parties can in all contracts, either during or after the contract, reserve the rescinding or continuation option for the contract for a maximum of three days.
2. The period of conditioning option is permissible, exceptionally, for more than three days regarding endowment, bailing, and Hawala of debt. The option period starts from the time of conclusion of the contract if the condition is laid during conclusion of the contract, and if laid after the contract, the period shall start from the time of the laying of the condition.

#### Article 653

The conditioning option is valid in enforced contracts that have possibility of rescinding, but shall not be valid in marriage contract, divorce, exchange, advance selling or payment, confession, procurement, gifting, and testament.

#### Article 654

Granting of the conditioning option is permitted for both contracting parties, either of them, or other than them.

### Discussion Questions

Review the above Articles. Why might it be good policy to allow a longer period in those contracts where that is allowed? Some contracts do not allow an option to rescind at all; why might this be good policy in those contracts?

In addition to establishing a right for both parties to rescind, Afghan law provides three other option mechanisms to help protect the buyer in a contract. These protections are generally good because, by shifting economic risk from buyer to seller, they encourage more people to buy and therefore increase the overall level economic activity.

#### 3.3.2 Option of choice

The **option of determining**, or **option of choice** is used when a contract has several potential subjects, only one of which will ultimately be transferred. For example, if someone places an order for a cellphones for his business, but he is not certain what type he needs, he may try to order up to three different models, with the understanding that, after a trial period, he would return all but one type of phone, the one that works best for him and his business. This option must be purposefully and explicitly included in a contract in order for it to be available. Generally, if a buyer wants to include an option of choice in a contract, it will increase the price of the contract because the offeror will require compensation for the additional risk he is assuming.

## Civil Code

### Article 662

1. Placing one of the determined objects as subject of a contract is permitted, and both parties can use the option of choice
2. If the option of choice is expressly mentioned in the contract, the possessor is deemed to be the holder of the option of choice unless the law provides otherwise, or the contractual parties have agreed to the contrary.

### Article 663

No more than three objects can be chosen as the subject of the option of choice.

### Article 664

The duration of the option of choice cannot exceed three days; this time period shall start from the conclusion of the agreement.

### 3.3.3 Option of defect

The **option of defect** is automatically included in any contract that is rescindable under Article 653. This option provides protection to the recipient of the subject if the subject of the contract does not function as expected. If the subject was broken and could not meet the needs of the buyer's subjective cause at the time the obligation was created, the buyer can rescind the contract if: a) the buyer did not know that it was broken; and b) the buyer's expectations of functionality are reflected in the price. The option ceases to be available to the recipient if the subject of the option is destroyed, if the recipient terminates the option voluntarily, or if the recipient uses the object before having knowledge of the defect.

## Civil Code

### Article 682

The right of rescinding a contract by option of defect exists without prior condition.

### Article 683

The option of defect shall be included in all contracts that may be rescinded.

### Article 684

The individual receiving the subject of a contract may exercise the option of defect when, a) there is a defect in the subject that existed before conclusion of the contract; b) the defect has not been accounted for in the price of the subject; c) the individual receiving the subject was not aware of the defect before purchase; AND d) the contract did not expressly deny the right to exercise the option of defect related to the defect in question.

### Article 688

The option of defect shall demise with the destruction of the subject of the option, increase or decrease thereof, termination of the option by the holder of the option, his acceptance of the defect after becoming aware of it, or his use of the subject before having knowledge of its defect.

### 3.3.4 Option of sight

This final category of option available under Afghan law provides protection to the recipient of the subject if the subject of the contract materially differs in appearance from the way it was described. The

**option of sight** does not need to be formally written into the contract (Article 676). A contract possesses an active option of sight that allows the buyer to rescind the contract if: a) the buyer never saw the subject prior to purchase; b) the subject differs from its description in a way that makes it difficult or impossible for the buyer to achieve his subjective cause; AND c) the buyer's expectations about the subject's appearance were reflected in the price. The option of sight is automatically included in contracts for the lease, transfer, or division of physical property. This option has the effect of reducing uncertainty about the quality of the subject, and therefore increases the likelihood that a contract will be made, thereby increasing economic activity. It also discourages fraud and other bad faith dealings, because it allows buyers who are lied to about the appearance of a subject to rescind the contract if the appearance of the subject does not meet their expectations.

### Civil Code

#### Article 676

1. The right to rescind a contract by option of sight shall be available in the following cases:
2. Purchase of properties whose determination is essential, and is not part of fixed debts under one's obligation;
3. Lease of properties;  
Division of similar properties; OR
4. Compromise on objects that can be owned.

#### Article 677

The option of sight shall only exist in contracts that can be rescinded

#### Article 678

For a contract to contain the option of sight, the subject of the contract must be determinable, and the person receiving the subject after conclusion of the contract must not have seen the subject.

## 4. UNENFORCEABLE CONTRACTS

Recall back to the initial chapters of this textbook when we discussed the formation of contract. Article 502(2) mentioned the conditions for valid contract. In certain instances, a contract be correctly concluded; however, it may be missing certain elements necessary for validity. Whether because of a flaw in the subject, cause, or conditions of contract, some contracts cannot be enforced as they were originally conceived. Afghan law recognizes several categories of unenforceable contracts. An unenforceable contract is a contract that lacks legal effect. A number of unenforceable contracts are described below.

### 4.1 Invalid contract

A contract is illegitimate by its nature and description if it is deficient in some essential way. Recall that article 502(2) requires capacity, subject, cause and congruence with public order for a contract to be valid. If any of these elements is absent, then the contract will be invalid. If the subject or cause of a contract is impossible, repugnant to public order or manners, absent from the terms of the contract, or so vague as to be indeterminable then the contract is **invalid**. Similarly, if one or both of the parties lack legal capacity, then the contract will be invalid. An invalid contract is different from the other unenforceable contracts mentioned below because in the case of an invalid contract, the contract never comes into existence. Article 614 states that an invalid contract cannot be concluded. This does not mean that it is impossible or illegal to complete the transaction contemplated in the contract; it just means that any agreement concluded for the transaction will not be enforceable in court. The other unenforceable contracts mentioned below come into existence but have no legal effect, whereas an invalid contract has no legal

effect because no contract even exists. If an invalid contract has been enforced, once it has been discovered that the contract is invalid, every effort must be made to restore the parties to the state they were in prior to enforcement (Article 615). Items that have been exchanged must be returned.

#### **Civil Code**

##### **Article 613**

An invalid contract is one that is illegal by its very nature and description

##### **Article 615**

Whenever an invalid contract has been enforced, returning the exchanged property and reinstating the original state are essential. In case return of the exchanged property is impossible, the court shall decide on just compensation.

##### **Article 618**

If elements of another valid contract come to existence in an invalid contract, the aforementioned contract shall be valid under the credibility of the second contract with the condition that both parties intended to create the aforementioned contract.

#### **4.2 Vitiating contract**

#### **Civil Code**

##### **Article 620**

A vitiating contract is one that is legitimate in principle, and illegitimate in description. Principally it is valid, because there is no defect in its element and subject, but it is vitiating according to some external descriptions.

##### **Article 622**

In exchange contracts a contract cannot be suspended if it contains a vitiating condition. If a vitiating condition exists, the contract shall be considered vitiating.

##### **Article 623**

If a vitiating condition exists in a non-exchanging contract, the contract shall be enforceable, but the vitiating condition shall be repealed. If a contract is suspended contingent on a vitiating condition, the contract shall be void.

##### **Article 626**

Each party to a contract, or their heirs, can rescind a vitiating contract, unless the cause of vitiating is eliminated.

A **vitiating contract** is a contract that has been properly concluded, but due to a defect in the contract's structure or conditions it is unenforceable and must be ignored in its current state. For example, if Asad wants to buy a car, and Hatem offers to sell a car to him it is legally permissible to create a sales contract for this purpose. If however, Hatem writes the contract in such a way that it is not clear which car is being sold, who it is being sold to, or how much the buyer is paying, the contract may be vitiating. The parties have the right to rescind a vitiating contract; however, the matter that caused the vitiating may be removed or corrected, in which case the contract becomes valid.

#### 4.2.1 Invalid vs. vitiated contract

Some students find it difficult to differentiate between the two. The chart below may clarify some of the differences.

<b>Invalid vs. Vitiating Contracts</b>	
<b>Invalid Contract</b>	<b>Vitiated Contract</b>
No contract exists	Contract exists but has no legal effect
Not fixable at all. None of the parties can ignore the deficiency and proceed with the contract.	One or both parties can either reject or fix the contract.
The deficiency is against public interest	The deficiency is against individual parties interests
Anyone can ask the court to revoke the transaction	Only one or more of the parties involved can ask the court to cancel it
There is no statute of limitations or at most a very long statute of limitations	Shorter statute of limitations period

#### Discussion Questions

1. Imagine, in the previous example, that Hatem does not actually own the car. It belongs to someone else he knows, but he sells it to Asad anyway. If the owner of the car discovers what Hatem has done after the car has been transferred to Asad, what happens?
2. What happens if, before the owner discovers the contract, Asad crashes and destroys the car?

#### 4.3 Suspended contract

In a **suspended contract**, the subject can be contracted for and the writing of the contract itself is acceptable, however, the person offering the subject through the contract does not have the legal authority to do so. Contracts for future subjects are also considered suspended contracts, as are contracts where the offeror is a minor.

Returning to the example of Asad and Hatem's car sale, imagine that the car is owned by Hatem's uncle Rajibullah. Rajibullah has been trying to sell the car for months but has so far failed to find a buyer. Rajibullah was out of town when Asad offered to buy the car, but, because Hatem did not want his uncle to miss this opportunity to sell the car, he negotiated and entered into a sales contract with Asad. The contract would then be suspended until Rajibullah returned and gave his consent for the contract to be enforced. If Rajibullah refused to give consent, the contract would instead be void.

The problem leading to suspension of this contract is that the possessor of the car, Hatem, is not authorized to transfer the subject. Once the person who legally owns the car, Rajibullah, consents to the contract, an enforceable obligation is created. But since there is no obligation created prior to this moment, either Asad or Hatem can rescind or cancel the contract without penalty at any time before Rajibullah gives consent.

## Civil Code

### Article 637(1)

A suspended, unenforced contract lacks legal effect, and shall not be proof of ownership, except with the permission of the person who exercises authority on the subject and possession of the contract, that and his permission entails all valid conditions.

## 4.4 Unbinding executed contract

## Civil Code

### Article 650

Whenever a contract, by nature, does not obligate one or both sides of the contract, or in which the choice of rescinding is given to one of the parties, the contract is considered an unbinding executed contract.

Any executed contract which has not yet created a formal legal obligation is considered an **unbinding executed contract**. Certain business partnerships may be unbinding executed contracts. For instance, when two people form a partnership, either one can terminate the partnership at any time as long as the terminating partner informs the other partner first. Contracts containing options to rescind, as well as options of choice, defect, or sight are also considered unbinding executed contracts from the time they are executed until the option expires.

## CONCLUSION

At this point in the chapter, you have seen the essential internal elements of a contractual obligation. What will follow are a pair of examples that will test your understanding of these elements and help you employ them to your advantage in the future.

## Case Study 1

Parwaiz has just heard that a large deposit of rare metals and minerals has been found in Zarkashan near Ghazni. He is in charge of a large mining company and wishes to acquire the rights to these metal deposits. If he is able to create a productive mine at the site, it will generate hundreds of jobs and be enormously profitable for his company.

This is a very complex operation and will require a number of steps to make it a reality. Assuming Parwaiz is able to acquire permission from the government to open the mine, he will still need to raise the funds needed to purchase the land and mining equipment, hire trained personnel, build roads and create other infrastructure for the mining site, and finding buyers for the mined material. It is also very likely that the additional economic activity will cause Zarkashan to grow. Demand for housing, shopping, restaurants, and other services are likely to increase. If the project is successful it is likely to create a great deal of wealth for the community.

He starts by trying to raise capital for the new project. He travels around Kabul asking prominent business leaders to invest in his operation. Once he feels that he has enough oral commitments to provide funding, he makes agreements to purchase all of the necessary material for the mine and commission the designs of the infrastructure. He begins advertising for the position of foreman and other management staff but avoids hiring unskilled labor for now.

1. What obligations is Parwaiz already a party to, and what obligations will he need to create moving forward?
2. What problems do you envision Parwaiz encountering as he tries to make this project a reality?
3. What would you have done differently?
4. How best can he protect himself, his project, and his employees from future disputes over contractual agreements?

### **Case Study 2**

Rahim wants to expand his restaurant business by opening a new location in a nearby city. He has decided where he wants the location to be, but his planning has not gone any further. He will need to take out a mortgage on his current restaurant in order to lease the new building, he will also need to hire new staff and establish new suppliers to service the proposed restaurant.

Rahim is already a very successful restaurateur and this does not leave him much time to handle the details of establishing his new restaurant. He hires a man named Ehsan to help him with these details, and to manage the new restaurant once it opens for business. Ehsan has previously managed restaurants in the city Rahim seeks to expand into. For most routine items, Ehsan is able to find suppliers willing to deliver their goods directly to the restaurant at a reasonable price, but the butcher he finds to supply meat insists that Ehsan must either go himself or send an employee to the butcher shop to collect the fresh meat each morning and pay the butcher after each delivery is made. Ehsan hires his nephew for that job. More serious difficulties arise when Ehsan begins hiring staff for the restaurant. Rahim has not requested that he hire an assistant manager for the restaurant, but he hires one anyway. He is able to hire a driver to collect the meat and other employees to clean and care for customers quickly, but he has great trouble hiring an appropriate chef. Rahim has given a very specific list of instructions to Ehsan explaining the skills that a chef in one of his restaurants must possess. Ehsan spends weeks interviewing candidates before he finds one that is suitable. Eventually, Ehsan accomplishes every task that Rahim needed to establish his new restaurant. At this point, problems start to become evident in the relationship between Rahim and Ehsan.

Just before Rahim's new restaurant opens, Ehsan complains to Rahim that he should be paid more for managing the new restaurant. They cannot reach an agreement and their business relationship ends. Ehsan decides that he should start his own restaurant, and that he would rather not compete with Rahim. He sabotages Rahim by convincing the chef to work at his restaurant instead. Rahim is not able to find an adequate replacement and must hire a less qualified chef. Later, on the first day that Rahim's restaurant is open for business, Ehsan calls his nephew after he left the butcher and instructs him to deliver the meat that Rahim was expecting to Ehsan's restaurant, the butcher still gets paid but now Rahim has no meat for his restaurant.

Rahim is furious and comes to you for legal advice.

1. What obligations are at play here?
2. What conditions and options exist?
3. If you had been involved from the beginning, would you have structured any of these agreements differently to give Rahim more protection?



In this chapter you were introduced to the concepts of subject and cause, as well as many types of conditions included in contracts, and several problems that may arise related to contract enforceability. By now, you should be comfortable with these concepts. When examining a contract you should be able to find and describe these contractual elements, and determine whether or not the contract creates an enforceable obligation.

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<sup>1</sup> Mirza Vejzagic, Future Contracts: Islamic Contract Law Perspective

<sup>2</sup> Afghan Civil Code Articles 596-599

<sup>3</sup> For comparison see Article 1933 of the Louisiana Civil Code. Acts 1984, No. 331, §1, eff. Jan. 1, 1985

## CHAPTER 6: EFFECTS OF CONTRACT

### INTRODUCTION

The last few sections of the book focused on the elements required to create a valid contract. This section of the book will focus on the effects of creating a valid contract. As you read this chapter, keep in mind the reading questions presented below.

#### Reading Questions

1. What happens when you agree to a contract?
2. If you were thinking about entering into a contract to purchase an item or service, what would you want to know about it?

Once a contract is in place, what obligations does it create for the parties? This chapter deals with effects of contract for the parties who entered into the contract. The **effects of contract** are the legal obligations and rights that result from concluding a valid contract. When parties agree to conclude a valid contract, they are generally bound by the terms of the agreement and, in the event one party does not **perform** her portion of the agreement, the other party can use the law to help solve the problem. To “perform” a contract simply means to complete the action required by the contract to which you agreed.

Why is a contract different from any other agreement between two parties? If you have agreed to go to your friend’s house tomorrow, is that a contract? What happens if you don’t go? As discussed in the last chapter, your promise to go to your friend’s house is not a legal contract because it does not meet contract formality requirements. Therefore, nothing happens if you tell your friend that you will meet them at a certain time and do not go. Your friend may be disappointed, but you did not break a legal obligation. By contrast, if a famous singer has a written, signed, and otherwise legally valid contract to perform at a stadium for a certain amount of money, his decision to skip the performance violates a *legal* obligation. As a result, the company hosting the concert would be able to seek a legal remedy for the singer’s failure to show up.

As you learned earlier in the book, a contract, as opposed to any standard agreement, has a number of requirements (such as offer, acceptance, subject, cause, and capacity) to be considered valid. Why would parties go through all of the effort to create a contract instead of an informal agreement? The major reason is that contract law can enforce promises. A contract, unlike an agreement to go to a friend’s house, is legally binding which means that courts assign penalties (whether **specific performance** or **damages**—both covered in detail later in the book) to the party who fails to perform. Since contracts are legally enforceable, it should cause parties to be very sure that they want to enter into the agreement before they agree to it. What should parties include in a contract? Read Article 690.

#### Civil Code

##### Article 690 (General Successors)

A valid contract, with conclusion of which effects such as provisions and rights are created, is a contract which is legitimate by nature and by description, and that its “*sigha*” (conclusive words) is issued by a person with full capacity about an object that is legitimate according to its provision, also that its descriptions is valid and free of defect and is not associated with a rescinding condition

As you can see, Article 690 states that a contract is valid, and therefore creates the rights and obligations contained within, if three conditions are met: (1) it is legitimate by its nature and description, (2) its offer

and acceptance are issued by people with full capacity about an object that is legitimate and (3) its description is valid and free of default, and it does not have a rescinding condition.

The execution of a contract creates obligations for each of the parties involved. For example, if Kader agrees to purchase a piece of art from Tahmina, both parties have obligations. Kader is obligated to pay the agreed price, and Tahmina is obligated to give Kader the piece of art and its title. The effects of a contract apply to both parties<sup>1</sup> and the obligations do not apply to anyone else because they are not involved in the contract. An important theme in contract law is the freedom to contract. Generally, parties willingly choose to communicate with one another to form an agreement, and can also choose not to do so. Contracts may have effects on the parties themselves (and their **successors**, as discussed below) as well as on third-parties who are not party to the contract itself. In this chapter we will discuss successors, and in the next chapter we look at third parties to contracts.

## 1. SUCCESSORS

A very important issue in contract law is succession. **Succession** is defined as the acquisition of rights or property by inheritance. Although it may be easy to divide up an estate among heirs, more difficult questions arise when you deal with issues like the debts of the estate or the transfer of one particular piece of property. Therefore, the Civil Code has rules to help govern what obligations and benefits flow to successors.<sup>2</sup>

### Civil Code

#### Article 691 (General Successors)

Both parties to a contract and their general successors shall be affected by the contract, with observation of not disturbing the rules of inheritance, unless it is recognized from the contract, the nature of transaction, or provision of law that the general successors shall not be affected.

#### Article 692 (Particular Successors)

If a person has personal obligations and rights, arising from a contract, regarding a property that shall afterwards be transferred to particular successors, the aforementioned rights and obligations, as well, at the time of transfer of property, shall transfer, provided that it requires property and that the successors, at the time of transfer of property, has knowledge of it.

In obligations law, there is a fundamental distinction between general successors and particular successors. A **general successor** (sometimes called a universal successor) is someone who receives the entirety of an estate, including the rights and duties, by succession.<sup>3</sup> A common example is when a father dies. The universal successors, the family members, receive the property, pay their father's debts, pay the funeral expenses, and divide the remaining property among themselves. In the Civil Code, Article 691 above governs general successors of contracts. It states that the effects of a contract apply to general successors unless they are specifically excluded from a contract.

A **particular successor**, by contrast, is someone who receives a particular estate property or item by succession. The critical distinction between a general successor and a particular successor is that the rights and duties of an ancestor do not transfer to a particular successor unless he is specifically aware. This principle is discussed in Article 692, above. For example, imagine that Aasif gives Basima a loan to purchase a car, and that Basima's heir Qasim knows about the loan. Some time in the future, Basima gives the car to Qasim, a particular successor. Because Qasim was aware of the loan on the car, Aasif still retains the rights to collect the loan debt from Qasim, even though Qasim is a particular successor.

## 2. MODIFICATIONS

Once the parties agree to be bound by a contract, all of the legal obligations of a contract come into effect. The law generally, though not always, works to ensure that a contract will be enforced. A major issue that arises in contracts is **modifications**. A modification is a change to the terms of the contract. What should happen if one, or both, of the parties to a contract want to change the terms after they have already formed a contract? Read Article 696.

### Civil Code

#### Article 696

(1) A contract shall be considered binding after its execution. Reversion from the contract or amendment thereof, without the consent of both parties or provision of law, is not allowed.

(2) In case of emergence of exceptional events or natural disasters, or an event whose prediction is impossible and the debtor faces, because of it, such a problem that threatens him with grave loss, even if fulfillment of pledge (obligation) regarding the contract is not impossible, the court could, after assessment of both parties' interests, reduce the debtor's obligation to a just amount. Any agreement repugnant to this provision is considered void.

According to Article 696, reversion from a contract is not allowed without consent. This means that modifications to a contract are not allowed unless both parties agree to the modification. The provision helps ensure that contracts are binding. Otherwise, parties would enter into contracts that are beneficial at the time, and then exit the contract when it becomes unfavorable. For example, imagine that Arian Afghan Airlines agrees to purchase airplane fuel from an oil supplier for 5,000 Afghanis a barrel for a one-year period. If the price of oil drops significantly, airline would want to exit the contract so they could buy cheaper fuel on the open market. Contract law exists to ensure that the airline performs its obligation.

As discussed later in the book, Article 696 does provide an exception. It states that in the event of certain emergencies, a debtor's obligation may be reduced a just, or fair, amount. One of the unique characteristics of civil law systems is the requirement of fault in order to find damages for breach of a contract.<sup>4</sup> If a contract is not performed for reasons outside the control of the nonperforming party, the party will not be held responsible for failing to perform the contract. For example, if the oil supplier's fuel stock is unintentionally destroyed by a fire or a flood, the company may have its obligation reduced or even fully terminated if a court finds such a reduction just. Even though there must be fault, it is important to remember that the exception to reduce or eliminate a contractual obligation is typically only allowed in a limited set of circumstances.<sup>5</sup>

## 3. EXCHANGE CONTRACTS AND ADHESION CONTRACTS

Many contracts involve future promises between two parties to exchange money for goods or services. These contracts are generally negotiated between the parties, ideally producing the optimal outcome for both parties. This section covers two different types of contracts and the rules the surround them: exchange contracts and adhesion contracts. An **exchange contract** is a contract where two parties agree to swap tangible items, such as two parties agreeing to exchange onions for rice, instead of a contract involving money.<sup>6</sup> Read Articles 693-695.

## Civil Code

### Article 693

If a swap contract that is concluded on properties meets all conditions of validity, it shall require proof of ownership of each of the parties in order to swap their property, and each of them is obliged to deliver his property to the other party.

### Article 694

Whenever a swap contract that is concluded upon benefits of properties meets all validity and enforcement conditions, the possessor of the property is obligated to deliver it to the recipient of the benefits, and the recipient of the benefits is obliged to deliver the lieu (the substitute) of benefits to the possessor of the property.

### Article 695

In addition to transfer of ownership and arrangement of profit, one of the effects of a swap contract is proving either debt under a person's obligation, or obligating the person for execution of an action, or guaranteeing the debt.

Article 693 of the Civil Code states that the items traded in an exchange contract require proof of ownership from each of the parties, and requires each party to deliver his property. Although all contracts require proof of ownership, mere possession of some forms of property, such as food and lesser expensive items, is sufficient, because in such cases, possession is equated with ownership. More expensive property, such as land or a car, usually requires a title (a government-issued proof of ownership). The principle of property ownership also exists in Islamic law. In fact, the "right of ownership in Muslim law is more absolute than it is in modern systems of law" because the idea that rights can become extinct is foreign.<sup>7</sup>

Article 694 of the Civil Code extends the obligations of exchange contracts to the benefits of properties, which are distinct from the property itself. For example, imagine that Sultana, who owns a small piece of property in Badakhshan, enters into a contract with a major minerals company. The contract states that the company has the right to haul their mining equipment across Sultana's property for 1000 bushels of wheat a year. Under Article 694, Sultana is obligated to allow the mineral company to transport equipment across her property, and the company is obligated to deliver the wheat.

Beyond property and its benefits, a contract may also create obligations based on debt or service. For example, a person may exchange her old cell phone and 5000 Afghanis for a brand new cell phone. The obligation of debt, to pay 5000 Afghanis, is an obligation created by the contract according to Article 695 of the Civil Code. She would need to both transfer her phone and pay the money to fulfill her obligation, not one or the other.

The Civil Code also regulates **adhesion contracts**. An adhesion contract is a contract in which one of the parties agrees to the terms laid out by the other party. When people typically think about a contract, they often imagine a negotiation between two parties. In reality, however, many contracts do not have such a back and forth negotiation. Insurance is a good example. A person buying insurance does not get to negotiate the price and terms of the policy with the insurance company. Instead, they have to agree to the price and terms put forward by the insurance company. This is called an "adhesion contract" because one party must "adhere" to the contract without negotiating to define its terms.<sup>8</sup>

What is wrong with an adhesion contract? After all, can't a party always decide not to enter a contract? The concern with adhesion contracts is that they are common in many industries important to society, so

it is difficult, if not impossible, for a person to refuse to enter into a contract. Think about a cell phone contract. When someone agrees to a cell phone contract, the contract will often include provisions that say that the customer will not hold the company responsible if the phone breaks, limiting the forums in which a person could bring a lawsuit against the company, and mandating a high penalty charge if the contract is broken early. The problem is that people need cellular phones, and the differences in the contracts of different phone providers are not significant. So they are forced to accept burdensome provisions in the contract, even though they did not have a chance to bargain for the terms of the agreement.

Since adhesion contracts are so prevalent, and occur in so many important industries, the Civil Code gives courts the power to regulate the fairness of their terms. Article 698, Clause 1 of the Civil Code permits courts, in the context of an adhesion contract, to modify the conditions or discharge the opposite party “in a way that justice requires.”<sup>9</sup> This does not apply if the adhesion conditions are established by government institutions,<sup>10</sup> such as the government granting privileges to certain persons or companies in governmental contracts. Article 698, Clause 2 supplements the governmental authority by allowing government institutions to approve and monitor the conditions of adhesion contracts, including prices in contracts of adhesion of private organizations.<sup>11</sup> By giving courts the ability to police the fairness of adhesion contracts, it provides ordinary people a way to make sure that the entities issuing adhesion contracts, often corporations, cannot take advantage of them.

### Applying Adhesion Contracts

1. Why is an adhesion contract different from other contracts?
2. What are some examples of adhesion contracts in everyday life?
3. How should a court determine whether an adhesion contract is fair? What should it do if the contract is not fair?
4. Why should governmental adhesion contracts be treated differently than standard adhesion contracts?

## 4. THIRD PARTY CONTRACTING

The previous section focused on the effects of a contract between the two parties (or their successors) that agreed to the contract. This section will address the role of third parties, people outside of the original negotiation or agreement, in the contract.<sup>12</sup> Frequently, only the two parties who conclude a contract will have any legal obligations under the contract. People who are not party to the contract, called **third parties**, typically have no legal interest in the contract. When Daoud and Farah agree to exchange a piece of land for a certain amount of money, for instance, the neighbor has no legal interest in the contract. There are other times, however, where a contract may create rights and obligations for a third party, even though they are not a party to the original contract.

For instance, Abdul may enter into a contract with Bahram agreeing to pay Bahram if he delivers certain goods to Camila. If Camila does not receive the goods, who can sue for breaking the contract? Under Afghan law, as well as most civil law systems, both Abdul and Camila have the ability to sue Bahram for violating the contract.<sup>13</sup> Even though Camila was not specifically a party to the contract—since the negotiations took place between Abdul and Bahram—Camila was nonetheless intended to benefit from the contract. Allowing Camila to sue ensures that she has **legal recourse**—the ability to pursue a claim in court—should the contract not be performed. Why should the law allow third parties to sue? Consider the next discussion box.

## The Justification for Third Party Rights

At the outset, providing third parties rights, benefits, and obligations under contract law seems strange. Why should the two people who concluded the contract be able to obligate a third person to do something? There are at least three major reasons.<sup>14</sup>

1. **Intent** of the Parties: At its core, contract law is about trying to enforce the intent of the parties at the moment the contract is formed. If the parties intend to enter into a contract that involves a third party, the law should allow it.
2. **Efficiency**: Allowing parties to agree to a contract involving a third party can increase economic efficiency. For example, national governments will sometimes provide student loans for kids to attend college. Since the national government often does not have the resources or desire to manage the loan, the loan will be sent to a third party.
3. **Social benefits**: There are certain types of contracts involving third parties that are important to have socially. Life insurance contracts are a good example. It is important for society to have a means by which an individual's heirs can collect money should that individual die.

### 4.1 Obligation to secure performance by a third party

A contract involving three parties, as opposed to two, raises some unique issues that the Civil Code must address. In a standard contract, discussed earlier in the book, there is an offeror and an offeree. In a third party contract, the offeree actually obligates a third party to perform an obligation. In this section, we will study two concepts unique to third party contracts: the obligation to secure performance by a third party and stipulations in favor of a third party.

We will begin with the obligation to secure performance. In a standard contract between two parties, both parties are generally aware of the terms of the contract (though they later may be disputed) because each party took part in the negotiation. When an offeree obligates a third party, however, the third party may not be aware of the obligations or understand them. How should the law deal with this? To begin, read Article 701.

## Civil Code

### Article 701

(1) If a person promises a third person's pledge, the third party shall not be obligated because of it, in case of rejection of the promise by the third party, promisor shall be obliged for its compensation. If the promisor fulfills his obligation without delivering harm to the creditor, he shall not be obliged for paying compensation of the promise.

(2) If the third party confirms the promise, he shall be responsible for it from the moment of sending the confirmation, unless the confirmation, implicitly or explicitly, is attributed to the day of promise.

Article 701 specifically lays out the requirement that a third party must accept an obligation created by an offeree. Specifically, Article 701, Clause 1 of the Civil Code states that a third party who rejects an offeree's pledge shall not be obligated. Third party acceptance is required because otherwise people could be obligated to perform contracts against their will. Just as an obligee must assent to be bound in a traditional two-party contract, a third-party must accept the contract, either explicitly or implicitly. The third party must also have legal capacity so that offerees cannot obligate individuals that are not legally capable of creating a contract. As you learned in the contract formation chapters, additional formalities



may be required for some types of contracts, such as donations. If the third party does accept the promise, Article 701, Clause 2 of the Civil Code states that he shall be responsible from the moment of sending the confirmation. It is important to remember that in the event the third party declines to fulfill the obligation, the offeree shall remain obligated to fulfill the obligation, or to provide compensation for non-fulfillment.

### **The Common Law Concept of “Privity”**

Unlike civil law jurisdictions, which generally allow third parties to sue to enforce a contract, some common law jurisdictions, such as Canada,<sup>15</sup> have a doctrine of “privity” that only allows the actual parties to a contract to seek legal remedies. Therefore, from the example above, Camila would not be allowed to sue for the goods failing to arrive because only Abdul and Bahram were “in privity” with one another. Camila is technically a third party to the contract, and did not have an active role in negotiating it. Therefore, it is said that she did not have privity to it. While the concept exists in common law, it is not necessarily embraced or favored by all practitioners. Some argue that the theory is incoherent, and many common law jurisdictions are abandoning the concept by eliminating it or expanding exceptions to the rule.<sup>16</sup> For example, the United Kingdom passed legislation in 1999 to open “up a whole new legal regime for third parties to enforce contracts directly.”<sup>17</sup>

#### **4.2 Stipulation in favor of a third party**

Article 701, discussed in the previous section, is the first basis for third party contracting. It requires an offeree to acquire agreement from a third party; then, if that occurs, the third party is obligated to perform the contract. In addition to this concept, the Afghan Civil Code also provides additional guidance and limits to guide contracts involving third parties. Read Articles 702-704.

### **Civil Code**

#### **Article 702**

(1) A person can conclude a contract, based on pledges in which he conditioned the interest of a third person, under his own name, provided that he benefits from its conclusion materially or intellectually. The third party gains the right of principal by executing the mentioned condition, unless agreed contrary to that.

(2) The pledger can, against the usage of the third party’s right of being a principal, defend as it occurs on the contract. Also the reserver of the condition can demand performing of the interest reserved as condition for benefit of the third person, unless contrary to that becomes obvious from the contract.

#### **Article 703**

(1) The reserver of condition can, before the third person sends his agreement regarding usage of the condition to pledger or the reserver of the condition, break the condition that he reserved, unless the contract requires otherwise. Creditors or the heirs of the reserver cannot enjoy this right.

(2) Reserving the condition does not exculpate the pledger against the reserver of the condition, unless repugnant to this is explicitly or implicitly agreed upon. The reserver of the condition can change the third person, or take his place.

Article 702 of the Civil Code establishes the first limitation on a stipulation of a third party. It states that a third party must benefit, materially or intellectually, from the contract in order to obligate the third party.<sup>18</sup> These requirements help ensure that offerees do not have an unlimited ability to create third party rights and obligations, which would permit the creation of unauthorized contracts. If the third party did not have to benefit from the contract, he could create contracts that obligate third parties for bad reasons. For example, he could obligate a business competitor to be a third party responsible for performing very

onerous tasks. If the offeree suffers no harm from creating these contracts to obligate third parties, nothing would stop him from doing this.

Once the third party begins to perform the condition in the contract, however, Article 702 of the Civil Code states that the third party becomes the **principal**. As the principal, the third party can sue the original offeror of the contract directly. For example, imagine that the Afghan Ministry of Foreign Affairs enters into a contract with American University of Afghanistan where the Ministry will pay the American University of Afghanistan to teach four Chinese language classes to Hadi, a Ministry employee. There are actually two separate legal relationships at work. The first legal relationship is between the Ministry of Foreign Affairs, who is providing the tuition funding, and AUAF, who is providing the classes. There is a separate legal relationship between the Ministry of Foreign Affairs, who is still providing the money, and Hadi, who attends classes. If the University stop providing classes because the Ministry suddenly refuses to make its payments, Hadi may directly sue the Ministry, even though he was not party to the initial contract.

Another potential issue with a contract involving three parties is modification, a term introduced in the previous chapter. What if the Ministry of Foreign Affairs and AUAF, the actual parties to the first contract, wish to modify their contract by replacing Chinese with French but Hadi, the third party beneficiary, does not? Article 703 of the Civil Code provides a rather complicated answer to the question.

Article 703, Clause 1 of the Civil Code states that the person placing the condition on the third party can withdraw or modify the condition before the third party sends agreement. Although this would seem to suggest that an agreement between an offeree and third party cannot be broken once the third party has sent confirmation, it is not so simple. Article 703, Clause 2 of the Civil Code states that the offeree (who is also known as the reserver) can change the third party or take the place of the third party. This allows the offeree a great deal of flexibility to modify the third party beneficiary.

While the offeree must benefit from the contract, there are not very strong limits on who the third party can be. Article 704 of the Civil Code states that the benefiter can be an independent person or an independent party.<sup>19</sup> The article goes on to state that it is permissible if the person or party is not defined at the outset so long as he can be identified at the time the contract's effects emerge.<sup>20</sup> For example, imagine that Ghulam is Makai's grandfather. They sign an official contract that Ghulam will purchase a new laptop computer for Makai's firstborn child when he or she reaches the age of twenty. This would be a permissible contract even though the third party beneficiary, the unborn child, cannot be identified at the time that the contract is made.

### Discussion Questions

1. Why should third parties be allowed to sue to enforce contracts?
2. What problems could that cause?
3. How does the law deal with these problems?

## 5. THIRD PARTY APPARENT AND IMPLIED CONTRACTS

When a contract involves three parties, as opposed to two, there also may be more opportunity for misunderstanding, and perhaps deceit, because each party has their own interpretation of the agreement. Therefore, the Civil Code provides some rules to deal with some possible ambiguities in third party contracts. Article 699, Clause 1 of the Civil Code states that if parties conclude a contract in collaboration with one another, or in joking, the creditors and the particular successors can stick to the apparent contract

as long as they have good faith.<sup>21</sup> The **apparent contract** is the written agreement between the contracting parties that other parties will believe to be the agreement. So, for example, imagine that a construction company and a supply company have a longstanding contract for the supply company to provide high-quality steel to the construction company to build buildings. When the companies sat down to renew the contract, they wrote that the contract was “to continue delivery of the same great product.” If the steel company then begins providing noticeably lower-quality steel, and subsequently a house collapses due to using inferior materials, the creditors of the construction company may have a claim because they would read the implied contract, which, because of the word “great,” suggests high-quality steel.

The Afghan Civil Code has additional provisions that help guide disputes between apparent and implied contracts. An **implied contract** is an agreement between two parties that may not be written representing their actual agreement. Article 699, Clause 2 states that if the words of the contract (the apparent contract) differ from the implied meaning of the contract, the apparent contract is preferred.<sup>22</sup> This provision applies to particular successors who would have no way to know about the implied contract between the two parties, and can only behave based on what is actually written. The result is similar when a third party is involved. Article 700, Clause 2 states that when the concluding parties conceal the real contract, third parties, such as creditors and particular successors, can abide by the apparent contract, as long as they act in good faith. This Article helps prevent the two concluding parties from tricking a third party by showing them an agreement that differs from what is supposed to be the actual contract.

When the contract involves universal successors, however, the result is different. Article 700, Clause 1 of the Civil Code states that between the concluding parties and their general successors, who presumably would have all of the information about the contract, the implied contract is enforced.<sup>23</sup>

### Section Review Questions

1. What are the requirements for a valid contract according to Article 690?
2. Is the performance of a contract optional?
3. What is the difference between a general successor and a particular successor?

## 6. IMPOSSIBILITY OF PERFORMANCE AND ACTS OF GOD

### 6.1 Introduction

Another way that a contract may be voided is if performance of the contractual obligation becomes impossible due to events outside of the control of the party to the contract. Events that will most easily satisfy this requirement are events referred to as “acts of god”. Acts of god generally include natural occurrences like storms or floods, but other events can qualify in some circumstances.<sup>24</sup>

### Civil Code

#### Article 960

If a debtor proves that fulfillment of his obligation has become impossible due to a cause that was beyond his will, the obligation shall demise.

In this Article, the Civil Code is referencing the civil law concept of impossibility of performance, which absolves parties of their contractual obligations when external events make performance impossible.

Although civil law jurisdictions all over the world vary in how they address acts of god, there is consensus establishing a three-factor test. An event must satisfy all three factors of the test in order to void a contract under Article 960. The three requirements are that the event is external, unforeseeable, and that it makes performance of the contract impossible.<sup>25</sup> Courts will evaluate the circumstances of the event objectively, and when the actions of the individual claiming impossibility are relevant, they will evaluate those actions against what a reasonable person under the same circumstances would do. The court will *not* examine the individual's actions subjectively.

## **6.2 Requirements of Article 960**

### **6.2.1 External requirement**

The event must be external to the debtor, the party that owes an obligation, meaning that it must be outside the debtor's control. One can imagine several potential events of this nature such as a sudden storm or flood. Clearly such events must be external to the debtor's control since people cannot cause storms to happen. Similarly, illness will usually qualify as an external event, unless an individual behaved recklessly and became ill because of it.

Natural events are not the only events that can satisfy the external requirement. For instance, something like a car crash not caused by the debtor might qualify as an external event. Imagine an individual is driving to deliver their goods to the other party to the contract. While on the way, driving carefully, their car is hit and the goods are destroyed. Although not a "natural" event, this would pass the external requirement because it is outside of the debtor's control.

While a debtor can generally at least argue that the actions of others, such as with a car crash, satisfy the external requirement, there are some actions that are categorically excluded. For example, the actions of one's employees are considered internal to the debtor.<sup>26</sup> If a debtor's employee accidentally destroys the goods promised to someone else, the debtor cannot avoid their contractual obligation because for the purposes of impossibility of performance an employee is considered under the debtor's control.

To finish our examination of the external requirement, let us use the example of a flood. Floods are a natural event outside of a human's control. However, for legal purposes, such events may be found to not satisfy the external requirement of *force majeure*. Within the external requirement is the sub-requirement that the debtor has undertaken and implemented all the precautions that a reasonable person, under the same circumstances, would have in order to avoid the damage caused by the event.

In the case of a flood, the way the court will determine whether or not the debtor satisfies the external requirement depends on the circumstances. Suppose that Hasan lives in an area that never or rarely experiences any flooding, and when flooding does occur it is very minimal causing almost no significant damage to property. Hasan has taken no precautions to protect his property in the event of a flood. Should a flood occur destroying or damaging Hasan's property that he was obligated to deliver to someone else, it is likely that he will satisfy the external requirement since a reasonable individual under the same circumstances likely would not have taken precautions against a flood either. However, if Hasan lives in an area where flooding is not a rare occurrence and he still has not taken any precautions, or has taken fewer precautions than what is reasonable to protect his property from such an event, it is more likely that the court will find that he did not satisfy the external requirement.

There is also a matter of degree involved in such a determination. Perhaps Hasan does live in an area where flooding occurs often. He has taken some precautions against flooding, but a flood comes and destroys his property that is promised to another. In the case of a normal level of flooding for the area the court may find that he did not do enough to satisfy the external requirement. However, if the flood is

significantly worse than what is normal for the area or if it is so bad that any precautions would not have prevented the damage caused by it, Hasan will likely be found to have satisfied the external requirement.

### Discussion Question

Isah owns an electronics store. He stores all of his merchandise in the back of the building. The roof over this part of the building leaks, but Isah lives in an area where it only rains for a few months every year. During these months Isah puts a sheet over the roof to protect his products. This year it rains unexpectedly in a different month and Isah's products are destroyed. Would this scenario satisfy the external requirement?

## 6.2.2 Unforeseeability requirement

The second requirement to satisfy act of god is unforeseeability. An event is unforeseeable if it could not have been predicted. The unforeseeability of an event is not judged on an absolute scale. An individual can imagine nearly any event occurring, no matter how unlikely, so any event is technically foreseeable. Rather, unforeseeability is judged by examining the *abnormality* of an event within its context. As when determining the external requirement, unforeseeability is examined by looking at the specific circumstances surrounding the event in question. Thus, events that are extremely unlikely to occur in a certain location can satisfy this requirement even if they are not unforeseeable in a broader sense.

The evaluation of unforeseeability will often blend with the sub-requirement of the external requirement discussed above. The difference here is that when determining unforeseeability, we are not concerned with the precautions that an individual did or did not take. We are purely concerned with whether or not he or she could have reasonably predicated that the event would occur.

Let us return to the flood example used previously. If Hasan lives in an area that never floods, and a flood does occur that destroys his property, then Hasan will satisfy the unforeseeable requirement. While it is foreseeable that a flood may occur anywhere on earth, such an event is abnormal enough for Hasan's area that a flood would be unforeseeable for Hasan. On the other hand, if Hasan lives in an area that frequently floods, a flood will likely not satisfy the unforeseeability requirement unless the flood is of a far greater magnitude than is normal for the area.

The challenging aspect to determining unforeseeability is when the event lies in the middle of the two extremes presented above. Perhaps Hasan lives somewhere that floods occasionally. Does that satisfy the unforeseeability requirement?

### Discussion Question

At what point would you say that a flood becomes a foreseeable event for Hasan? When his area floods every 100 years? What about every 50 years? 10 years? 2 years?

Another aspect of the unforeseeable requirement is the timing of the evaluation. As you have already learned, many problems in contractual obligations will be examined by looking at the circumstances at the time of contracting. This is also true for the unforeseeable requirement. Courts will ask whether or not the event was foreseeable when the parties formed the contract.

Imagine that Ahmad has contracted with Mustafa a few months before the beginning of the growing season to buy 20 bushels of Mustafa's wheat when it is ready. Mustafa farms in an area where the crops have consistently been of high quality for decades. Unfortunately, this year the area suffers from a

harmful beetle infestation that ruins the wheat crop. Farmers in the area knew that the infestation was likely a couple weeks before the season began.

Although the event did not turn out to be unforeseeable in the end (the farmers had advance notice that the wheat crop would be infested that season), a court would likely find that it did satisfy the unforeseeability requirement because they would examine the circumstances *at the time* that the contract was formed. At that point, a few months before the growing season, a bad crop would be unforeseeable for the area since it had enjoyed decades of excellent growing seasons. Even though it became apparent that Mustafa would not be able to deliver the wheat before the growing season, this occurred after the contract was formed.<sup>27</sup>

Finally, economic shifts are generally excluded from being unforeseeable for the purposes of impossibility of performance.<sup>28</sup> Imagine that instead of Mustafa's wheat being destroyed by an infestation, his wheat is the only crop that survived a sudden flood. His wheat is now worth far more than it was when he formed the contract with Ahmad, but Mustafa cannot claim that the new value of his product was unforeseeable and that he should be released from his contractual obligations.

### Discussion Question

In December, Sayed hires Omar to play the piano at a party Sayed is hosting in January. A couple of days before the party, Omar catches a cold that has been going around the city and can no longer perform at the party. Does this qualify as an unforeseeable event? Why or why not? What additional facts would be useful in determining whether or not this event is unforeseeable?

### 6.2.3 Impossibility requirement

The final requirement common to civil law jurisdictions is that the event in question has made the performance of the debtor's contractual obligation impossible. If the debtor's goal is to completely void the contract, then impossibility is judged using a strict standard. It does not just mean difficult or impracticable. A different Article in the Civil Code, however, allows for a change in obligations when performance is difficult or impracticable and will be addressed later. Like the other requirements, the impossibility of performance is examined by looking at the totality of the circumstances of the case at issue. Additionally, the impossibility of performance must have occurred *after* the contract was formed.<sup>29</sup>

For the purposes of act of god, impossibility means that the debtor is unable to perform his or her obligations under the methods stipulated under the contract or, in some circumstances, by other means. Whether other means negate a debtor's claim of act of god again depends on whether or not the source of the goods or the method of delivery was an integral part of the contract. For example, if it is feasible for the debtor to deliver goods of the same quality by using a different source, performance may not be considered impossible so long as the specific source was not a part of the contract.

Suppose that Rashad has a contractual obligation to Zahra to deliver 10 computers. They agree on certain specifications, but not on the brand. Rashad has a warehouse in the city and stores the bulk of his merchandise there, and has reserved 10 Dell computers for Zahra. He also has a second warehouse several kilometers away where he keeps a small supply of merchandise. The second warehouse is difficult to access and Rashad tends to give the merchandise he stores there to friends and family. Additionally, it is merchandise that, although identical in quality and kind to the merchandise he keeps in the city, he has had to pay a higher price to obtain. Rashad has 10 of the computers that Zahra ordered in his secondary warehouse, but these are made by Sony.

A storm satisfying the requirements of an unforeseeable, external event occurs and destroys the merchandise that Rashad was keeping in the city. Rashad wants to claim that act of god absolves him from delivering the computers to Zahra. Will Rashad succeed?

Rashad will likely be unsuccessful. Although it will be difficult for Rashad to deliver the computers to Zahra, and he will not receive the same economic benefit because he will have to give Zahra goods he paid a higher price for, but these facts do not make performance impossible. Rashad has access to the goods contracted over. Additionally, although the computers in the first warehouse were made by Dell and the second by Sony, the contract did not specify a brand, so this difference is immaterial (of minimal or no importance.)

Recall, though, that merely having other means of delivering the same quality of goods from another source does not always eliminate the impossibility of performance. If the contract is specific about the source of the goods or services then an event that renders the delivery of those specific goods or services impossible will void the contract.

If the contract between Rashad and Zahra had specifically been for 10 Dell computers with the same specifications as the Sony computers in his secondary warehouse, and Rashad could not access an alternative source of the Dell computers, then he would succeed on his claim. This is because the brand of computer was specified in the contract and he could not now substitute the Sony computers for the Dells.

#### **Discussion Question**

Let's imagine another scenario. Suppose that Mohammad has a contractual obligation to Sayed to deliver 20 gallons of milk. Sayed purchased the milk from Mohammad because the land where Mohammad grazes his cows is renowned for creating cows with the highest quality milk. Unfortunately, a fire swept through Mohammad's farm and killed his cattle. Normally, Mohammad would be absolved from his obligations due to an act of god. However, Mohammad's brother, also a cattle farmer who grazes his cows on the same land as Mohammad, has offered Mohammad his cows' milk so that Mohammad can fulfill his obligations. Mohammad still wants to void his contract with Sayed. Will he be successful? What are the arguments that Mohammad will be released from his contractual obligations? What are the arguments that he will be required to deliver the 20 gallons of milk to Sayed using his brother's cows?

Finally, the impossibility must be permanent. If it is merely temporary then the contract will be suspended until the impossibility is resolved. This applies unless time is an integral part of the contractual obligation.<sup>30</sup> For time to be considered integral the time constraint must be part of the contract or the understanding of the parties and not merely the preference of one of the parties.

Imagine that Abdul has contracted Fatima to make a sculpture. While creating the sculpture, Fatima learns that one of the materials she needs for the sculpture will be unavailable for several months. In this situation, performance is not impossible permanently. Fatima can deliver the sculpture when the material becomes available again. However, if Abdul wanted the sculpture as a gift for his wife's fortieth birthday in two months' time, and the contract stated that fact or Abdul and Fatima understood that that was the purpose of the sculpture, then time is an integral part of the contract and performance will be impossible. The time constraint must have been understood by both of the parties, preferably by stating it in the contract itself. If Abdul did not communicate the time constraint to Fatima, then performance will not be deemed impossible since the material will be available again in the near future.



### 6.3 Exceptions

While impossibility is a strict standard when the aim is to void a contract, the Civil Code allows for a looser standard to be applied if the act of god causes great hardship to the debtor, though not necessarily rendering the obligation impossible.

#### Civil Code

##### Article 696

In case of emergence of exceptional events or natural disasters, or an event whose prediction is impossible and the debtor face, because of it, such a problem that threatens him with grave loss, even if fulfillment of pledge (obligation) regarding the contract is not impossible, the court could, after assessment of both parties' interests, reduce debtor's obligation to a just amount. Any agreement repugnant to this provision is considered void.

Although the event will still have to pass the external and unforeseeable requirements, a court may relax the impossibility standard when forcing performance would be highly damaging to the party forced to perform. Note that what constitutes a "grave loss" is left for the court to decide and is highly subjective. One court may interpret a "grave loss" as the debtor losing a significant amount of money if they are forced to perform while another may interpret "grave loss" to only occur when forcing performance will cause financial ruin.

Additionally, notice the phrase "just amount." The means that the court will assess the specific situation and then potentially lower the obligation owed by the debtor to the amount that it deems most befitting. Although this Article does not give courts specific permission to void a contract, it is possible that, taking into account the circumstances, a court may find that an event outside of the debtor's control has made a "just amount" of their obligation zero or no obligation to perform at all.

One last point of significance in this article is the last line, which states that any provision in a contract that tries to go around Article 696 of the Civil Code will be rendered void.

#### Discussion Question

For example, imagine that Hakim has just opened a store that sells leather goods. He was able to stock his store with very high quality goods because a friend of his did him a favor and allowed him to purchase the goods at a very discounted price. Unfortunately, the store has not been profitable yet. Kadir has ordered a leather jacket from Hakim with some alterations, a service that Hakim offers. While completing the alterations, some of Hakim's goods, including Kadir's jacket, are destroyed by an event that otherwise satisfies the requirements of impossibility of performance. Hakim could order a replacement jacket from his friend, but the friend will not offer Hakim the same discounted price. Hakim argues that paying full price for the replacement jacket will cause him to go out of business. Do you think a court would adjust his contractual obligation?

### 6.4 Contracting out of impossibility

Finally, the code permits the parties to assign the responsibility for events that would render performance impossible if they choose to do so at the time of contracting.



## Civil Code

### Article 830(1)

(1) It is permissible that both parties agree for the pledger to bear responsibility of acts of god and forced causes.

The pledger is the party that is receiving the goods or services. If when forming the contract the two parties agree that should an event occur that would satisfy the requirements to remove obligations to a contract, the pledger will still uphold their obligations. This Article can be very useful when contracting over a high-risk product. If, for example, Sayed wants Rasoul to grow him some mulberries, but the area that Rasoul grows his crops in is not ideal for growing mulberry bushes, Rasoul may not want to agree to the contract if the reason that the area is not ideal for mulberries is because some natural event that would qualify for the external and unforeseeable requirements occasionally occurs. However, Rasoul might agree if Sayed agrees to pay for the mulberries even if some natural event destroys.

Article 830(1) is interesting because it seems to be inconsistent with Article 696 which states that parties cannot contract out of a courts ability to assess an act of god. How may the two articles be reconciled? Recall from our discussion of the example of Hassan and the flooding lands that what is and is not an act of god is better conceptualized as a spectrum of various degree rather than two distinct categories. What 830(1) says that a particular party may accept to bear the responsibilities for acts of god, meaning that the possibility of such a pledger claiming a act of god is greatly mitigated since the pledger had agreed to assume such liability. However, Article 696 still provides a last line of defense for contracting parties in the case of an emergency event beyond what the parties may have even fathomed to be acts of god. Thus despite the pledger's assumption of liability in the event of act of god, Article 696 allows the courts to make a final decision on what is just between the parties given the particular emergency situation.

### Discussion Question

Article 830(1) refers to “acts of gods and forced events”, whereas article 696 refers to “exceptional events or natural disasters”. Do you think this distinction is significant? In what ways? Why may the authors of the Civil Code used these two different terms?

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<sup>1</sup> 1977 Civil Code, Article 691, Clause 2, Law No. 353 (5 January 1977).

<sup>2</sup> For a useful comparative analysis of succession law, see George A. Pelletier, Jr. and Michael Roy Sonnenreich, "A Comparative Analysis of Civil Law Succession," *Villanova Law Review* 11 (1966): 323-56.

<sup>3</sup> *Ibid.*, 325 (defining universal succession as "succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent").

<sup>4</sup> The civil law can be contrasted with the common law, which does not have a fault requirement. See Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal," *Victoria University of Wellington Law Review* 32 (2001): 824-26.

<sup>5</sup> For a useful comparative look at contract nonperformance, see Harold J. Berman, "Excuse for Nonperformance in the Light of Contract Practices in International Trade," *Columbia Law Review* 63 (1963): 1413-39.

<sup>6</sup> For example, a treatise on American law defines an exchange contract as "mutual transfer of property for property other than money." 33 C.J.S. Exchange of Property § 1 (2012).

<sup>7</sup> Saba Habachy, "Property, Right, and Contract in Muslim Law," *Columbia Law Review* 62 (1962): 456.

<sup>8</sup> For a useful comparative analysis of adhesion contracts, see Arthur Lenhoff, "Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law," *Tulane Law Review* 36 (1961-62): 481-94.

<sup>9</sup> The Civil Code, Article 698, Clause 1.

<sup>10</sup> *Ibid.*

<sup>11</sup> The Civil Code, Article 698, Clause 2.

<sup>12</sup> For a useful article describing Egyptian third person law, see Salah-Eldin Abdel-Wahab and John H. Brinsley, "The Stipulation for a Third Person in Egyptian Law," *The American Journal of Comparative Law* 10 (1961): 76-86.

<sup>13</sup> The Civil Code, Article 699. For a strong theoretical defense of a third party beneficiaries' right to sue and a comparative analysis of the topic, see Gabriela Shalev, "Third Party Beneficiary: A Comparative Analysis," *Israel Law Review* 11 (1976): 315-38.

<sup>14</sup> See generally The Asia Foundation, *Free Market Contract Law, Phnom Penh, Kingdom of Cambodia* (Phnom Penh: Phnom Penh Printing Shop, 1997), 799-800.

<sup>15</sup> John D. McCamus, "Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?," *The Canadian Law Business Journal* 35 (2001): 173-215.

<sup>16</sup> *Ibid.*, 176.

<sup>17</sup> Yeo Tiong Min, "When Do Third Party Rights Arise Under the Contracts (Rights of Third Parties) Act 1999 (UK)?" *Singapore Academy of Law Journal* 13 (2001): 34-53.

<sup>18</sup> The Civil Code, Article 702.

<sup>19</sup> The Civil Code, Article 704.

<sup>20</sup> The Civil Code, Article 704.

<sup>21</sup> The Civil Code, Article 699, Clause 1.

<sup>22</sup> The Civil Code, Article 699, Clause 2.

<sup>23</sup> The Civil Code, Article 700, Clause 1.

<sup>24</sup> Impossibility of performance and acts of god are comparable to the concept of *force majeure* in many civil law countries.

<sup>25</sup> This is the test under various jurisdictions including Egypt, France, Greece, Syria, and the United Arab Emirates. Marel Katsivela, "Contract: Force Majeure Concept or Force Majeure Clauses?" *Uniform Law Review* 12 (2007): 103,106; Adnan Amkhan, "Force Majeure and Impossibility of Performance in Arab Contract Law," *Arab Law Quarterly* 6, no. 3 (1991): 303.

<sup>26</sup> Katsivela, "Contract: Force Majeure Concept or Force Majeure Clauses?" 104.

<sup>27</sup> Note, however, that Mustafa may not succeed on the external requirement. He had advance warning of the infestation and if a court finds that there were precautions he could have taken to prevent the degree of damage he will likely fail the external test.

<sup>28</sup> Michael P. Thereoux and April D. Grosse. "Force Majeure in Canadian Law," *Alberta Law Review* 49, no. 1 (2011): 412

<sup>29</sup> If performance was impossible before the contract was formed then there would be no obligation in the first place.

<sup>30</sup> Amkhan, "Force Majeure and Impossibility of Performance in Arab Contract Law," 306-07

## CHAPTER 7: GOOD FAITH

### INTRODUCTION

Generally, parties negotiating a contract can negotiate the agreement to suit their needs. They can negotiate and specify anything from price to quantity to timeframe to the penalties for breaking the contract. This chapter introduces a limitation on the negotiation and performance of all contracts: **good faith**. As we will explore, the concept of good faith is difficult to define but broadly refers to the idea that one party should not be dishonest or unfair when negotiating and performing a contract. Consider the follow questions as you read this chapter.

#### Reading Questions

1. When you hear the concept “good faith,” what do you think it means?
2. Should there be a penalty for withdrawing from contract negotiations?
3. How much information should a party have to disclose during negotiations?
4. How would you determine whether a party is executing a contract fairly?

Many doctrines in contract law are very specific. For instance, the rules governing offer and acceptance draw fairly specific lines around what counts as a contract. The contract law doctrine of good faith, however, is much more ambiguous. It is a concept that is intended to prevent one party from taking advantage of the other party. According to one commentator, good faith “is an elusive idea, taking on different meanings and emphases as we move from one context to another—whether the particular context is supplied by the type of legal system (e.g., common law, civilian, or hybrid), the type of contract (e.g., commercial or consumer), or the nature of the subject matter of the contract (e.g., insurance, employment, sale of goods, financial services, and so on).”<sup>1</sup> There are many different definitions of good faith.<sup>2</sup> Ultimately, one leading comparative law scholar argues, “[i]t is of course true that the term ‘good faith’ lacks a fixed meaning...[I]t simply confers on judges and arbitrators a measure of discretion, authorizing and directing them to search for a fair solution without giving them much guidance on how to go about it.”<sup>3</sup> Another commentator adds that good faith “plays a gap filling role and is usually invoked in extreme circumstances—either in the total absence of legal rules or when there is a complex network of legal rules.”<sup>4</sup>

#### A Comparative Look at Good Faith

1. The **UNIDROIT Principles** include a general principle on good faith that “(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.”
2. **France** has been “rather reluctant to invoke notions of good faith on a broad scale” while good faith in **Germany** has become a “powerful instrument[] in the hands of courts willing to protect what they regard as reasonable expectations created by inaction.”<sup>5</sup>
3. The **Uniform Commercial Code**, which regulates commercial exchanges in the United States, defines good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”<sup>6</sup>

Since good faith is hard to define, scholars often turn to its opposite: **bad faith**. If one can identify what actions count as bad faith, presumably, not taking those actions is acting in good faith. One prominent scholarly treatise defines bad faith as “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.”<sup>7</sup> While the comment is not actually law, it does provide a useful insight into the types of actions that some commentators associated with bad faith.

## Civil Code

### Article 697

A contract shall be executed upon anything included in it, subject to good faith requirement. Also, the contract, in addition to the fact that it obligates both parties regarding what is included in the contract, it includes all requirements of nature of obligation according to provisions of law, custom, and appropriate justice.

The concept of good faith can be found, both explicitly and implicitly, throughout the Civil Code. Article 697 is the foundation of the good faith requirement in Afghan law. It explicitly states that a contract shall be enforced subject to a good faith requirement.<sup>8</sup> Additionally, Article 9 of the Civil Code states that a person will be held responsible “[w]hen the interest of the person is trivial compared to the damage he inflicts upon others.” So, if he makes use of his rights in such a way that it gives him minimal benefit while greatly harming the other party, the contract may not be enforceable.<sup>9</sup> Although good faith can be hard to define, it is important to note that good faith, unlike many other provisions in contract law, is mandatory. Parties cannot agree to a contract that waives the good faith requirement; it is always present.

The concept of good faith also underlies all contracts in Islamic law. One commentator explains that, “[d]espite of the fact that Islamic Law does not use the term ‘good faith’, the concept is even broader in Islamic Law. Good faith in Islamic Law includes a duty to act altruistically. This is natural because Islamic Law does not lay a bright line separation between law, morality and religion. It addresses society’s interests, not only those of contracting parties.”<sup>10</sup> For example, Chapter 9, verse 7b of the Qur’an states “[A]s long as they act straight with you, act straight with them; verily Allah loveth those who show piety,” which prominent articles argue represents the good faith principle.<sup>11</sup> The Qur’an chapter on commerce also strictly prohibits fraud and fraudulent dealings.<sup>12</sup>

The chapter will discuss good faith in two contexts: good faith during contract negotiations (when a contract has not officially been formed) and good faith after a contract exists.

## 1. GOOD FAITH IN CONTRACT NEGOTIATIONS

Contract law generally works to ensure the freedom of the parties to contract, and decide not to contract, as each pleases. Such freedom, however, is not completely without limits. As one commentator noted, “strict adherence to freedom from contract might transform it into a freedom to manipulate the rules of the game.”<sup>13</sup> Historically, contract law is often viewed through very binary terms.<sup>14</sup> Either there was a valid offer and acceptance, in which case there was a contract, or there was not. In today’s environment, however, it is often more complicated. Contract negotiations, particularly between large and sophisticated corporate entities, can be extremely complex and lengthy. For instance, imagine that Microsoft and Google were interested in merging with one another. It would take a great deal of time and effort for each company to do all of the work necessary to determine whether merging with the other company was a good idea. If, after a few of days of researching the other company’s materials, Google decides to end merger negotiations, should it be punished? What if the research had been going on for many months? What if the companies were about to announce the merger the next morning? The concept of good faith is used to balance the freedom any party has to avoid entering a contract against the (possibly costly and

time-consuming) actions the other party undertook while relying on the fact that the contract would be completed.

The theory of good faith, particularly in the context of negotiations, has its roots in the German law of obligations. The doctrine of culpa in contrahendo states that a person is held to be liable for any damage resulting from his fault during negotiation of a contract.<sup>15</sup> The justification for the rule was that, while parties are free to contract with people as they choose, a party should not be allowed to suddenly back out of a contract because the other person reasonably expected that a contract would result. Although it may seem odd to punish a party for not entering into a contract, one justification is that the parties, by negotiating, enter into a relationship of trust and confidence that the contract will be negotiated.<sup>16</sup>

### Comparative Law: Good Faith in Negotiations

1. In **Italy**, the Civil Code includes a provision that contract *negotiations*, not just contract performance, must be conducted in good faith.<sup>17</sup>
2. The International Institute for the Unification of Private Law (**UNIDROIT Principles**), an international restatement of trade law, states in Article 2.1.15: (1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.<sup>18</sup>

It is not always easy to determine the balance between the freedom not to contract and the requirement to negotiate in good faith. An interesting example is disclosure. When you are negotiating with another party, how much information do you need to disclose? Where do you draw the line between shrewd negotiation and acting in bad faith? If you are selling a car, do you need to disclose a problem with the engine? A stain on the inside? A typical standard, drawn from French law, is that a party has to disclose “relevant” information that will influence the conditions under which the contract is concluded. Consider the following examples.

### Discussion Questions

1. **The Painting:** Fahim owns a painting that he would like to sell. He thinks that the painting may have been painted by Kamaluddin Behzad. Therefore, he hires a well-known art expert who has the painting examined by an expert specializing in 16<sup>th</sup> century Afghan art. They determine that there is a good chance that the work was painted by Behzad. The painting is described as an authentic Behzad painting at an auction, where Rasoul buys it for 500,000,000 Afghanis. Eventually, a group of archaeologists discover information that proves that Behzad could not possibly have painted the picture. The painting is now worth only 25,000 Afghanis. Rasoul sues Fahim, claiming that he did not accurately describe the painting, which the experts could not conclusively prove was a Behzad. Will Rasoul win? Probably. The facts of the case are adapted from a famous French case. While the French duty of disclosure is broad, there is nonetheless a large difference between purchasing a painting that was definitely painted by Behzad and one that merely had a “good chance.” The chance that it was not painted by Behzad easily could have convinced Rasoul not to purchase it, or at least lower his bid.<sup>19</sup>
2. **Getting a Loan:** Rajibullah goes to a regional bank office to try to negotiate financing for a new business. The headquarters of the bank, located in a different city, allowed to regional branch to handle the negotiations. After a number of months, the parties appeared to reach an agreement. The regional bank prepared the final text of the agreement and sent it to Rajibullah for signature. At the

last minute, however, the regional bank told Rajibullah that the head office needed to approve the deal and had refused to do so. Should the bank be held liable for a violation of good faith? Most likely, yes. A Swiss court found that while either party could have broken off the negotiations without giving any reason, each party was under a duty “to inform the other, to some extent, of the peculiar circumstances that would influence its decision to conclude the contract or to conclude it on certain conditions.”<sup>20</sup>

### Hypotheticals: Answers

1. Probably. The facts of the case are adapted from a famous French case. While the French duty of disclosure is broad, there is nonetheless a large difference between purchasing a painting that was definitely painted by Behzad and one that merely had a “good chance.” The chance that it was not painted by Behzad easily could have convinced Rasoul not to purchase it, or at least lower his bid.<sup>21</sup>
2. Most likely, yes. A Swiss court found that while either party could have broken off the negotiations without giving any reason, each party was under a duty “to inform the other, to some extent, of the peculiar circumstances that would influence its decision to conclude the contract or to conclude it on certain conditions.”<sup>22</sup>

### 3. GOOD FAITH AFTER A CONTRACT EXISTS

As discussed in the previous section, part of the good faith doctrine addresses the interaction between parties *before* a contract exists. The doctrine also applies after parties conclude a contract. There are two ways to look at good faith as it relates to contract performance.<sup>23</sup> One view is **subjective**. The subjective view looks at the party’s state of mind. Did the party intend to gain an unfair advantage in the contract by, for example, agreeing to sign a contract that he never intended to perform? The other view is **objective**. Under this view, what matters is not the mindset of the party but rather the actual terms of a contract. If, for example, Latif agrees to sell livestock to Paiman at three times their market value, this may violate the principle of objective good faith because the price differs so widely from the market value which shows that Latif may have intended to extract an unfair amount of money from Paiman; it only matters that the price seems unreasonable in the context. Extremely high pricing is also referred to as swindling, which will be discussed in the following chapters. In Afghanistan, both the subjective and the objective interpretations of good faith are relevant when evaluating a party’s actions.

The Afghan law contains a number of provisions to help courts enforce the fairness of contracts. From the subjective point of view, the Civil Code contains a number of provisions to help guard against fraud and duress. For example, Article 505 requires that a contract be concluded without duress.<sup>24</sup> **Duress** is defined as a threat of harm made to compel a person to do something against his or her will or judgment.<sup>25</sup> Similarly, Article 570 defines **fraud**, a prohibited action, as using means of deceit to drag a party to agree to a contract that they would not have otherwise agreed to.<sup>26</sup> This requires a subjective intent to deceive the other party. Fraud and duress are discussed further in the following chapters.

Other parts of the Civil Code seem to take a more objective view. An objective view will look at the actual contract to see if the terms are unfair as opposed to the mindset of the parties involved. Article 571, for example, specifies that a price is deemed exorbitant, or excessive, when the difference between the real value of a property at the time of contract and the price it was sold amounts to 15 percent or more.<sup>27</sup> At a broader level, Article 502, Clause 2 states that the validity of a contract is conditioned upon public order and reality.<sup>28</sup> Similarly, Article 590 says that an obligation is void if the subject is repugnant to public order and manners.<sup>29</sup> Lastly, Article 608 says that a condition is void if it does not benefit both

parties in the contract.<sup>30</sup> Each of these provide the court with the ability to scrutinize the substantive provisions of a contract without having to assess the mindset of the party.

#### **Good Faith Problem: Hassan's Loan<sup>31</sup>**

A bank in Afghanistan provides Hassan a demand loan, and one of the conditions of the loan is that Hassan makes the bank aware of any transaction that he is doing with the loan. Hassan informs the bank that he intends to enter into a car purchase transaction on May 2, at 4pm, and then re-sell the car a few days later. However, the bank informs Hassan on May 2, at 12pm that they intend to recall the loan, which they recall at 3pm. Hassan is not able to go through with his transaction.

Even though the bank is allowed to recall the loan under the terms of the contract, did the bank violate its obligation of good faith?

#### **Good Faith Problem: Answer**

Yes. The bank likely violated its obligation of good faith. Here, the benefit the bank gets from calling the loan is very small, but the damage it causes Hassan is great. Therefore, Article 9 and 697 works to mitigate the damage the Hassan might face by the bank calling the loan in this instance.

#### **4. GOOD FAITH DAMAGES**

If a court finds that a party did not act in good faith, what should the remedy be for the other party? As will be discussed further in the remedies chapter, there are two types of damages: **reliance damages** and **expectation damages**. Reliance damages are what the party has already invested in a contract negotiation whereas expectation damages are what the party would have received had the contract been performed by both sides. For example, suppose a manufacturing company signs a contract for which it expects to gain a profit of 500 million Afghanis. As part of the contract, the company spent 25 million Afghanis on attorneys, consultants, etc. If a breach of contract lawsuit arises, the reliance damages would be 25 million because that is what the party put into the contract whereas 500 million would be the expectation damages.

In the context of good faith, a court will typically award reliance damages, which is what the party put into the negotiations, not what the benefits of the contract would have produced. The court will only award reliance damages because had the parties acted in good faith, the deal probably would not have occurred at all.<sup>32</sup> Therefore, it would be unfair to give the party the full benefit of the contract.

<sup>1</sup> Roger Brownsword et al., “Good Faith in Contract,” in *Good Faith in Contract: Concept and Context*, ed. Roger Brownsword et al. (Boston: Dartmouth Publishing Company, 1999), 3.

<sup>2</sup> For a survey of some of the definitions of good faith, see William Tetley, “Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering,” *Journal of Maritime Law and Commerce* 35 (2004): 561-616.

<sup>3</sup> Friedrich K. Juenger, “Listening to Law Professions Talk About Good Faith: Some Afterthoughts,” *Tulane Law Review* 69 (1995): 1254.

<sup>4</sup> Dr. Tariq Hassan, “The Principle of Good Faith in the Formation of Contracts,” *Suffolk Transnational Law Journal* 5 (1980-81): 49.

<sup>5</sup> *Ibid.*

<sup>6</sup> U.C.C. § 2-103(1)(b) (1977).

<sup>7</sup> *Ibid.*, cmt. D.

<sup>8</sup> The Civil Code, Article 697.

<sup>9</sup> The Civil Code, Article 9.

<sup>10</sup> Hossam A. El-Saghir, “The Interpretation of the CISG in the Arab World” Pace Law School Institute of International Commercial Law (2008), accessed February 11, 2013, <http://www.cisg.law.pace.edu/cisg/biblio/el-saghir.html#c>

<sup>11</sup> Saba Habachy, “Property, Right, and Contract in Muslim Law,” *Columbia Law Review* 62 (1962): 465.

<sup>12</sup> Fatima Akaddaf, “Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?,” *Pace International Law Review* 13 (2001): 31, accessed February 13, 2013, <http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html>.

<sup>13</sup> Nili Cohen, “Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate,” in *Good Faith and Fault in Contract Law*, eds. Jack Beatson and Daniel Friedman (New York: Oxford University Press, 1995), 27.

<sup>14</sup> For useful theoretical background, see E. Allan Farnsworth, “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations,” *Columbia Law Review* 87 (1987): 217-94.

<sup>15</sup> Dr. Tariq Hassan, “The Principle of Good Faith in the Formation of Contracts,” *Suffolk Transnational Law Journal* 5 (1980-81): 3-7. While common law jurisdictions generally do not recognize *culpa in contrahendo*, the doctrine of promissory estoppel performs a very similar role. Mohamed Yehia Mattar, “Promissory Estoppel: Common Law Wine in Civil Law Bottles,” *Tulane Civil Law Forum* 4 (1988): 71-150.

<sup>16</sup> Dr. Tariq Hassan, “The Principle of Good Faith in the Formation of Contracts,” *Suffolk Transnational Law Journal* 5 (1980-81): 5.

<sup>17</sup> Dr. Tariq Hassan, “The Principle of Good Faith in the Formation of Contracts,” *Suffolk Transnational Law Journal* 5 (1980-81): 7.

<sup>18</sup> UNIDROIT Principles of International Commercial Contracts (2010) Article 2.1.15, accessed February 11, 2013, <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>19</sup> For the facts of the French case and a description of French disclosure law, see Muriel Fabre-Magnan, “Duties of Disclosure and French Contract Law: Contribution to an Economic Analysis,” in *Good Faith and Contract Law*, eds. Jack Beatson and Daniel Friedman (New York: Oxford University Press, 1995), 99-122.

<sup>20</sup> The facts are drawn loosely from the case *Escophon AG v. Bank in Langenthal*, Bundesgericht, Switz., 105 BGE II 75, 80, 128 J.T. I 66, 70 (1979), which is discussed in E. Allan Farnsworth, “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations,” *Columbia Law Review* 87 (1987): 235.

<sup>21</sup> For the facts of the French case and a description of French disclosure law, see Muriel Fabre-Magnan, “Duties of Disclosure and French Contract Law: Contribution to an Economic Analysis,” in *Good Faith and Contract Law*, eds. Jack Beatson and Daniel Friedman (New York: Oxford University Press, 1995), 99-122.

<sup>22</sup> The facts are drawn loosely from the case *Escophon AG v. Bank in Langenthal*, Bundesgericht, Switz., 105 BGE II 75, 80, 128 J.T. I 66, 70 (1979), which is discussed in E. Allan Farnsworth, “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations,” *Columbia Law Review* 87 (1987): 235.

<sup>23</sup> See generally E. Allan Farnsworth, “Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,” *The University of Chicago Law Review* 30 (1962): 666-79. Although Professor Farnsworth’s article is in the context of the United States’ Uniform Commercial Code, it provides a useful history and theoretical framing of the debate between the objective and subjective interpretation of good faith.

<sup>24</sup> The Civil Code, Article 505.

<sup>25</sup> Black’s Law Dictionary (9th ed. 2009).

<sup>26</sup> The Civil Code, Article 570.

<sup>27</sup> The Civil Code, Article 571.

<sup>28</sup> The Civil Code, Article 502, Clause 2.

<sup>29</sup> The Civil Code, Article 590.

<sup>30</sup> The Civil Code, Article 608.

<sup>31</sup> This example is adapted from the Canadian case of *Houle v. National Bank of Canada* (1990), SCC, Civil, L’Heureux-Dubé J.

<sup>32</sup> Friedrich Kessler and Edith Fine, “Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative,” *Harvard Law Review* 77 (1964): 418.



## CHAPTER 8: INTERPRETATION

### INTRODUCTION

The last few chapters focus on the obligations that a contract creates on the parties involved. This chapter will focus on what happens when the contract is breached, or some other dispute arises, and a court is required to resolve the dispute. It is important to remember that the vast majority of contracts are never brought before a court. Either the parties successfully perform their obligations under the contract, or they find an alternative way to resolve their dispute. Nonetheless, this chapter will discuss how a court may resolve competing contract claims in a lawsuit. To help understand some of the issues that arise in contract interpretation, complete the contract creation exercise.

#### Contract Creation Exercise

Pair up with one other person in the class. In this exercise, imagine that one of you works for the administration of a school. The other person is a teacher. For the exercise, please negotiate and draft an employment contract. You only have 15 minutes.

As you negotiate, think about the following:

1. What terms do you want to make sure the contract includes?
2. Are there terms you do not want included?

Trade your contract with another group. Read the other group's contract and answer the following questions:

1. Are there any ambiguous words or terms? How do you think a court would interpret that word or term?
2. What is a topic the other group forgot to include in the contract? If a dispute arose about that topic, how do you think a court would resolve it?

A contract represents an agreement between two parties to undertake certain obligations. Contracts, however, are not always perfect. One of the most common reasons for lawsuits regarding a contract arise is a disagreement about the meaning of part of the contract. There are typically two major types of disagreements: differing interpretations of the words included in a contract and differing interpretations about what a contract means when it does not address a particular issue. This chapter will discuss both.

### 1. INTERPRETATION ISSUES: DETERMINING THE MEANING OF WORDS IN A CONTRACT

One set of contract interpretation disputes involves disagreements about what the words or terms in a contract mean. In a very famous contract law case,<sup>1</sup> for example, two parties disagreed on the meaning of the word “chicken” in a meat shipping contract. One party thought they could send any chicken to fulfill the contract but the other party thought it must be a young chicken.

As discussed earlier in the book, parties enter into a contract to create a defined and enforceable agreement. When one party becomes unhappy with the contract, they may go to court to try to fix the problem.<sup>2</sup> When a judge is confronted with conflicting interpretations of a contract, which interpretation should be preferred? The Civil Code contains a number of provisions to help judges interpret contracts.

As one commentator explains, “[t]he civil law is based on codes which contain logically connected concepts and rules, starting with general principles and moving on to specific rules. A civil lawyer usually starts from a legal norm contained in a [piece of] legislation, and by means of deduction makes conclusions regarding the actual case.”<sup>3</sup> To begin understanding how courts interpret contracts, read Articles 705 and 706.

### Civil Code

#### Article 705

The principle in contract is the consent of the two contracting parties, and the result of what they have obligated upon themselves by the contract.

#### Article 706

In contracts, observing the apparent will of both parties, credence shall be given to intentions and meanings, not to words and letters.

When deciding between competing interpretations of the words contained in a contract, according to the Civil Code, a judge should focus on the **intent** of the parties. The advanced reading at the end of the section explains the concept in much greater detail. The emphasis on the parties’ intent is reflected in Article 705 of the Civil Code. The judge, to the best of his or her ability, must try to ascertain what the parties were trying to agree to at the time of contracting, even if it now seems unclear or unwise. For example, imagine that Nabil and Sadaf sign a contract where Nabil will buy a dozen pomegranates each month from Sadaf for a “fair market price.” The contract is intended to last for nine months, and, for each of the first eight months, Nabil purchases the dozen pomegranates for 600 Afghanis without a problem. Suddenly, Sadaf informs Nabil that, due to changes in the market because of a drought, the price for the pomegranates is now 5,000 Afghanis. Nabil refuses to pay and a lawsuit ensues. Should Nabil have to pay 5,000 Afghanis? How do you define “fair market price”? During the contract negotiations, do you think Nabil would have agreed to pay a “fair market price” even if it could be as high as 5,000 Afghanis?

Article 706 of the Civil Code reflects a similar principle. It states that credence is given to the intention and meanings of the parties, as opposed to the words and letters of the contract. If, for instance, an employer and an employee agree to a contract that the employee will work for 500 Afghanis an hour, but the text of the contract says 50 Afghanis an hour, the employer cannot simply point to the contract as evidence that the employee should be paid 50 Afghanis an hour. The parties meant to create a contract for 500 Afghanis an hour, and an error in the writing should not excuse the employer from performing his side of the contract. Similarly, Article 707 of the Civil Code states that in oral contacts, the real meaning of a word takes precedence over the figurative meaning, unless the real meaning is excused.<sup>4</sup> Imagine that a person signs a contract to purchase a car for a certain price. One of the parties cannot give the other party a laptop instead, claiming that “car” actually means “laptop.” If this were allowed, it would be too easy for parties that become unhappy with a contract to say “but we actually meant something different.”

Article 708 of the Civil Code expresses a similar idea and applies to all contracts, whether formed in writing, orally or otherwise. It states that the implied is not credible against the explicit. Put differently, the explicit will be preferred over the implicit. If parties agree to a contract for 1,000 Afghanis, it is not credible for one of the parties to say that the price of the contract was actually 500 Afghanis. The contract is clear what the price was. The Civil Code has a similar provision for describing contracts in court. Article 714 states that description is not credible in presence, and credible in absence.<sup>5</sup> If two parties are present in court arguing whether a watch is real or fake, the watch itself, if present, takes precedence over descriptions of whether the watch is real. In the event the watch is not present, then the court will resort to descriptions of the item to solve the dispute.

What if a contract attempts to address an issue, but the parties disagree about what it means? Consider the Mining Contract Hypothetical.

### **Mining Contract Hypothetical<sup>6</sup>**

[A]ssume that a landlord and a mining company enter into a lease agreement for an area to be exploited as a mine. The lease is for 25 years. The price to be paid by the mining company is a fixed amount per ton of the extracted product, and such price is subject to an index regulated in the contract. The lease agreement contains a clause regulating the possibility to renew the contract that reads as follows:

“This agreement expires on the 25th anniversary of the date the contract signed. The mining company is entitled to a renewal of this lease – at the same conditions – if it notifies the other party one year prior to the expiration of the contract of its decision to renew within.”

The mining company notifies the landlord within the required timeframe that it would like to renew the contract “at the same conditions,” which includes the same price. The landlord objects to the renewal, and requires that the financial conditions of the lease are renegotiated.

If you were the mining company, what would be your best arguments? What if you were the landlord?

To encourage parties to clarify the terms of the contract, and avoid the ambiguity presented in the Mining Hypothetical, the Civil Code encourages parties to be specific when writing contracts. Article 711 states that “[u]se of language is preferred” to neglecting it. When a contract includes language, courts will generally try to interpret the contract in a way that accounts for the language as opposed to reading it out of the contract. For example, if the Afghan government agrees to purchase 500 blue iPhones, a court will probably require the iPhone to be blue, as opposed to any other color. Why would the parties specify blue iPhones if that is not specifically what they wanted? Therefore, the court will try to account for every word in the contract.

To close this section, read the “Contract Law and Economic Efficiency” box. Do you agree with Judge Posner? Why or why not?

### **Advanced Reading: Contract Law and Economic Efficiency<sup>7</sup>**

Why does contract law exist? What would happen if parties could not resort to the law when settling contract disputes? Judge Richard Posner, one of the United States’ most prominent contracts commentators, explains why contract law is important to promote economic efficiency:

[A] system of unenforceable contracts would not be efficient. Apart from the costs of credit bureaus and security deposits (especially since return of the deposit could not be compelled), self-protection would often fail. Although someone who was contemplating breaking his contract would consider the costs to him of thereby reducing the willingness of other people to make contracts with him in the future, the benefits from breach might exceed those costs. He might be very old; or (a related point) the particular contract might dwarf all future contracts that he expected to make; or he might not be dependent on making contracts but instead be able to function in the future on a cash-and-carry basis.

The basic aim of contract law (as recognized since Hobbes’s day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures. But it is not always obvious when a party is behaving opportunistically. Suppose A hires B to paint his portrait “to A’s satisfaction.” B paints a portrait that connoisseurs of portraiture admire, although not enough to buy it themselves at the contract

price. A rejects the portrait and refuses to give any reason for the rejection. If the rejection is not made in good faith, A will be held to have broken the contract. Good-faith performance—which means in this context refraining from taking advantage of the vulnerabilities created by the sequential character of contractual performance—is an implied term of every contract. No one would voluntarily place himself at the mercy of the other party, so it is reasonable to assume that had the parties thought about the possibility of bad faith they would have forbidden it expressly....

So opportunism is one problem with which the law of contracts must cope and another is the limitations of foresight. The longer the performance of a contract will take—and remember that contract “performance” includes the entire stream of future services that the transaction contemplates—the harder it will be for the parties to foresee the various contingencies that might affect performance....

Adjudicative gap-filling is a particularly economical method of dealing with contingencies that, even if foreseeable in the strong sense that both parties are fully aware that they may materialize, are so unlikely to do so that the costs of careful drafting to deal with them exceed the benefits when those benefits are discounted by the (low) probability that they will ever be realized. It may be cheaper from a social standpoint for the court to “draft” the contractual term necessary to deal with the contingency if and when the contingency materializes. (One adjudication may substitute for 1,000 drafting sessions.)

## 2. INTERPRETATION ISSUES: DETERMINING THE MEANING OF CONTRACTUAL SILENCE

Another major problem that arises in contract interpretation is when a contract, intentionally or unintentionally, does not cover a particular issue. Contracts are often incomplete because it would be inefficient, and impossible, for contracts to deal with every possible situation that might arise during the contract. Although the law encourages use of specific terms, parties often fail to, or chose not to, include them. How should the court interpret the contract when it is unclear what the parties agreed to? This section will outline some of the major tools that courts use to interpret contracts that do not address issues that arise later.

### 2.1 Default rules

One of the major tools that courts use to fill in gaps that exist in contracts is **default rules**. A default rule is a legal principle that fills a gap in a contract in the absence of an applicable express provision but remains subject to a contrary agreement. It is a legal principle or common example provision that fills that gap left by the parties. Warranties are a good example. Imagine that your iPhone breaks a couple of months after you purchase it, and the purchase agreement says nothing about whether the product has a warranty. If you brought a lawsuit, will a court find a warranty exists? You will argue that products, particularly expensive electronics such as an iPhone, should have some sort of warranty to protect the customer. Apple, by contrast, will argue that the purchase agreement does not mention a warranty so one does not exist. Even though the purchase agreement does not specifically mention a warranty, a court very well may say that a warranty exists for a reasonable amount of time, such as a year because that is the normal expectation of a customer when buying a product such as an iPhone. This would be the court creating a default rule: products (at least iPhones) should have a reasonable warranty, regardless of whether the purchase agreement specifically includes one.

Consider another example. Imagine the Afghan Ministry of Defense purchases a new airplane from a defense contractor. When the plane arrives, the Afghan Ministry of Defense is angry that many of the plane specifications are not what they wanted. In response, the defense contractor argues that they meet all of the terms of the contract, which was not very specific. Contracts cannot predict every possible problem that could arise, such as the types of screws required for an airplane. Otherwise, contracts might

be thousands of pages, and it would not be worth the effort to write them. Here, a court might say that the materials for the airplane, such as the screws, need to be of a reasonable quality, a common substitution in the absence of a specific provision. And, if the court determined that the plane did not meet these reasonable standards, it would take the side of the Afghan Ministry of Defense.

The Civil Code contains a number of individual articles that create default rules about how contracts will be interpreted. Article 710 states that in case the impediment (obstacle) and exigency (demand) are contradictory, impediment shall be given preference.<sup>8</sup> For example, in a dispute between parties about whether to conclude a contract, the view of the party who does not want the contract concluded (the obstacle) will take precedence over the demand to complete the project. This article helps minimize harm and the harm from not concluding a contract can be mitigated relatively easily, as discussed in the next section. Article 712 states that mentioning of some of what is indivisible is like mentioning its whole. If, for example, you bought a sweater and went to complain about the tear in a sleeve, Article 712 clarifies that you are talking about the entire sweater, not just the sleeve. There is no way to give back the sleeve without also giving back the sweater. A similar idea is expressed in Article 727, which states that if a person becomes owner of an object, he shall become the owner of its accessories. If you purchase a cellular phone, it will generally come with a charger, so that you can use the phone for a long time. Lastly, Article 717 of the Civil Code states that when there is a disagreement, doubt shall be interpreted in the interest of debtor.<sup>9</sup>

Article 719 of the Civil Code establishes the rule for **induction**, a specific form of reasoning that might be used in contracts. Induction is the act or process of reasoning from specific instances to general propositions. So, for example, if you know that (1) Naqib is a basketball player and (2) all basketball players are tall, then you know that Naqib is tall. Article 719 of the Civil Code states that if you show that the first part of the induction is incorrect, the other side may not conclude that the second part is correct.<sup>10</sup> Therefore, if you prove that all basketball players are not tall, then the other side cannot conclude that Naqib is tall. While induction is another method through which the scholars and lawmakers can make Islamic law (often referred to as *qiyas*), it cannot create public or religious corruption.

If parties do not like a default rule created by courts, are they required to follow it? No. A default rule is simply the rule that will govern unless the contract says something more specific. Therefore, in the airplane example, the parties could be as specific they want about the specifications of the airplane and the materials that need to be used. The purpose of a default rule is simply to provide a backup if the parties forget, or find it inefficient, to agree on particular specifics in a contract.

## 2.2 Custom

When a court seeks to create a default rule, what information should it use to create the best default rule? The parties will typically disagree—Apple will want the default rule to be no warranty and you would want a lifetime warranty—so how should courts fairly balance those interests?

One of the most important tools for interpreting contracts, and creating default rule, is **custom**. Custom is defined by one legal dictionary as “a practice that by its common adoption and long, unvarying habit has come to have the force of law.”<sup>11</sup> As an introduction, complete the “custom exercise” in the box below.

### Custom Exercise

Read the following Articles: Articles 2, 720, and 721 of the Civil Code, Articles 620 and 623 of the Commercial Code, and Article 498 of the Civil Procedure Code.

1. What are some of your local customs that you think could be important for contract interpretation?

2. Why do these examples count as customs?
3. Why should custom play an important role in contract interpretation?

In contract interpretation, there are often two kinds of custom. One type of custom is the **local custom**, which are the practices associated with a rural community. In Afghanistan, for instance, MAN is used as a measure of weight in some provinces. In Kandahar, a MAN is less than a kilogram while in Ghazni it is around seven kilograms. Each town, village, or province may have unique customs that the people abide by. The other type of custom is **industry custom**. Industry custom is the practices that are typically used in a certain industry. For example, imagine that a restaurant enters into a contract to regularly purchase a certain quantity of meat from a supplier. The contract does not contain any terms about the quality of the meat. When the meat arrives, it is significantly below the quality that the restaurant was expecting. If the restaurant sues the supplier, the quality of the meat usually provided by the processing industry may be used to determine what sort of meat is typically delivered. Industry custom does not need to be specific a business. There can be customs that govern professions ranging from business to education to medicine. The key is that the custom is determined by the industry.

Read the box below that identifies some of the most critical passages articles in the Civil Code dealing with custom.

#### **Civil Code**

**Article 720**

What is common in custom is as if it were reserved as condition.

**Article 721**

Habit, whether it is general or special, shall be subject to judgment.

**Article 722**

Habit is credible when it has universality or prevalence. Credence shall be given to the common (widespread) prevalence, not rare prevalence.

**Article 723**

What is habitually prohibited is considered as it is actually prohibited.

**Article 724**

Reality shall be left by indication of habit

Custom helps in contract interpretation because it serves as strong evidence of what the parties likely intended. Article 720 of the Civil Code states that what is common in custom acts as if it were a condition. The Article is a very strong endorsement of custom because it goes as far as to say custom is on par with a condition, which is a term that must be satisfied in order to have a valid contract. Article 724 of the Civil Code goes even further and says that reality may be left by indication of habit. This means, for example, that merchants who have a long history of doing business with one another can conclude a contract without putting it in writing. So, if the actions of a party violate a long-standing or well-understood custom, then any other part of the agreement may be invalid because of the violation of custom.



One issue that arises in custom is the extent of the custom. How many people should have to abide by this custom for it to be considered in contract interpretation? Article 721 of the Civil Code states that habit, whether common to many people or special to fewer people, is subject to judgment. Article 723 of the Civil Code adds to this by stating that what is habitually prohibited is considered actually prohibited. For example, if consumption of alcohol is not legally prohibited, but is considered prohibited by most people in the country, it shall be considered legally prohibited. Article 722 of the Civil Code clarifies the persuasive scope of custom by stating that habit is more persuasive when the practice is widespread instead of rare. A custom that everyone abides by is much more persuasive than a custom that is only adopted by a few people. For example, there might be a custom that is very prevalent in Herat but not in Kandahar. Therefore, it will be entitled to much more weight when there is a contract dispute between two parties in Herat than two parties in Kandahar. Similarly, there may also be customs there are Afghan, but not Iranian or Pakistan. Overall, custom is very flexible.

### 2.3 Performance, principles, and agents

In addition to custom, another contract interpretation tool is **performance**. When a person performs a contract, they begin to take the actions specified in the contract. Imagine that a supplier agrees to provide a restaurant with meat every day at a certain price but does not send an official acceptance letter to the restaurant. If the supplier begins sending meat, even though it did not send an official acceptance letter, it is performing the contract. Should this be considered a valid contract? This will generally be considered a contract because the supplier decided to perform the contract. Article 709 of the Civil Code supports this view, stating that indicator of a thing becomes its representative.<sup>12</sup> By performing the contract, the supplier is providing evidence that they agree with the contract terms. If they did not want to make the contract work, why would they begin to send the meat? A similar idea is expressed in Article 715 of the Civil Code, which states that a question confirmed implicitly in the answer shall be answered.<sup>13</sup>

The Civil Code also contains a number of articles dealing with the relationship between **principals and agents**, discussed in more detail in the previous section. A principal is the person in charge and an agent is someone who works on behalf of the principal. Common principal/agent relationships are voters and politicians (the voters are the principals who elect a politician to work on their behalf) and shareholders and corporations (the shareholders elect a board who works on the shareholders behalf). Article 726 of the Civil Code makes clear that subordinate shall abide by principal, and there shall not be a separate judgment.<sup>14</sup> A similar concept is expressed in Article 725 of the Civil Code, which states that offshoot has the state of principal.<sup>15</sup> Likewise, Article 728 of the Civil Code states that the subordinate will also demise when the principal does.<sup>16</sup>

#### Doctor Swap Hypothetical<sup>17</sup>

There are two doctors, Elham and Omar. Elham practices in Kabul; Omar practices in Kandahar. Both are hoping to move to be closer to their families, so they decide to switch cities. Elham and Omar enter into an agreement to exchange offices in each of their cities and transfer to each other their respective medical practices. After some months, Elham decides to return to his original city and starts there a new practice in direct competition with his own former firm that had been transferred to Omar. Omar wishes to prevent this competition, because most of his new clients might be tempted to go to their former doctor rather than continuing to visit Elham's old practice that Omar now owns. The contract does not contain any clause limiting the competition between the two firms or the possibility for one doctor to return to the original city and start competition with the other party. Omar sues Elham, arguing that the contract implicitly includes an agreement that Elham could not compete with his old practice in the same city. Should Omar prevail in court?

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<sup>1</sup> *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

<sup>2</sup> This idea is reflected in Article 718 of the Civil Code, which states that judgment shall materialize with the existence of reason, and demises with the elimination of it.

<sup>3</sup> Caslav Pejovic. "Civil Law and Common Law: Two Different Paths Leading to the Same Goal," *Victoria University of Wellington Law Review* 32 (2001): 820. By contrast, in the common law, a lawyer "starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction." *Ibid.*

<sup>4</sup> The Civil Code, Article 707.

<sup>5</sup> The Civil Code, Article 714.

<sup>6</sup> Giuditta Cordero Moss, "Lectures on Comparative Law of Contracts," accessed February 11, 2013, [http://folk.uio.no/giudittm/PCL\\_Vol15\\_3%5B1%5D.pdf](http://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf).

<sup>7</sup> Richard Posner. *Economic Analysis of Law*. (New York: Aspen Publishers, 7th ed. 2007), 94-96.

<sup>8</sup> The Civil Code, Article 710.

<sup>9</sup> The Civil Code, Article 717.

<sup>10</sup> The Civil Code, Article 719.

<sup>11</sup> Black's Law Dictionary (9th ed. 2009).

<sup>12</sup> The Civil Code, Article 709.

<sup>13</sup> The Civil Code, Article 715.

<sup>14</sup> The Civil Code, Article 726.

<sup>15</sup> The Civil Code, Article 725.

<sup>16</sup> The Civil Code, Article 728.

<sup>17</sup> This example is largely drawn from Giuditta Cordero Moss, "Lectures on Comparative Law of Contracts," accessed February 11, 2013, [http://folk.uio.no/giudittm/PCL\\_Vol15\\_3%5B1%5D.pdf](http://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf).



## CHAPTER 9: DEFECTS AND IMPOSSIBILITY

### INTRODUCTION

As we have learned, a contract by definition requires that each party meaningfully assent to the conditions agreed to. Without both parties' consent a court may find that a contract never even legitimately existed; that the contract is now non-binding; or that one of the parties is entitled to damages.

This chapter will address defects of consent in contracts. The fact that a contract exists does not automatically mean that the parties have consented to it. A defect of consent exists when some aspect of the formation or execution of the contract has an error that affects an essential element that caused the parties to agree to the contract. If proven, a defect of consent will have some legal effect on the contract. It may nullify or void the contract, it may make the contract rescindable, or it may cause a judge to alter obligations under the contract. The Civil Code acknowledges three categories of defects of consent: coercion, mistake, and fraud. We will address each of them, beginning with coercion.

### 1. COERCION

#### 1.1 Defining coercion

**Coercion** is a kind of defect that, if judged to be integral to the formation of the contract, will invalidate the contract.

#### Civil Code

##### Article 551

Coercion constitutes forcing a person, without the right, to execute an action against his consent, whether the coercion be physical and/or mental.

##### Article 558

A contract shall not be valid if any type of coercion could be proved in confirmation of a contract.

For our purposes, "action" means the act of entering into a contract. So, in other words, coercion exists when one party agrees to a contract that they ordinarily would not have because the other party has threatened them in some way.

There are two key elements to the definition of coercion. First, one can generally assume that the threat must come from the other party to the contract and not a third party.<sup>1</sup> It is possible that people other than the opposite party may coerce an individual into a contract, but the coercion is only legally relevant if it comes from the opposite party. The only circumstances that could cause a third party's coercion to have a legal effect on the contract are if the opposite party arranges for the third-party to threaten an individual into the contract. Additionally, if the third-party is an agent or otherwise under the control of the opposite party and the opposite party knew about the coercive act, then the third-party's coercion will be legally relevant. Beyond the situations just described, outside threats do not affect the contract.

Second, the threat must be what *caused* the threatened party to agree to the contract. Note that while an individual may have entered into a contract because the other party threatened them in some way, it is only considered coercion if the contract is one they would not have otherwise entered into.

Imagine that Halim wants to buy a new car. He has already decided to buy one from Ibrahim, a car salesman. Ibrahim's business has not been successful recently, so he needs Halim to buy a car from him.

After Halim visits the dealership, Halim is certain that he is going to buy a car from Ibrahim. Halim hopes that if Ibrahim thinks he is unsure about whether he wants to purchase a car at all, Ibrahim will offer him a better price. Ibrahim is worried that he will not make a sale. In an effort to get Halim to make a purchase, Ibrahim threatens to reveal that Halim's brother sells counterfeit goods if Halim does not buy a car. Ibrahim offers Halim a fair price for the car. Halim agrees to the sale but later tries to get out of the contract due to coercion. Even though Ibrahim's actions were coercive, Halim may lose on his claim if it is revealed that Halim had actually intended to purchase a car from Ibrahim for price close to what was agreed. If we remove the coercive action from the situation, we are left with a contract that Halim would have agreed to anyway. Thus, the coercive act is *not* what caused Halim to enter the contract.

Defining what constitutes a threat is the most challenging aspect of coercion. Jurisdictions around the world approach the problem in different ways. For example, under Islamic law, and in Germany and the Netherlands, to constitute coercion the threatened action must be unlawful.<sup>2</sup> By contrast, the French merely require that the threat attempt to gain an unjust advantage over the threatened party, regardless of its legality.<sup>3</sup> Moreover, in South Africa, the requirement is simply that the action is illegitimate or morally wrong.<sup>4</sup> The Civil Code does not explicitly state that the threatened action must be illegal to qualify, but Article 551 includes the phrase "without the right". "Without the right" suggests that the threatened action must be illegal but does not necessarily exclude actions that are legal but against custom, tradition, or public order.

### **Coercion in the Common Law**

In many common law countries an almost identical doctrine, the doctrine of duress, is used to allow a coerced party to void a contract. In the United States, the generally accepted test to determine if duress existed has two parts. First the threat must be "improper", meaning the threatened action is illegal, a violation of good faith, or involves a more powerful party unfairly taking advantage of the less powerful party. Second, the threat must leave the coerced party no reasonable alternative but to agree to the contract. If both elements are found to be present, the coerced party may void the contract.<sup>5</sup>

Imagine, for example, that Ahmad and Rahim live in a remote village. Ahmad wants to buy Rahim's horse, but Rahim does not want to sell it. Ahmad tells Rahim that if he does not sell the horse, Ahmad will disclose the name of Rahim's wife to the entire village. While Ahmad did not threaten to do something illegal, Rahim will likely prevail on a claim of coercion because the threatened action goes against the public order and norms, and Rahim likely felt that he had no other choice but to agree to sell the horse.

There is a wide range of threats that may constitute coercion. In some instances, the presence of coercion will be easy to prove. For example, if one party threatens to kill the other party's parents unless they enter into the contract with them, then the threatened party did not truly consent to the contract and it will be found invalid. But there are many more minor threats that an individual could make that may or may not constitute coercion depending on the specific circumstances taken all together.

The Civil Code gives further guidance to help figure out when coercion will be legally relevant by separating coercion into two categories.

### **Civil Code**

#### **Article 552**

There are two types of coercion, complete and incomplete.

**Article 553**

Complete coercion constitutes grave physical or financial threat; threat of unsubstantial danger constitutes incomplete coercion.

**Article 554**

Complete coercion eliminates consent, and vitiates freewill. Incomplete coercion eliminates consent, but does not vitiate freewill.

A contract will not be valid if it involves either complete or incomplete coercion. However, understanding the distinction between complete and incomplete coercion will help to understand coercion overall. Complete coercion can be thought of as threats that are so serious that one would say that the threatened individual had “no choice” but to enter into the contract. It is reserved for scenarios where suffering the threatened action is nearly unthinkable. Incomplete coercion can be thought of as threats that, although serious, still leave the threatened individual with the choice of entering the contract or not. It is for scenarios where the threatened could tolerate suffering the threatened action.

When proving the presence of coercion in the formation of the contract, complete coercion will generally be more easily proven due to its gravity. Incomplete coercion will be more difficult to prove, since the threatened party has to show that the “unsubstantial danger” was serious enough to induce them to enter into the contract. There is always the chance that the judge will determine that the threat was not serious enough to be considered coercive, and that the individual’s ability to consent was not ruined. Proving incomplete coercion relies more on the subjective aspects of the circumstances, such as the belief in the threat of the parties involved, than proving complete coercion does.

For example, imagine that Tariq is a baker. Mariam sometimes buys pastries from Tariq for parties, but also purchases pastries from other bakeries at times. For one particularly large party, Mariam decides to buy from a baker other than Tariq. Tariq tells Mariam that if she does not buy pastries for the party from him that he will call the owner of the party space and cancel the party. Mariam knows that Tariq does not know where the party is or who owns the party space but since she likes Tariq’s pastries the most out of all the bakers in town she agrees to buy from Tariq instead. She later claims coercion and tries to void the contract. Mariam is likely to fail on such a claim. She was still able to choose between two valid options and the threatened action was not very serious.

However, remember that the distinction between complete and incomplete coercion has no legal relevance. After the Articles of the Civil Code discussed above, the code does not mention this distinction again, and only speaks of coercion in a way that includes both forms. If either form was part of contract formation, the contract will be vitiated.

Although coercion is very subjective, the Civil Code does specifically mention that certain types of threats are almost always coercive.

**Civil Code****Article 555**

Threat to harm a person’s parents, spouse, or a person’s forbiddens, or threat that could negate his/her prestige/respect shall be considered coercion. A court could assess the threat with due consideration to its circumstances and qualities.

The second sentence of this Article brings us to the next step in assessing coercion: examining a threat in the context of the situation. A threat to one’s family or reputation is the kind of threat that is coercive. But

not every threat to family or reputation is coercive when looked at in context. One has to examine all of the circumstances of the situation to determine if a threat was coercive. For example, if it is nearly impossible for the individual that threatens harm to one's parents to actually carry out that harm, then the threat will not be coercive even though this is a threat specifically listed as coercive in Article 555.

Additionally, what may be a threat that is serious enough to induce one individual to enter into a contract may have little or no effect on the consent of another individual. Thus, when evaluating a coercion claim, a court will look at the claim both subjectively and objectively.

### Civil Code

#### Article 556

Coercion differs according to person, age, social condition, characteristics, and the extent of the threat's effect in terms of its intensity or mildness.

#### Article 557

The coercion that eliminates the consent is credible when the threatener is capable of executing the threatened action and the person under coercion believes that materialization of the threatened action most likely is inevitable.

A threat will only be considered coercive if, taking into account the specific characteristics of the individuals involved and the circumstances of the specific situation, the threat could have actually occurred *and* the threatened party must have *believed* that rejecting the contract will cause the threatened action to occur.

Before we examine these two elements, note that the relevant time to judge the credibility of the threat is the *time of contracting* and not the current credibility of the threat.

The objective examination requires the court to decide whether or not the threatener could actually carry out the threat. Let us return to the example of Ahmad, the farmer, and Rahim, the landlord, however this time, imagine that instead of renting his existing farmland from Rahim, Ahmad rents it from another landlord, Mustafa. In this scenario, Rahim's threat not to renew Ahmad's lease on his existing land (which Ahmad leases from Mustafa) if Ahmad does not agree to rent a piece of Rahim's land would not be credible. Rahim has no power not to renew Ahmad's lease because Ahmad leases from Mustafa. Unless Ahmad can prove that Rahim has the power to get Mustafa to not renew the lease, the threat will fail this objective test.

### Discussion Questions

In which of the following scenarios is the threat credible?

1. Malik threatens to physically attack Yusuf's brother if Yusuf doesn't agree to sell Malik his truck. Malik is old and in a wheelchair.
2. Malik threatens to physically attack Yusuf's brother if Yusuf doesn't agree to sell Malik his truck. Malik was in a wheelchair for a broken leg at the time of the contract but is now healthy.
3. Malik threatens to physically attack Yusuf's brother if Yusuf doesn't agree to sell Malik his truck. Malik was healthy at the time of contracting, but is now permanently in a wheelchair

The subjective examination is concerned with the belief of the threatened individual at the time of contracting. To succeed on a coercion claim, they must prove two facts: that they believed the threat was credible *and* that they believed the only way to eliminate the threat was to agree to the contract. The analysis for both steps will usually be the same. After all, if the individual did not believe the threat to be credible, they would also likely not be concerned about how to eliminate it.

Imagine that Basir is a painter who also teaches art lessons and Meena is a schoolteacher. While Basir earns more money from each individual painting he sells than he does from each art lesson he teaches, the majority of Basir's income is derived from the art lessons. The majority of Basir's students come from the school where Meena teaches. He believes that Meena is the reason so many of the school's students take lessons from him because she is a well respected teacher. In reality, only two of Basir's students have come to him because of Meena's recommendation. The other students from Meena's school heard about Basir in different ways. It is merely a coincidence that so many of the students come from Meena's school. Meena wants Basir to paint her a picture. Meena tells Basir that if he doesn't agree to paint for her she will stop recommending Basir to her students that are interested in art lessons. In this scenario, Meena's threat would still be coercive because Basir believes that her recommendation is the reason he is getting his students.

The party claiming coercion must also demonstrate that they thought the only way to eliminate the threat was to enter the contract. If there was an alternative that the individual thought would work, then an individual will not succeed on a coercion claim. For example, if the threat involves carrying out an illegal action, the judge may ask why the threatened party did not contact the police rather than agreeing to the contract. If the threatened party cannot demonstrate why they believed the police would not be helpful, then their claim will fail.

## 1.2 Effects of coercion after removal

Finally, the Civil Code addresses how coercion is dealt with after the threat has been removed. As stated previously, if coercion was what motivated contract formation, then the contract will be found to be vitiated. However, if a court finds that the threat was credible at the time of contracting but has since been eliminated, the contract may be considered valid.

### Civil Code

#### Article 559

If coercion occurred in a revocable contract, the threatened (person) can revoke the contract after removal of coercion. This right shall not be eliminated by the death of the threatener or parties to the contract. The heirs of the deceased shall be recognized as the deceased's representative.

#### Article 560

Contract of the threatened shall be concluded as vitiated. The contract shall become valid whenever, after removal of the threat, the threatened permits the contract explicitly or implicitly.

Article 559 reemphasizes how the coercion is what occurred at the time of contract formation, not after the contract was already entered into. Note that in such circumstances, the contract will not be deemed as automatically void. Instead, if coercion was present at the time of contracting in a revocable contract, then the contract can be revoked by the threatened or his heirs at any point in time regardless of whether or not the threat continues. Article 560 indicates that the threatened party also has the right to confirm a contract if the contract was agreed to due to coercion, though the threat must first be removed before any such confirmation takes place.

### Discussion Question

Sayed is a cattle farmer. Mohammad wants Sayed to agree to sell him cattle every year for a rate well below what Sayed's product is worth. In order to convince Sayed to do this, Mohammad tells Sayed that if he does not agree to the contract he will have his brother, Rahim, kill Sayed's son. Rahim has a reputation for being violent and cruel and very obedient of Mohammad, so Sayed agrees to the contract. 5 years later, Rahim dies, but Mohammad continues to enforce the cattle contract. If two more years pass and Sayed continues to sell Mohammad cattle at a reduced price, can he revoke the contract?

### Civil Code

#### Article 561

Enforceability of the threatened person's contracts shall not be subject to his permission after removal of the threat. Grasp of the sold property shall constitute vitiated ownership. In such a case, any unbreakable transaction shall be valid, and the threatened can choose to demand either the price of the day of delivery, or the price of the day of possession.

This article addresses non-rescindable contracts. In many circumstances the property transferred in a contract will be used by the purchaser before any legal action is taken. For example, imagine that Abdul sells Zainab some concrete, but Zainab has coerced Abdul into selling it to her for less than the concrete's fair value. Abdul wants to challenge the contract, but Zainab has already used the concrete to fix her house. Abdul cannot get his concrete back, but he does have a remedy. If the property has been used or otherwise destroyed, and the contract was entered into due to coercion, the coerced party can demand the price of the property on the day of delivery or on the day of possession. In the scenario just described, Abdul would be able to recover money from Zainab since getting the property back is impossible.

## 2. MISTAKE

We will now turn our discussion to the defect of mistake. There are many different kinds of mistakes that can occur in a contract. For example, a contract can contain a mistake about the substance of the subject of a contract, or it can contain a mistake about the characteristics of the subject of a contract. A contract may mistakenly identify one of the parties, or it may include a clause that was meant to be eliminated from the final contract. Finally, mistakes can be unilateral or mutual. But, the most important aspect of mistake is to remember that mistakes must be unintentional.

Depending on the type of mistake, judges may decide that the contract is still valid but that it must be amended, or they may decide that the contract is now non-binding, or they may find that the contract is void.

### 2.1 The substance of a thing

We will begin our exploration of mistake by examining mistakes about the substance or the characteristics of the subject of a contract addressed in Article 562 of the Civil Code. Before we begin, one must understand what the term "substance" of the subject of a contract is intended to mean. Like many aspects of contract law, it is difficult to express a clear rule about what constitutes the substance of a thing.

The substance of a thing includes both the object's essential elements and other important elements that, based on common understanding, distinguish the object from other things.<sup>6</sup> In other words, in order to determine an object's substance one should look at the dictionary's definition of the object *and* one should consider how the culture or society where the contract was made would define the object.

Think of a motorcycle. Some essential elements of a motorcycle are that it has two wheels and a motorized engine. If either of these elements were missing, then one would no longer be in possession of a motorcycle. But there are other elements of a motorcycle that, based on common understanding of the term and customary practice, make up the substance of a motorcycle. For example, the seat of a motorcycle seats two people. If you saw a motorcycle with a seat long enough to comfortably seat three people, or with the seat of a bicycle, you would notice this unusual element. While it may not be enough to make the object not a motorcycle anymore, it is a change to the substance of the thing because it goes against the common understanding of the word motorcycle.

The parties to a contract also have the power to define the substance of the subject of *their* contract. When presented to a court, errors that would be objectively deemed insubstantial to the substance of an object can be deemed substantial if the contracting parties consider the quality material (having significant importance) to the contract.<sup>7</sup> Staying with the motorcycle example, objectively, the kind of tires put on a motorcycle is likely not to be a material element of what makes a motorcycle a motorcycle. But if the one or more of the parties claim that the tires were important or material to their specific contract, the court may find that *in this case*, tires affect the substance of the subject of the contract.

## 2.2 Mistakes in the subject of a contract

Recall that the subject of a contract is the thing of value conferred from one party to another. Now let us begin our examination of the effects a mistake may have on a contract by starting with when there is a difference between the intended subject of the contract and the subject as written into the contract.

### Civil Code

#### Article 562(1)

If a mistake has been made in the subject of a contract, and the subject of the contract is identified, and described, the following rules shall apply:

(1) In case of difference in substance, the contract shall depend on the identity of the subject without which the contract shall be void.

Let us first examine Article 562, Clause 1. It presents us with an example of when a contract containing a mistake is not automatically void. Instead, it instructs us that when there is a difference in *substance* between the subject of the contract and what one of the parties believed the subject of the contract to be, whatever has been written into the contract is legally enforceable. The contract is only considered void if the subject, as identified in the contract, does not actually exist. Otherwise, the contract will be considered valid as written.

However, this does not mean that an individual subject to a substantive mistake, a mistake related to an important element of the contract, is required to proceed with the contract. Under certain conditions, the party that suffers from a mistake relating to the substance of the subject of a contract may rescind the contract. We will address these scenarios shortly, but first let us examine the second half of Article 562.

### Discussion Question

Sayed is a farmer who grows a variety of crops on his farm and sells them at market. At his booth in the market he displays all of the crops he has available for purchase. Khadija visits Sayed's booth at the market and contracts to purchase 10 bushels of Sayed's wheat in a week's time. A week later, Sayed and Khadija meet again, however instead of delivering the expected 10 bushels of wheat, he has 10 bushels of



rice. Khadija refuses to purchase the rice and the two take the matter to court. Will the contract be found void? If no, does Khadija have to purchase the rice or does Sayed have to produce the wheat?

### Civil Code

#### Article 562(2)

If a mistake has been made in the subject of a contract, and the subject of the contract is identified, and described, the following rules shall apply:

[...]

(2) In case of unity of substance, and difference in description (characteristics), the contract shall depend to the subject that is pointed to, and shall be concluded based on existence of pointing (referring) to a subject. In case of absence of the description, the contractor shall have the option to either rescind or confirm the contract.

Article 562, Clause 2 addresses mistakes in the subject of a contract that are less significant than those that affect the substance of the subject. As noted previously, the substance of something is those qualities that are material to the essence of the object; they are what distinguish the object from other kinds of objects. Mistakes under Article 562, Clause 2 are not those that affect the grade or quality of an object. Article 562, Clause 2 mistakes are those that affect aspects of an object that do not affect the substance.

Think about a motorcycle again. One can purchase a motorcycle in a wide range of colors, but one would not argue that a red motorcycle and a blue motorcycle are different objects based on their substance, as long as everything else is the same. The color of a motorcycle is not what makes it a motorcycle. However, if the motorcycle received only had one wheel, then it could be argued that its very substance was missing, because it would not work.

For contracting purposes, a difference in something like color between the subject and the subject *as described in the contract* will affect the contract under Article 562, Clause 2. The Civil Code partially treats these mistakes in the same way as it treats mistakes as to the substance of the subject of the contract. Where there is a difference in description between the subject and the subject as described in the contract, the court will enforce the contract using the description of the subject in the contract, even if it was written in error.

Imagine that Faisal sells motorcycles in a variety of colors, but the majority of his customers purchase white motorcycles. Rasoul wants a red motorcycle so he signs a contract with Faisal to purchase one of Faisal's motorcycles. Since most of the motorcycles sold are white, Faisal accidentally fills out the contract stating that Rasoul will purchase a white motorcycle. Rasoul does not notice the mistake and signs the contract. When the motorcycle is delivered, Rasoul is upset to find that the motorcycle is white and not red and wants the contract rescinded. However, if he takes the matter to court, the contract would likely be found to be enforceable for a *white* motorcycle, not a red one. The subject as contained in the contract was a white car. Moreover, Faisal was not aware of Rasoul's subjective intention to purchase a red car.

Rasoul would have better luck if the motorcycle described in the contract did not exist at all. Imagine instead that Faisal still sells motorcycles in a variety of colors, but has recently begun to only sell motorcycles with flames painted on the side. Rasoul still wants a red motorcycle so he signs a contract with Faisal to purchase one of Faisal's motorcycles. The contract states that Rasoul will purchase a red motorcycle from Faisal. When the motorcycle is delivered, Rasoul is upset to find that his red motorcycle has flames on the side and wants the contract rescinded. Since Faisal does not have red motorcycles with



no flames on them, Rasoul will have the choice between rescinding the contract and purchasing the motorcycle with the flames.

It is often difficult to determine what will be considered a mistake of substance versus one of description. For those errors that could reasonably fit into both categories, the decision between substance and description will be left to the judge hearing the case. Additionally, remember that the parties to the contract have the power to elevate a descriptive mistake to a mistake about the substance if they believe that the mistake in question is essential to their contract.

### 2.3 Substantive mistakes

Under certain circumstances, one or more of the parties may have the right to rescind a contract containing a mistake. However, this only occurs if the mistake is *substantive*. Substantive mistakes are those that have a considerable or serious affect on the terms of the contract. Mistakes affecting the substance of the subject of the contract are substantive. They affect the essential elements of the object and are by definition serious in nature. The Civil Code also specifically indicates two kinds of mistakes that are always considered substantive. But first, let us address those mistakes that are *not* substantive.

#### Civil Code

##### Article 567

A material or arithmetic mistake doesn't affect the validity of a contract, and its correction is indispensable.

Here, "arithmetic" refers to a mistake made when writing down or paying the price of a good or service. It does not relate to the *value* that the parties assign to the subject of the contract. Let's explore what happens when the mistake is one of arithmetic. If Abdul agrees to sell Samira his computer for 30,000 Afghani when the school year ends and in the contract the price is accidentally written down as 300,000 Afghani, Samira will not have to purchase the computer for 300,000 Afghani. Although the contract is still enforceable, it is enforceable at the correct price of 30,000 Afghani.

If, however, Abdul had offered the computer for 300,000 Afghani, even though the computer was only worth 30,000 Afghani, and Samira had agreed to that, she would not be able to have the price changed nor would she be able to rescind the contract. Such a mistake would be one of value and not one of arithmetic.

Article 567 also indicates that when a contract contains a "material" mistake, the mistake must be corrected and the contract is not rescindable. Here, "material mistake" is meant to contrast with a "substantive mistake".<sup>8</sup> Material mistakes are less serious than substantive mistakes. The Civil Code is unclear as to when a material mistake is serious enough to be considered a substantive mistake, but Article 567 suggests that arithmetic mistakes are material mistakes rather than substantive ones.

Now let us turn to the other two kinds of mistakes that the Civil Code specifically indicates *are* substantive.

#### Civil Code

##### Article 564

Whenever the mistake is so grave that the contractor would not confirm the contract if he had the knowledge of it, such a mistake is considered substantive.

In order to determine if a mistake is substantive the court will examine the contractor's claim *subjectively*. It does not matter how a "reasonable person under the circumstances" would view the mistake in question. The only relevant factor is the view of the contractor making the claim. The contractor will have to convince the court of two points. First, they must demonstrate to the court that they would not have entered into the contract had they been aware of the mistake. And, second, they must demonstrate that the mistake was so serious that they would not have entered into the contract even if they had been aware of it.

In most scenarios, the two points will depend on the same factors. However, certain circumstances may arise where a contractor may claim they would not have entered into a contract had they been aware of the mistake, but the mistake itself may not be that serious. Even though the test for Article 564 is subjective and is only concerned with the viewpoint of the contractor, the contractor must still convince the court that they genuinely would not have entered into the contract because they feel that the mistake is particularly grave.

### Discussion Question

Imagine that Idris has signed a one-year contract with Ahmad to rent Ahmad's land. One of the terms of the contract is that Idris is required to maintain the tulips that Ahmad currently grows on part of the land. When they were negotiating the terms of the contract, Idris mentioned that he wanted that part of the contract removed. Although Idris promised to maintain the tulips, stating that it would not be any extra effort for him to do so, he asked Ahmad to remove that clause from the contract because he would prefer not to be legally required to maintain the tulips. By accident, this clause ended up in the final contract. Idris now wants to rescind the contract by claiming that he would not have entered into the contract had he been aware that the clause was in the contract. If you were a judge, would you consider this mistake grave?

Up to now, we have characterized mistakes as relating to physical objects or clauses in the contract. But these are not the only kinds of mistakes that can affect the validity of a contract. In certain circumstances, mistakes regarding the parties to the contract have a legal effect on the contract.

### Civil Code

#### Article 565

Whenever the mistake occurs on the identity (the person), or on one of the contractor's characteristics, and the contractor's identity (personage) or characteristic is a major cause of conclusion of the contract, such a mistake is considered substantive.

First, notice that mistakes about people's identity or characteristics are only relevant if the identity or characteristic is material to the conclusion of the contract. Mistakes about people can be present in the contract, but will have no legal effect on the contract if the person's identity or characteristic was of little or no importance to the contract.

For example, imagine that Basira's friend recommended a book to her, which Basira decides to purchase. The friend mentions that their cousin, Jamila, works at a bookstore and that it would be nice if Basira purchased the book from her cousin.<sup>9</sup> Basira accidentally purchases the book at a different bookstore from a different woman also named Jamila. When Basira realizes her mistake, she wants to rescind the contract with the store she purchased the book from so she can buy it at the other bookstore. She claims that Article 565 gives her the right to do so. However, Basira will likely be unsuccessful. Although this is a case of mistaken identity, the identity of the saleswoman was not material to the conclusion of the

contract. Basira had initially intended to purchase the book regardless of whom she purchased it from. Basira may argue that Jamila's identity was a major cause of the conclusion of the contract, but a judge is unlikely to find that to be true. Although she tried to do her friend a favor by purchasing it from her friend's cousin, buying something from the cousin did not motivate Basira to purchase the book. Additionally, the seller of a book is not usually important when one is purchasing a book.

However, mistakes regarding the identity of one of the parties will usually be substantive, especially when the contract is between two individuals. For example, if a written contract requires you to name the parties involved and one of the parties is misidentified the mistake must be substantive. Otherwise, there is nothing binding the intended parties to the contract.

The second part of the article tells us that mistakes regarding one of the party's characteristics may cause a contract to be non-binding if it is material. Here, characteristic means a quality that the individual possesses. For example, imagine that Naseer wants to learn to play the piano. He hires Rahim to teach him because he has heard that Rahim is a master at the piano and a great piano instructor. Naseer wants to learn from the best. However, at their first lesson it turns out that Rahim does not know how to play the piano. Instead, he is a master at the guitar and a great guitar instructor. This would be considered a substantive mistake about a party's characteristics because the conclusion of the contract, Naseer learning to play the piano, entirely depends upon Rahim's ability to teach him. Since Rahim has been mischaracterized in his ability to perform the task, the mistake is substantive.

### Discussion Question

What if, in the scenario above, Rahim did know how to teach the piano, and while he was able to play the piano himself, he was not a master. Naseer still hired Rahim because he wanted to learn from someone who was both an excellent teacher and player of the piano. Would this be a mistake about Rahim's characteristic still be a major cause of the conclusion of the contract? Why or why not?

## 2.4 Effects of substantive mistake

Now that we understand what kinds of mistakes are considered substantive, we can examine what happens when a substantive mistake is present. The existence of a substantive mistake may allow the party subject to the mistake to rescind the contract. However, a substantive mistake does not automatically grant the party subject to it the right to rescind. In order to rescind, the circumstances of the mistake must satisfy one of three criteria.

### Civil Code

#### Article 563

A person subject to substantive mistake can rescind the contract with the condition that the opposite party has been subject to similar mistake as well, or had the knowledge of mistake, or could easily become aware of it.

Two categories of mistake emerge: mutual and unilateral. Mutual mistakes are those that are shared by both parties to the contract and are addressed by the first portion of Article 563. If there is a mutual mistake, then either party has the power to rescind the contract. Note, however, that for the mistake to be mutual, both parties must be subject to the same or a similar mistake. An example of the same mistake would be if Zahar is selling Latif a plot of land and both men believe that the land is ideal for growing rice. The ability to grow rice on the land is the reason that Latif wants to buy it, and Zahar is selling his land because he prefers to grow wheat. If they later find out that the land is not suitable for growing rice

but is great for growing wheat, either party can rescind the contract because they have been subject to the same mistake.

The second and third scenarios stated in Article 563 relate to unilateral mistakes, which are those that only one party is subject to. When only one party is subject to a substantive mistake, that party has the right to rescind the contract if the other party knew or should have known about the mistake. If the opposite party, in good faith, was not aware of the mistake, then the party subject to that mistake cannot rescind the contract on these grounds. Generally, if the substantive mistake, or the importance that the party put on it, is or should have been so obvious to the opposite party, then the party subject to the mistake may rescind the contract.<sup>10</sup>

It is again difficult to draw a clear rule as to when the opposite party will be accountable for a unilateral mistake. If the opposite party was aware of the mistake but did not realize that it was substantive, then the party subject to the mistake may not be able to rescind. This will especially be the case where the mistake is found to be substantive under Article 564, where the contractor claims that they would not have entered into the contract had they been aware of the mistake. If the opposite party had no reason to know of the importance that the party subject to the mistake put on the issue, then that party will not be able to rescind.

However, there are some circumstances where one party is in a better position to know information about the terms of the contract. Mistakes arising in these circumstances will generally allow to the party subject to the mistake to rescind. For example, imagine that Mohammad is selling a plot of land to Sadiq. In the contract, the plot of land is shown to include a lake, but this is a mistake. In reality the lake belongs to Mohammad's neighbor. Assuming that the inclusion of the lake was an essential element of the contract, Sadiq will be able to rescind the contract because Mohammad, as the landowner, either knew of the error or could easily have become aware of it.<sup>11</sup>

By contrast, if Sadiq had assumed that the lake was part of the plot of land but the contract did not include the lake, nor did Sadiq tell Mohammad that he thought the lake was included, then Sadiq would not be able to rescind the contract. While it may be a substantive mistake, it is one that is entirely the fault of Sadiq. No one led him to believe that the lake was included; he merely assumed that it was. Additionally, Mohammad had no reason to know that Sadiq believed the lake was included. A mistake like this one would not be rescindable.

## **2.5 Mistake in law**

The final kind of mistake that we will explore is mistake in law. These arise when an essential element of the contract is based on something prohibited by the law. Either party can rescind in such a case.

### **Civil Code**

#### **Article 566**

A contract, because of mistake in law, can be rescinded when conditions of mistake occur in the events relevant to the contract, unless expressed otherwise in law.

This sort of mistake is best explained through an example. Suppose that Rashida owns a bakery and she wants to sell the land it sits on.. Ahmad agrees to buy the property, but he would like to build a house for his family on the land. Both Rashida and Ahmad know that this is why Ahmad is purchasing the land and both believe that the land can be used for homes instead of businesses. If it turns out that the city's laws prevent homes from being built on that piece of land, then the contract will be rescindable.

In almost any situation where the terms of a contract are prohibited by the law, the contract is rescindable by either party. The only situation in which such contracts would not be rescindable is if another provision in the Civil Code explicitly states so.

## **2.6 Summary**

As you now know, mistake is a large category of defect that requires an individual to prove that their circumstances meet several criteria. First, one must prove that there is a mistake at all. Then they must demonstrate that it is a substantive mistake. If it is substantive, they must either demonstrate that it is mutual or unilateral. If it is mutual, either party can rescind. If it is unilateral, then the party subject to the mistake must show that the other party was aware of the mistake or should have been aware of the mistake. If they can do make it through all these steps, then they may rescind the contract.

## **3. FRAUD**

### **3.1 Introduction**

In some ways fraud is very closely related to both coercion and mistake. As we have just learned, coercion arises when an individual is induced to enter a contract that they would not have otherwise entered by another party, and mistakes are errors that are not caused by misrepresentation (lies or intentional deception). Fraud arises when a party is induced to agree to a contract due to the intentional misrepresentations of another party to the contract. When fraud is proven, the defrauded party may rescind the contract.

#### **Civil Code**

##### **Article 570**

Fraud constitutes using oral or practical means of deceit that would drag the opposite party to consent to concluding a contract, in a manner that, if these means were not used, he would not consent to conclude the contract.

A few key concepts emerge from this definition. First, fraud is not limited to oral misrepresentation. Instead, it includes any important misrepresentation by one party intended to get the other party to agree to a contract that they otherwise would not have. Take, for example, a contract over the sale of land. The parties to the contract discuss the size of the land to be sold, but never discuss the boundaries of the land. Instead the owner gives the buyer a paper showing the boundaries of the property. If the owner forged the document so that the boundaries are incorrect, then he or she has committed an act of fraud.

The second key concept is that fraud requires an intention to mislead on the part of the fraudulent party. If the party accused of fraud did not intentionally make a false statement or act, then the problem is one of mistake rather than one of fraud. In other words, if the accused party believed their assertion to be true, then they are not guilty of fraud. The assertion must be knowingly false. The third key concept is that the fraudulent act must have been what caused the defrauded party to agree to a contract that they otherwise would not have. The question to ask oneself is, if we removed the fraudulent action, would the defrauded party still have agreed to the contract? If the answer is “yes”, then the fraud was not the cause of the contract and the party claiming fraud will lose.

Imagine that Basir is considering purchasing furniture from Mustafa. Mustafa invites Basir over to look at the furniture in person, but to get Basir to come over sooner Mustafa tells him that one of Basir’s old friends from secondary school will also be over to look at furniture in a few days time. Basir makes sure to go on the same day that Mustafa told him his friend would be over, even though it was several days

earlier than he had initially planned. It turns out that Mustafa lied and Basir's friend was not there, but Basir purchased some furniture from Mustafa anyway. In this scenario, the fraudulent act (lying about the presence of a friend) did induce Basir to take some action (he went to look at the furniture earlier than he wanted to), but the action was not material to the contract because the lie did not induce Basir to purchase anything. Thus, while Mustafa's actions may be considered deceitful, he likely cannot be said to be committing fraud.

While the definition of fraud is largely straight forward, the real difficulty lies in determining when a statement or action goes beyond permissible business talk and rises to the level of fraud.

### **Discussion Question**

At market, merchants must compete amongst each other for customers. In order to induce people to buy their products, they will make grand claims about the quality of their goods. If a merchant has a sign next to his produce stating that his pomegranates are the best quality pomegranates at the market, would you consider that fraud? What if someone buys those pomegranates due to the sign? Why or why not?

Generally, merchant's claims that their products are the best are not considered fraud. The law allows for what is arguably an individual's opinion about their product. The claim did not offer any specific reasons why the pomegranates were "the best" and this type of claim is so common that it would be difficult for an individual to prove that they were induced to purchase the pomegranates because of the sign. Statements of opinion do not constitute fraud because they do not inherently claim to be the objective truth.<sup>12</sup>

On the other hand, some statements or actions are very clearly fraudulent. Imagine that someone is selling another individual a car. The buyer comes to inspect the car before committing to purchasing it and the seller shows them a brand new car in perfect condition. The buyer is satisfied and purchases the car, which the seller will deliver the next day. When the car is delivered, the buyer actually receives a used car with many parts that need to be fixed. This scenario is directly in line with Article 570's definition of fraud: the seller deceived the buyer into consenting to a contract that they otherwise would not have.

However, there are many scenarios that will fall somewhere in the middle of these two examples. Inherent to business is the need to present one's product in the best light possible to convince customers to buy that business's products over its competitors' goods. While it is not permissible to lie about the product, it is difficult to state definitively when exactly a statement or action goes beyond presenting the product in the best light possible and becomes a fraudulent act or statement. Thus, while it is fine to describe an average piece of farmland as a "lush, green oasis", it would not be ok to use the same description for a dry piece of land that is not suitable for farming.

Civil law jurisdictions across the world have not developed a consistent standard by which to judge when these in-between scenarios rise to the level of fraud. How a claim turns out in these in-between situations will mainly depend on the judge that hears the case.

### **3.2 Silence as fraud**

Another issue to consider is when silence becomes fraudulent. The Civil Code indicates that:

#### **Civil Code**

##### **Article 573**

Mere concealment of reality shall constitute depriving fraud. This fraud is considered subreption.

The Civil Code indicates that hiding the truth, which could be achieved by being silent on an issue, can constitute fraud. But the Civil Code is unclear what constitutes “reality” and at what point silence amounts to “concealment.” We can look to other civil law jurisdictions for guidance. Over the last couple of decades, the trend in many civil law jurisdictions has been to consider silence in certain scenarios as equivalent to fraud. Such requirements are characterized as a *duty to disclose* information about goods that an individual intends to sell. If the knowledge of specific facts about a product would effect an individual’s decision to purchase the product, then many countries require for the seller to disclose this information to potential buyers. For example, in commercial contracts, the French require that prior to the formation of a contract, “every professional selling goods or providing services must put the consumer in a situation where he is able to know the essential characteristics of the goods or the service.”<sup>13</sup> Notice how the duty to disclose illustrates the overlap between fraud and the good faith requirements placed on the contracting parties.

Giving more specific rules about what facts must be disclosed is impossible and will be left to judges to determine based on the circumstances of the case before them. However, another guideline common to civil law jurisdictions is that the seller is required to reveal information that the buyer could not easily discover his or herself, but that the seller knows or could discover at little cost. For example, imagine that you are selling your car and you know that the air conditioning stops working if you drive faster than 80 km/h. Not revealing this fact to potential buyers may not only be going against the good faith requirement mentioned in an early chapter, but may also be considered fraudulent since a functioning air conditioner is an important feature of the car and the potential buyer is not likely to discover this fact on their own.

Similarly, if one party to a contract makes a statement that the other party knows to be false and the statement is essential to the party’s motivation for entering the contract, then a court will likely find that the opposite party had a duty to correct them. Imagine you are buying an antique ring that you believe belonged to the King of Afghanistan in the 18<sup>th</sup> century. You tell the seller how excited you are to own a ring owned by a king. If the seller knows that, although a very nice ring, it was never owned by a king, they have a duty to correct you before selling you the ring.

Additionally, if one party makes an assertion that was true but is no longer true at the time of contracting, they have a duty to disclose that the fact is no longer true.

### Discussion Questions

Would you classify the following actions as fraudulent or not? Why or why not?

1. An individual sold another person their computer but did not tell them that the computer tends randomly to restart every hour.
2. An individual sold another person their house but did not reveal that the kitchen sink constantly drips.
3. An individual is selling a large amount of farmland. About 5 percent of the land is not suitable for farming. The seller did not know this fact.

Finally, remember that underlying fraud considerations, as with all aspect of contracts, is the concept of good faith and fair dealing. This aspect is especially helpful for determining the presence of fraud, which, as we have seen, is difficult to define. Considering if the contract was formed in good faith is another tool one can use to determine whether or not an action should be considered fraud.



### 3.3 Third-party fraud

Sometimes an individual may enter into a contract because of the misrepresentations of another individual who is not a party to the contract. However, except for a narrow set of circumstances, fraudulent acts by those who are not a party to a contract will not qualify as fraud.

#### Civil Code

##### Article 574

In case of occurrence of deceit by the third party to the contract, the deceived person can demand rescinding the contract when he proves knowledge of the opposite party about fraud of the third party at the time of conclusion of the contract, or proves his (the opposite party's) ability to secure such information.

The fraudulent actions of someone not party to a contract will only be legally relevant to establishing fraud if the party claiming fraud can demonstrate that the other party knew or should have known about the actions of the third-party. This will be easier to prove if the third-party is an agent, employer, or otherwise under the control of the opposite party.

Imagine that Layla wants to buy a watch. She needs it to be waterproof because she often goes swimming and does not want to have to always take the watch off when she swims. She goes to buy a waterproof watch at a store owned by Mohammad. She specifically tells the salesman, Rashad, that she is looking for a waterproof watch. Rashad says he understands and shows her a few models that he claims are waterproof. Rashad convinces Layla to buy the most expensive watch in the shop, but it turns out that the watch is not waterproof. Rashad knew this but did not tell Layla. A month later the watch breaks and Layla finds out that it was not waterproof. Can she rescind the contract that she had with Mohammad, the storeowner? Does your answer change if Mohammad is known as a liar generally? What if he has been disciplined for lying to customers before?

### 3.4 Duty on the defrauded

There is no duty on the defrauded party to independently investigate the truth of the statements made to them.<sup>14</sup> While it may have been wise for that party to verify the statements or acts, not doing so will not prevent them from being successful in a claim of fraud.

### 3.5 Swindling

Another potential defect of consent is swindling. Swindling is a type of fraud that is fortunately more easily defined than the larger category of fraud. Swindling occurs when the seller convinces the buyer to pay above what the fair value of the product is, or when the buyer convinces the seller to sell their goods for less than what the product is worth. Swindling only has legal effect on a contract when it is extreme.

#### Civil Code

##### Article 571

(1) Whenever, as a result of cheating of one side of the contract, the other party gets swindled exorbitantly, the deceived person can demand rescission of the contract.

(2) Swindle shall be called exorbitant when the difference between the real value of a property at the time of contract and the price it was sold amounts to 15 percent or more.

##### Article 575



- (1) Exorbitant swindling would render the contract rescindable.
- (2) If the swindled person was aware of swindling at the time of conclusion of the contract and showed consent to it, he cannot rescind the contract, unless his consent is based on the opposite party's false information, concealment of reality, or fraud.

Article 571 and the first two clauses of Article 575 lay out three essential aspects for swindling to rise to the level of a legally relevant action.

The first is found in Article 575, Clause 2 and is also implied by the word “cheating” in Article 571, Clause 1. The swindling *must* be the result of cheating or deception from the party that benefitted from the inflated or deflated price. In other words, fraud must be present. The Civil Code allows for parties to a contract to set whatever price they want and there are many reasons why individuals may agree to a price that is far above or below the fair value of the products at issue. For example, maybe the two parties are old friends and the seller agrees to a price 20 percent below the fair value because he knows that is what his friend can afford. Or, one can imagine an individual paying a price far above the fair value because they, as an individual, value the good at the inflated price even though they know that they are paying “too much.” Furthermore, sometimes parties enter into long-term contracts for a stable price knowing that the fair value of the product may go up or down over time because it is simpler than renegotiating the price over and over again. To constitute swindling, the party claiming to have been swindled must demonstrate that the other party deceived them into believing they were paying or selling for a fair price for the good or service under Article 571, Clause 1. Or they must demonstrate, under Article 575, Clause 2, that they knew they were paying an unfair price but the other party made some other fraudulent statement or act that caused the defrauded party to agree to the unfair price.

Second, the difference between the price paid and the fair value must be extreme or *exorbitant*. Thus, if someone thinks that they were overcharged, but not by much, they will not have the option to rescind the contract as this would not amount to exorbitant swindling. Only price discrepancies of 15 percent above or below the fair value of the goods or services will qualify. This requirement adds a practical difficulty for a party trying to demonstrate swindling and that is ascertaining the fair market value of the good or service. Fair market value, while a commonly tossed around word in academic circles, is generally much more difficult to determine in real life.

Third, when assessing if the degree of swindling qualifies as exorbitant, one must look at the fair value of the good or service *at the time of contracting*. This follows logically from the fact that the market is constantly changing. Thus, assessing the value of a good or service at the time that a case is brought to court may have little relation to the value of that same good or service whenever the contract was formed.

If these three elements are satisfied, the swindled party's request to rescind the contract will be granted.

### Discussion Question

Omar wants to purchase a computer and he goes to the store owned by Halima. Omar has done his research and knows how much the kind of computer he wants should cost. He picks out a Dell computer but notices that Halima is charging 20 percent over the fair price of the computer. He asks her why she is charging so much and she tells him that she is the only store that sells authentic Dells. Everyone else imports counterfeit models so they are able to sell them for much cheaper and still profit, but she has to charge more because her Dells are authentic. Omar believes Halima and agrees to the price. He later finds out that Halima was lying and many other stores import authentic Dells. Will Omar be able to rescind the contract? If he can, which Article could he use?

### Discussion Question

Remember that when discussing mistake **Article 567** indicated that if the mistake related to the price of the good or service, the only option is for the price to be corrected; the contract with the correct price would be enforceable. However, **Article 571** indicates that if price is incorrect due to swindling, the swindled party may rescind the contract. Do these two articles contradict each other?

#### 3.5.1 Other exclusions to swindling

In one specific circumstance, the Civil Code prevents those who believe they have been swindled from bringing such a claim. This is when the price that the parties agree upon is a result of an open bid.

#### Civil Code

##### Article 576

In contracts that are concluded through open bids, protest regarding existence of swindling is not allowed.

Such exclusion logically follows from the overall purpose of auction sales. They are inherently removed from the concept of an objective fair value. Instead, auctions are based on the subjective value that the bidders place on the good or service for sale. Therefore, nullifying such a sale because the price was 15 percent over or under the fair value of the good or service would go against the purpose of an open bid sales process.

#### 3.5.2 Swindling and government property

We have already examined the first two clauses of Article 575, but there is a third clause that deals with swindling and government property.

#### Civil Code

##### Article 575

(3) Exorbitant swindling regarding the government's properties, endowment, and property of a protected person (incapable person), in any way that it may have happened, shall cause rescinding of a contract.

Article 575, Clause 3 indicates that the requirement that the swindled party was deceived into agreeing to the price does not apply if the property belonged to the government or a protected person. A judge only has to determine whether or not the price agreed to in the contract was 15 percent above or below the fair value of the property. If this is the case, then the contract must be rescinded, regardless of the circumstances that led the parties to agree to the price.

#### 3.5.3 Rescinding at a later date

Generally, if a court determines that fraud was material to a contract's formation, the defrauded party has the power to rescind the contract. However, there are a few circumstances that deserve further comment.

#### Civil Code

##### Article 577

If one of the parties' need or lack of experience or weak realization is misused, and exorbitant swindling occurs in the contract as a result of it, the cheated person shall be able, within one year from the date of

conclusion of the contract, to demand nullity of the contract, or diminution of his obligations at a reasonable scale.

Article 577 protects individuals whose weaknesses relative to the other party to the contract have been exploited by allowing the exploited party to rescind the contract or lower their obligations under the contract. The exploited party must raise the issue within one year to benefit from Article 577 protection.

To utilize this Article, an individual must demonstrate that exorbitant swindling, amounting to at least 15% of the fair value, occurred *and* that it occurred because the other party exploited their lack of knowledge or experience. This provision echoes the idea mentioned previously that a disparity in power between the parties might be grounds to void a contract. Thus the Civil Code is sympathetic to those who find themselves exploited by another more knowledgeable person, but does not allow someone who *should have known* they were being swindled to use this article.

For example, imagine that Ahmad has a car worth 20,000 Afghani but wants to make a lot of money and tries to sell it for 50,000 Afghani. Ashraf agrees to buy Ahmad's car for 50,000 Afghani, but a week later he finds out that he overpaid. 5 months later, Ashraf decides to go to court to rescind the contract. If Ashraf is a wealthy, 35-year-old who did not initially care that he had overpaid, he will likely have a difficult time convincing the court to allow him to rescind the contract. He knew about the price issue for several months and during that time he continued to drive the car. However, if Ashraf was a 17-year-old who was inexperienced with business transactions, Article 577 would allow him to bring his claim to court within a year from the day he purchased the car.

While the Civil Code does not explicitly put a time limit on when fraud claims to be brought to court for those not protected by Article 577, one can infer that the yearlong period for those who are protected by Article 577 is longer than what would be permissible for those who are not.

### Discussion Question

In which of these scenarios would someone be able to use Article 577?

1. Ahmad is buying his first computer. He goes to his local used-electronics store and asks them for help selecting a model that will fit his needs. The store sells him a computer for 20% over the market value; a fact Ahmad discovers a year and a half later.
2. Rahim is selling some art that has been in his family for a long time. He goes to an art gallery to have the value of the art determined by an expert. They give him a price that is 15% lower than the fair value. Rahim later sells the painting at that price to a buyer that heard about the painting from the art gallery expert. Rahim discovers the true value of the artwork 6 months later.

### Civil Code

#### Article 578

If payment of an amount that judge has determined be considered sufficient for removal of swindle, the opposite party, in exchange contracts, can drop (withdraw from) the rescinding lawsuit.

Oftentimes, contracts will not involve the exchange of money for a good or service. Instead they will involve the exchange of one good or service for another. For the purposes of establishing swindling, courts treat exchange contracts in the same manner that they would for contracts that involve the

exchange of money for a good or service. The swindling must still be exorbitant, which in this case is measured by comparing the fair value of both sets of goods and services.

Unlike with contracts that involve money-for-goods/services, where a judge must rescind the contract if they find exorbitant swindling, the judge may offer the swindled party the option to receive a sum of money that will make up for the value difference between the items exchanged if the party withdraws their Article 571 lawsuit.<sup>15</sup>

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<sup>1</sup> Jacques du Plessis, "Fraud, Duress, and Unjustified Enrichment: A Civil Law Perspective," in *Unjustified Enrichment: Key Issues in Comparative Perspective*, eds. David Johnston and Reinhard Zimmermann (Cambridge: Cambridge University Press, 2002), 199. Generally, in civil law countries coercion must come from the other party. However, the Civil Code of Afghanistan does not explicitly exclude third-party coercion, so it may be possible.

<sup>2</sup> Abd El-Wahab Ahmed El-Hassan, "The Doctrine of Duress (Ikrah) in Shari'a, Sudan and English Law," *Arab Law Quarterly* 1, no. 2 (1986): 232; Graham Glover, "The Test for Duress in the South African Law of Contract," *South African Law Journal* 123, no. 1 (2006): 111.

<sup>3</sup> Codice Civile, "Article 1438" in Hein Kötz, *European Contract Law*, trans. Tony Weir (Oxford: Clarendon, 1997), 211.

<sup>4</sup> Glover, 106.

<sup>5</sup> Restatement (Second) of Contracts, Sections 175-76.

<sup>6</sup> Saúl Litvinoff, "'Error' in the Civil Law," in *Essays on the Civil Law of Obligations*, ed. Joseph Dainow (Baton Rouge: Louisiana State University Press, 1970), 239.

<sup>7</sup> *Id.*

<sup>8</sup> The Dari term used in the Civil Code is *madi*.

<sup>9</sup> Note that in this scenario, Jamila would not earn any money from the sale. She merely works at the book store and her salary does not depend on how many books she sells.

<sup>10</sup> Kötz, 188.

<sup>11</sup> Note that if Mohammad knew that there was no lake but chose to remain silent on the issue, Sadiq may be able to argue that Mohammad committed fraud. Fraud will be discussed in depth in the next section.

<sup>12</sup> Kötz, 187.

<sup>13</sup> Law No. 92-60, Art. 2 (18 January 1992) in Muriel Fabre-Magnan "Duties of Disclosure and French Contract Law," in *Good Faith and Fault in Contract Law*, eds. Jack Beatson and Daniel Friedmann (Oxford: Oxford University Press, 2001) 101.

<sup>14</sup> Kötz, 198.

<sup>15</sup> This chapter relied on the following sources: Amkhan, Adnan. "Force Majeure and Impossibility of Performance in Arab Contract Law," *Arab Law Quarterly* 6, no. 3 (1991): 297-308; Barry, Nicholas. *The French Law of Contract*. Oxford: Clarendon, 1992; Du Plessis, Jacques. "Fraud, Duress, and Unjustified Enrichment: A Civil Law Perspective." In *Unjustified Enrichment: Key Issues in Comparative Perspective*, edited by David Johnston and Reinhard Zimmermann, 194-226. Cambridge: Cambridge University Press, 2002; El-Hassan, Abd El-Wahab Ahmed. "The Doctrine of Duress (Ikrah) in Shari'a, Sudan and English Law," *Arab Law Quarterly* 1, no. 2 (1986): 231-236; Fabre-Magnan, Muriel. "Duties of Disclosure and French Contract Law." In *Good Faith and Fault in Contract Law*, edited by Jack Beatson and Daniel Friedmann, 99-122. Oxford: Oxford University Press, 2001; Glover, Graham. "The Test for Duress in South African Law of Contract." *South African Law Journal* 123, no. 1 (2006): 98-125; Katsivela, Marel. "Contract: Force Majeure Concept or Force Majeure Clauses?" *Uniform Law Review* 12, 2007: 101-120; Kötz, Hein. *European Contract Law*. Translated by Tony Weir. Oxford: Clarendon, 1997; Litvinoff, Saúl. "'Error' in the Civil Law." In *Essays on the Civil Law of Obligations*, edited by Joseph Dainow, 222-269. Baton Rouge: Louisiana State University Press, 1969; Rayner, Sue. "A Note on Force Majeure in Islamic Law," *Arab Law Quarterly* 6, no. 1 (1991): 86-89; Sabbath, E. "Effects of Mistake in Contracts, A Study in Comparative Law." *International and Comparative Law Quarterly* 13, no. 3 (1964) 798-829; Thereoux, Michael P. and April D. Grosse. "Force Majeure in Canadian Law," *Alberta Law Review* 49, no. 1 (2011): 397-425; Valcke, Catherine. "Convergence and Divergence of the English, French, and German Conceptions of Contract," *European Review of Private Law* 16, no. 1: 29-62.

## CHAPTER 10: REMEDIES FOR NON-PERFORMANCE

### INTRODUCTION

Imagine that your client contracted with a farmer to purchase 1,000 bushels of corn in six months. Now your client tells you that the farmer will not be fulfilling the contract. Your client says that without the corn, his livestock will die. What can your client do? Or perhaps you represent the farmer, and the farmer tells you that he does not want to perform the contract because corn prices have risen dramatically since the contract was signed. The farmer tells you that he would rather sell the corn to another purchaser who has offered to pay twice the price. What can the farmer do?

This chapter discusses what happens once one party does not perform its obligations as promised. What can the aggrieved party do to get what he bargained for from the debtor, and who is responsible for the expenses borne by the creditor that can be traced to the debtor's default? Does the creditor still have to perform his obligation?

Three **remedies** in the Civil Code answer these questions. A remedy is a court's enforcement of a legal right. The remedies discussed in the Civil Code are not grouped neatly together, but are instead scattered throughout. Nevertheless, three principles can be distilled from the Civil Code's discussion of remedies. First, specific performance is the primary and favored form of relief for unperformed contracts. Second, the Civil Code makes money damages available when specific performance is impossible. And third, non-performance by the debtor can trigger a right for the creditor to cancel the contract.

Afghan contract law focuses on claims, which is the right to require from another person a particular act or omission. If you have a specific right against another person through a contract, you can require that person to act accordingly—not just to pay damages. If the other person does not comply, you can sue that person to do what he or she promised to do.

### 1. SPECIFIC PERFORMANCE

Under the Civil Code, contracts are made with the expectation that the obligor will perform as promised, and if he does not, that the party will be compelled to perform specifically. Thus, specific performance is the primary remedy for non-performance. A debtor has a legal duty to perform his contractual obligation, which can be performed voluntarily or enforced through **surrogate performance**. Under surrogate performance, the debtor does not personally perform the obligation, but is held responsible for the cost of another person performing the obligation. Unlike damages, specific performance is not available for every breach of contract. Specific sections in the Civil Code, together with the nature of the particular obligation, limit whether a court can order specific performance.

#### 1.1 Elements of specific performance

The Civil Code makes two requirements for specific performance. First, specific performance must be possible. Second, the creditor must notify the debtor either by bringing a suit against him or, in some cases, by notifying him informally in the case of an emergency. The majority of Arab civil codes add a third requirement: specific performance cannot be unduly onerous for the debtor.<sup>1</sup> The Civil Code does not clearly make this relaxation for debtors in its text, but this well-established civil law principle may influence judges in Afghanistan. Article 815 of Civil Code contains the phrase “unless financial exchange incurs a total harm to the opposite party” to identify an instance where the debtor may be relieved of specifically performing. The phrase is difficult to interpret. A plain reading of the phrase suggests that if a debtor would be put in financial ruin, then he may be not required to provide financial compensation.

However, this legal result would provide the creditor no legal recourse in such instances. No doctrine or jurisprudence to date has dealt with the particular portion of the article.

## Civil Code

### **Article 815**

Undertaker shall be obligated to perform specifically what he has undertaken. If specific performance is impossible, obligating undertaker to financial substitute shall be permissible, unless financial substitute shall inflict substantial harm on the other party.

### **1.1.1 Specific performance must be possible**

Article 815 of the Civil Code, the initial and most elementary article in the chapter on specific performance, requires that specific performance be possible. The court will first ask whether specific performance is physically possible after the non-performance. If so, the breach is labeled a mere delay, and the court will order specific performance. If specific performance is not possible, the debtor will fulfill his obligation through damages, which are discussed in the next part.

Specific performance may not be possible because of a foreign cause, in which case the debtor will not be required to perform specifically unless he contributed to the foreign cause. For example, if a party contracts to paint a house and the house burns down before the agreed upon start date, specific performance is not possible, and the obligation will be dissolved through financial exchange.

Specific performance also may not be possible because of the nature of the obligation, such as with special events. For example, if Ahmad hires Abdul to speak to his corporation about business strategies and the contract states that the speech will occur at the June 1 annual employees meeting, specific performance will be impossible if Abdul does not show up on June 1. However, because the Civil Code prefers specific performance above other remedies, courts will not find impossibility if the terms of the contract can be read to permit specific performance.<sup>2</sup> Imagine that the terms of the contract between Ahmad and Abdul say that only Abdul will speak at an employee's meeting and that the parties privately agreed after signing the contract that Abdul would speak on June 1. The court will rule that specific performance of the speaking contract is possible. Ahmad will have to schedule Abdul for a later meeting instead of taking only damages for relief. This rule is subject to reasonableness. If Abdul fails to appear a second time, the court will usually regard specific performance as impossible. However, the law does permit a creditor to apply certain economic pressures to compel performance by the debtor, discussed further in the following sections.

In some cases, specific performance might not be possible because of the debtor's unwillingness to cooperate. Usually, impossibility of specific performance can be avoided through surrogate performance under Article 820, whereby the court authorizes the creditor to contract with a third party to fulfill the obligation, and the associated expenses are charged to the debtor. It should be noted, however, that there is no rule requiring a party to seek surrogate performance before being eligible for damages. Even if surrogate performance is a possibility, the creditor is not obligated to pursue it. Rather, surrogate performance is simply an option available to the creditor.

Indeed, surrogate performance may simply be inappropriate for some contracts. If the debtor's personal cooperation is essential for the performance of the obligation and the debtor refuses to cooperate, specific performance is impossible, unless the creditor chooses to accept performance by another person pursuant to Article 819. For example, if you contract with Nagma to give a concert, her cooperation is deemed essential, and a court will not require you to find relief through surrogate performance (hiring a different

vocalist). The Civil Code makes this important exception to specific performance's preferred status because surrogate performance will be an inadequate substitute for you. Only Naghma can give a Naghma concert, and you, presumably, will not be interested in someone else singing Naghma's songs. The creditor is not required to accept surrogate performance offered by the debtor (for example, Naghma tells you she has found someone else to perform her obligation), and the Civil Code will not require the creditor to arrange surrogate performance instead of taking damages.

### Civil Code

#### Article 819

If nature of obligation or agreement of parties requires personal performance of action by undertaker, creditor may reject performance of action by another person.

#### Article 820

(1) If undertaker does not perform the action he has undertaken and if performance of action by him is not considered essential, the other party may seek permission to perform the mentioned action, if possible, on undertaker's account, from court.

(2) In emergency cases, the other party may, without seeking permission of court, after noticing undertaker, perform the action on undertaker's account.

#### Article 821

If person has promised to perform an action, he shall be obligated, upon demand of the other party, to perform the promised action, otherwise, if nature of transaction requires, ruling of court shall replace performance of undertaker.

If the cooperation of the debtor is *not* essential to the performance of the obligation, then specific performance is possible, and the debtor should seek permission to make arrangements under Article 820 for surrogate performance. The aggrieved can perform the obligation himself or assign performance to another person. The court will require the debtor to pay these expenses. This would include acts like constructing a building or a tenant causing repairs to be carried out. The Civil Code presumes that the creditor does not care who performs the obligation—just that the obligation is performed.

Article 819 is not a permissive right for the creditor to reject surrogate performance by the debtor whenever the creditor chooses. The court will determine if the “nature of the obligation” requires the debtor personally to perform. Article 821 makes clear that when the debtor himself chooses not to perform, the court will permit the creditor to seek specific performance before it permits money damages and that surrogate performance is an alternative to specific performance with the debtor's cooperation.

It is important to repeat that one party cannot force the other party into accepting damages over specific performance for the unperformed obligation except where the debtor's personal cooperation is essential. If the creditor offers to accept damages but the debtor prefers specific performance, or if the debtor offers to pay damages but the creditor prefers specific performance, Article 815 prevents the court from ordering damages. Even if the debtor offers to pay damages greater in value than the specific performance, Article 815 is a barrier because specific performance is possible. Of course, if both parties prefer damages, the parties can settle the claim under the peacemaking articles in Book 2, Title 1, Chapter 5.

How is surrogate performance different from damages? Legally, the court order to perform the action under the debtor's account is distinct from a damages award. Surrogate performance resides in Chapter Two, apart from the compensation provisions in Chapter Four. However, for practical purposes, surrogate performance differs little from damages because the creditor still must secure payment from the debtor



and the creditor bears the risk of the debtor's insolvency. However, unlike damages, the creditor does not have to show actual damage.

### **1.1.2 The creditor must notify the debtor**

In all cases of specific performance, the debtor must be notified by the creditor. Notification can occur under Article 821 by confronting the debtor and arranging for specific performance out of court. The court filings in Article 820, Clause 1 serve as notification before a court order of surrogate performance. Even when surrogate performance is allowed in an emergency, Article 820, Clause 2 requires the creditor to first notify the debtor before contracting for surrogate performance.

### **1.1.3 Specific performance must not be unduly onerous**

In the great majority of Arab states, a court will not order specific performance if it will cause excessive harm or severe hardship to the debtor. The text of the Civil Code does not make this a prerequisite for specific performance, but Afghan judges may be influenced by this well-established civil law principle. And this principle is also found elsewhere in the Civil Code in other contexts, such as Article 696, which we discussed in Chapter 10. In essence, when denying specific performance to the creditor would also impose hardships upon the creditor, the court will balance the hardships to the creditor and debtor and order the remedy that satisfies the creditor unless the debtor would bear a disproportionate loss. Whether or not specific performance would be unduly onerous is a question for the court, so this rule does not permit the debtor to choose damages when the debtor prefers damages to specific performance.<sup>3</sup>

#### **Discussion Questions**

1. Does the distinction between contracts for which the debtor's participation is essential and non-essential make sense? Why not permit the creditor to decide whether the debtor's participation is essential? Can you think of non-essential contracts that a client might not want to have surrogate performance for? Would you raise this possibility with your client in the contract formation stage?
2. Civil law's strong preference for specific performance is a major difference between Afghan law and common law countries, such as Great Britain and the United States, where damages are the primary remedy. Oliver Wendell Holmes, a United States Supreme Court Justice in the nineteenth century, remarked: "Duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."<sup>4</sup> What are the advantages and disadvantages of the Article 815 approach and Justice Holmes's approach? Would it be inappropriate to conceptualize the contract as only a duty to pay and not a duty to perform?
3. Karl Llewellyn, a prominent American contracts scholar in the twentieth century, said: "A contract is no equivalent of performance; rights are a poor substitute for goods."<sup>5</sup> What does he mean by this? For what kind of contracts would specific performance be a "poor substitute?" How does the Civil Code address this?

## **1.2 Specific performance of particular contractual obligations**

The previous section discussed specific performance when the debtor's obligation is to do something. Specific performance is treated differently when the debtor's obligation is to transfer property, to use a certain standard of care, or to refrain from doing something. But many concepts carry over to these sections of the Civil Code. Most significantly, obligations to transfer ownership cause immediate transfer of the rights to ownership, which leaves the debtor with only the obligation to deliver the property.

## Civil Code

### Article 823

If undertaker infringes his obligation of action or omission, the other party may demand removal of what has been performed against the promise and, if necessary, claim compensation for damages from undertaker.

### 1.2.1 Obligations of result

#### 1.2.1.1 Obligations to transfer ownership

An obligation to transfer ownership, which is a form of an obligation of result, is treated differently from obligations to do something. The Civil Code separates an agreement to sell property into an obligation to transfer the right to ownership and an obligation to deliver the property. The former obligation is self-executing and passes either at the time the agreement is reached or, if the property is unspecified, once the property has been quantified. The right to the property is transferred not by the contract's terms, but rather by the operation of law. Once the obligation to transfer the right to ownership passes, the residual obligation to deliver is the only obligation left.

Significantly, if the obligation concerns a promise to transfer specified real property, the parties to the contract must comply with local registration laws, as provided in Article 816, before the debtor's right to ownership is transferred by law and enforceable between the contracting parties and against third parties. If either of the contracting parties does not execute the transfer of ownership, the aggrieved party can petition the court for an order authenticating the validity of the contract and permitting the debtor to register without the creditor's cooperation. The contract between the parties is not enforced until it is registered. The party in breach must pay damages, but he will not be forced to fulfill his promise.<sup>6</sup>

If the contract concerns the transfer of moveable property or goods, there are no procedural requirements. Article 816 transfers the right at the conclusion of the contract.

## Civil Code

### Article 816

Promise to transfer of ownership or any other type of real rights, shall cause immediate transfer of these rights upon observing rules of document registration, provided that subject of obligation is inherently a definite object and promisor is its owner.

Ownership does not transfer until the subject matter of the contract is specified or quantified. The contract is specified when the seller sets aside the purchased goods for delivery. If the seller defaults before specifying the property or goods, Article 817 permits the creditor to purchase the same thing from another seller while charging the debtor with the expenses that the creditor incurs and damages from delay.

Recall the example from the first paragraph of this chapter. Ownership of the corn contemplated by the farmer's contract to sell 1,000 bushels of corn is not transferred until the farmer sets aside for delivery the 1,000 bushels of corn. If the farmer's harvest yields less corn than anticipated and the farmer fails to fill the order, the buyer can purchase 1,000 bushels of corn elsewhere, and the court will order the farmer to pay the expenses and damages from delay. However, if the farmer has already set aside the corn but decides to sell it to a different buyer in violation of his contract with the original buyer, the original buyer can argue that title passed to him before the farmer illegally resold the corn.

## Civil Code

### Article 817

If person promises to transfer one of a specified kind of real rights, transfer shall not occur until subject is specified, otherwise, creditor may, with permission of court, acquire subject out of the kind. Also, creditor may, in both cases, claim price of subject of obligation in addition to compensation for damage.

As mentioned above, the Civil Code treats the obligation to deliver the property as a separate obligation that is inextricably intertwined with the obligation to transfer ownership of the property right. The seller is obligated to protect the sold property until the time of delivery, and the default position in the law is that the seller is responsible for delivery. Article 818's requirement to protect is a promise to use a standard of care, which would be governed by Article 822. Thus, the purchaser bears the risk of loss during the time of "protection" by the seller.

## Civil Code

### Article 818

Promise to transfer real right shall entail promise to deliver subject of promise and its protection until the delivery time.

## Discussion Question: Whistler's Valentine

A dispute between a world-famous painter and an English baronet erupted into an international sensation at the end of the nineteenth century. The case was finally resolved by the French Court of Appeal in 1897.<sup>7</sup> The case began when Sir William Eden commissioned a small portrait of his wife for a final price to be between 100 and 150 guineas. James McNeill Whistler, a world-renowned British artist living in Paris, would paint the portrait, a Valentine's Day gift to Sir William's wife. Sir William visited Whistler on Valentine's Day, approved the portrait, and left with Whistler a sealed envelope that included a check for 100 guineas and a note jokingly describing the compensation as his "valentine" to Whistler. Whistler, who had made a reputation for his eccentricities, felt his dignity as an artist had been wounded, so he refused to deliver the portrait. Sir William sued for possession of the portrait, the 100 guineas, and 10,000 francs in damages. In response, Whistler painted over Lady Eden's head and replaced her with another woman's face.

Let's think through how this dispute would have proceeded under Afghan law.

Sir William's attorney's argued that the contract should be treated as a sale of property, as discussed in the quote below. Under Article 816 of the Civil Code, such a sale would have resulted in the transfer of the right to the property immediately upon completion by Whistler. Review the articles respecting transfer of property before reading on.

*Whereas the plaintiff, on examining the picture, formally recognized it as his property, identifying it not only by the tonality of the face, but also by all the accessories, the furniture, the hangings, even the dress worn by Lady Eden when she sat, and seeing, further, that he declares the only changes are the modification of the features and the introduction of a flower on the right. Whereas this is unquestionably the picture which, as he ordered it and paid for it, it became the property of Sir William Eden.*<sup>8</sup>

Whistler's attorney made two arguments in response about Article 816, which are reprinted below. First, that Article 816 could not have operated because the portrait was no longer a portrait of Lady Eden as Sir William had ordered. Second, that the contract was unspecified—Whistler had not finished the painting.

*Now what, in fact, was the contract? Not that Mr. Whistler should paint a portrait of some sort, but that he should paint a portrait of Lady Eden. As Lady Eden's portrait no longer exists, there can be no reason why another portrait should be handed over to Sir William Eden. There is yet [another] reason, gentlemen, why this picture should not be given up. We may set aside for the moment the eventual rights of some third person to the work. The picture as it now stands is not finished. It is a mere sketch, a design; you cannot oblige an artist to give up an unfinished work, and allow the incomplete creations of his heart and brain to circulate in the world.<sup>9</sup>*

Sir William's lawyer replied that the portrait was completed before Whistler painted over Lady Eden's face, thus resulting in the transfer of property before Whistler took his artistic liberties:

*I have to answer my learned friend, who maintains that you cannot adjudge the picture to Sir William Eden, because it is an imperfect and incomplete creation of the artist's brain. But, gentlemen, we need not ask what the portrait is now. What we must ask is, was the picture completed at a given moment? Certainly it was, as we know from Mr. Whistler himself. It was finished so much to his author's satisfaction that he did not hesitate to describe it to interviewers as a "masterpiece."<sup>10</sup>*

The French government intervened in the case and offered its own argument raising a third theory that Whistler contracted to do something. They argued specific performance is impossible under Article 815 because Whistler's cooperation is essential:

*The artist is not even called upon to give any reason for refusing to fulfill his contract. He is within his rights if he refuses to carry out his undertaking, and elects to take his chance of having to pay damages. This right is absolute, and Mr. Whistler simply affirmed his right when he refused to give up the picture. . . . Mr. Whistler refuses to deliver it, though he accepts the penalty of his action."<sup>11</sup>*

1. Which advocate has the best argument? Which advocate's position best serves the policies of specific performance?
2. Why did Sir William not get a court order for surrogate performance?
3. Mr. Whistler displayed the portrait at the Salon in Paris, one of the greatest annual art events in the Western world at the time, before Sir William paid the 100 guineas. Does that affect your analysis? Whistler's attorney defended the showing.

Mr. Whistler, we may take it, continued to be the owner of the picture, although at a given moment it may have appeared finished. He continued to own it, not having given it up to the claimant, although he had exhibited it. The exhibition was, in fact, an experiment, a sort of rehearsal, as we may gather from the fact that on several occasions incomplete works, works unsigned, and even unfinished, have been exhibited as pictures by Whistler.<sup>12</sup>

4. Why would Sir William want possession of what is now a portrait of another woman? In the damages discussion, Whistler's attorney alleged Sir William was a speculator and intended on selling the portrait for a profit. Should Sir William's attorney have raised this? If true, does it make Sir William's case stronger that the portrait should be treated as property?

The trial court found for Sir William, but the Court of Appeal held that a contract for painting of a portrait had a special character and that property in the painting remained in the painter until he handed it over and the client approved. However, as long as the portrait bore some of Lady Eden's features, Whistler could not use it privately or publicly.<sup>13</sup> Artists celebrated the decision as a vindication of an artist's right to decide when his work was complete.<sup>14</sup>

### **1.2.2 Obligations to use a particular “standard of care” (means)**

This form of obligation involves a contracting party's promise not to achieve a certain result, but to employ a certain standard of care in performing an obligation. In other words, this is an obligation of means. Under this type of obligation, for example, the debtor must safeguard a thing, manage a property, or act prudently in performing an assigned task. Under Article 822 of the Civil Code, the obligor fulfills his duty if he acts with the care that he habitually would use—in other words, the care he would employ with respect to his own property. It is immaterial whether or not the goal of the contract is achieved.

Article 822 makes three exceptions to judging the debtor by the “habitual” standard of care. First, the law may require a different standard. For example, Article 1638, Clause 1, which governs obligations for safekeeping, adopts an ordinary person standard: “The safekeeper shall be obligated to protect and administer the property that is under his safekeeping and it is essential that he exercises care about it as much as an ordinary person.” The ordinary person standard is objective, whereas the habitual person standard subjectively depends on the debtor's past personal conduct. Second, the parties can contractually obligate the debtor to a different standard. For example, a risk-averse obligor might require the obligee to release the obligor from responsibility for negligence in the contract. Third, if the debtor commits fraud or gross negligence, Article 822 requires the debtor to be held responsible. Any agreement purporting to relieve the debtor from liability for fraud or gross negligence is unenforceable.

#### **Civil Code**

##### **Article 822**

In promise to take action, if protection or administration of object taking precaution in performance is required from promisor, promise shall only be considered fulfilled if promisor takes the kind of precaution in performance that he usually takes, even though the desired aim is not realized, unless otherwise explicitly stated by law or agreement of parties. In all cases, if promisor commits fraud or big fault, he shall be considered liable.

This article controls many contracts to provide services. Your contracts with your legal clients will fit under this article, as do a physician's contracts to treat his patients. If a criminal defendant hires you to represent him, Article 822 holds you to the same standard of care you habitually use in representing your clients. This standard will vary from attorney to attorney. It is not the standard of care of an average attorney. Indeed, such a standard would place about half of all attorneys in breach. Article 822 also does not hold you liable if, despite your best efforts at criminal defense, your client is convicted. Similarly, doctors cannot be held liable if their treatment fails to cure their patients.

So how can you tell whether a contract is one of means or result? The type of obligation does not need to be explicitly mentioned. A contract need not use the words “means” or “result” to identify it as such. Rather, the type of contract will be adduced by looking at the nature of the transaction. Of course, there may be difficult cases, and those are where the tensions arise in a contract. We will explore further the difference between means and result later in the chapter. For now, however, it is enough to know that the contract does not need to mention the precise words “means” or “result.”

### Discussion Question

Why do you think the parties can contractually change the standard of care for all acts except fraud and gross negligence?

#### 1.2.3 Obligation to refrain from doing something

If the debtor violates an obligation to *refrain* from doing something, the creditor can have what is done in breach of the obligation destroyed at the debtor's expense under Article 823 of the Civil Code. For example, if one party to a building scheme constructs a building that violates the limits in the scheme, Article 823 authorizes the other parties to the building scheme to demand removal of the building to bring it into compliance with the scheme. Other examples of promises not to do something include promising not to compete with another seller in a certain area and granting exclusive rights contracts, such as the promise of a singer or an actor to perform only in the creditor's theatre.<sup>15</sup>

#### 1.3 Compelling specific performance with penalties

The court, in its discretion, can authorize penalties to induce the debtor to perform. As discussed, the creditor can obtain specific performance without the debtor's cooperation by obtaining a court order for surrogate performance. However, if the cooperation of the debtor is required for specific performance, Article 824, Clause 1 of the Civil Code provides special coercive measures in the form of monetary penalties to induce the debtor to give specific performance. The court can increase penalties as appropriate under the authority of Article 824, Clause 2. These penalties are not limited to contractual obligations and can be used to secure abatement of a nuisance.<sup>16</sup>

### Civil Code

#### Article 824

(1) If specific performance shall be impossible or unsuitable without personal performance of obligation by undertaker, the other party may request court ruling to obligate undertaker to perform and, in case of refusal, to threaten him to compensate.

(2) If court considers the amount of compensation, for forcing undertaker who refuses to perform his obligation, inadequate, it may raise amount of compensation as the case requires.

Penalty decisions are subjective and inexact. The court will decide whether to resort to them, and if so, what amounts are appropriate to induce the debtor to perform. These penalties will be applied for a specified period of time. If the time elapses without the obligation being performed, the penalties can be renewed, and they will accumulate as long the delay in performance continues. Penalties are paid to the creditor, but the court does not consider the harm inflicted upon the creditor. If the debtor continues to show no willingness to perform, the court will have no option but to award damages. Pursuant to Article 825, courts treat the debtor's failure to perform as a sign of bad faith, which is weighed in the final assessment of damages.

### Civil Code

#### Article 825

If undertaker, after being threatened by compensation, does not personally fulfill his obligation or insists in refusing to perform, court shall determine the amount of compensation by taking the inflicted damage to the other party and intention of undertaker into account.



Penalties take two forms. First, the court can set a periodic sum at the beginning that is provisional and cannot be enforced until the court liquidates the penalty at the end of the period. The court can vary the amount at the end of the period. Or second, the sum that is to be paid will not be able to be revised, in which case the final figure is determined through a mathematical calculation.

Penalties must be distinguished from damages. Penalties are specifically meant to be a coercive means of getting a party to specifically perform, rather than getting damages from that party. Before the 1970s, penalties were not codified in civil law codes. Courts once had presented penalties as a variation on damages, but that was self-defeating since the penalty loses its effect if it takes the place of damages. Courts struggled to separate them from damages, though, because without any legislative text apart from the damages sections, they had no authority to award penalties that were not damages. Thus, the codification of a penalty section in the Article 824 and 825 is very significant.<sup>17</sup>

#### **Discussion Question: Criminalizing Non-Performance?**

Civil law codes added penalty codes in the early nineteenth century to put economic pressure on debtors and thereby discourage debtors from forcing the creditor into damages. However, the payment of penalties to the creditor results in an unearned windfall to creditors. Can you think of facts under which penalties might create perverse incentives for creditors? Would it be an improvement for penalties to be paid to the government? Would this amount to criminalizing non-performance? Do Articles 824 and 825 already effectively criminalize non-performance? Should non-performance be punished apart from the damages caused?

#### **1.4 Effect of liquidated damages clauses**

Contract clauses that stipulate the amount of damages due for non-performance do not prevent the creditor from asserting his right to demand specific performance. Penalty clauses are held to mean that the contracting parties choose to agree, in advance, on the amount of damages. Damages can still be awarded in addition to specific performance, for any injury or loss caused by the breach. The parties must use explicit and unambiguous language to remove specific performance as the primary remedy.<sup>18</sup>

#### **Discussion Question: Qudratullah's Snowplows**

It is October in Fayzabad, which means winter is approaching, and Qudratullah is preparing his snow removal business for the season. Qudratullah has ordered five new snowplows that are to be delivered on October 20, and Qudratullah managed to sell his five oldest snowplows to the city of Fayzabad with delivery on October 10. As part of the contract, Qudratullah must replace the blades on three of the snowplows. Qudratullah has great relations with the city because he has a contract with the city to clear the streets in fifteen neighborhoods. The contract gives the city priority. Under its terms, Qudratullah must clear the snow in the neighborhoods before noon.

Qudratullah calls the city's public works director on October 8 to explain that the new blades were delayed because of bad weather near the manufacturers. Qudratullah calls again the next day with more bad news. Forecasters are predicting that the same snowstorm delaying the shipment of the blades will fall on the Fayzabad the next day. He explains the predicament with being five plows short for ten days and pleads with the city to permit him to use his plows for the coming storm. After much pleading, the city agrees to let him use two of the plows in need of replaced blades. Qudratullah knows that the three plows that he is to turn over belong to the city at midnight, so he parks them outside his gate where they will be accessible for the city workers when they come for the plows early in the morning.

Qudratullah wakes up the next morning to two disappointments. The city is covered in snow—more than forecasted—and the three plows parked outside his gate have been vandalized. Qudratullah feels like he has no choice with the excess snow, so he gives the keys to four of the five plows to his employees to begin fulfilling his contracts. The city is left with just one plow.

You are the lawyer for the city's public works director. What should the city do to make up for the two other plows it expected to be able to pick up? Who is responsible for the damage to the plows by the vandals (assuming the vandals are never prosecuted)? Does it matter whether the vandals struck before or after midnight? To add to the disappointment, Qudratullah has called to say he will not be able to plow the neighborhood contract until 8:00 p.m. What, if anything, will you tell the public works director he can do?

Regardless of the advice you give the director, imagine that the director decides later that morning to purchase one snowplow when Qudratullah fails to make available all three plows agreed to. Ignoring cancellation as a remedy, will the city still need to accept all five snowplows from Qudratullah once this all is sorted out?

## **2. DAMAGES**

Now that we have finished our discussion of specific performance, the next item to discuss in the remedies context is damages. A discussion on damages flows naturally from our discussion of specific performance. Damages can be awarded after specific performance is found to be impossible. And, in the case of delay, damages can be complementary to specific performance.

In the civil context that we have been discussing, liability is divided between contractual liability and delictual liability (found in Book 1, Title 2, Chapter 3 of the Civil Code), the latter of which was discussed in previous chapters. It is important to note that the Civil Code and all other Arab civil codes do not devote a separate section for contractual liability, like specific performance.<sup>19</sup> Rather, the relevant code provisions for contractual liability appear throughout the Civil Code and can vary depending on the particular obligation or obligations involved. Because of the primacy of specific performance, contractual liability is strictly the duty to pay money damages. This section will introduce you to the general principles of contractual liability and the classifications of obligations.

Civil liability, for both delictual and contractual liability, requires three elements: fault, causation, and damages. We will discuss each of these three elements throughout this section.

### **2.1 Fault**

Contractual fault is the failure of an obligor to perform his contractual obligation. A valid contract must be performed specifically. Failure to perform according to the terms of the contract before the breach and the failure to perform specifically amount to contractual fault.

The fault concept is objective. The debtor's reason for breaching the contract makes no difference. Regardless of whether the debtor's breach was intentional, unintentional, or the result of negligence, the simple failure to perform constitutes fault. The extent of the non-performance and whether there was partial performance has no bearing on contractual fault. Additionally, the fault element will be proven even if the failure to perform was because of foreign causes that the debtor had no control over.<sup>20</sup>

Thus, non-performance of a contractual obligation and contractual fault are synonymous. Fault is not presumed when there is non-performance—the non-performance alone is fault.



## 2.1.1 The taxonomy of breaches

In civil law systems, whether or not there has been a breach depends on a classification of the contract that relates to intensity. The remedies available will be gauged against the various levels of intensity. In general, the intensity of the obligation is inversely proportional to the difficulty of the performance. These obligations can be classified as obligations of requiring achievement of a specific result, obligations requiring the adoption of a particular standard of care (means), and obligations of warranty.

### 2.1.1.1 Obligations of result

Obligations of result impose a duty to achieve a promised result. With obligations to adopt a standard of care, the party that claims damages for the breach must prove the fault of the obligee. However, in the case of obligations of result, it is sufficient to prove that the promise made was not performed.<sup>21</sup>

For example, a seller of goods has an obligation to transfer the sold goods to the buyer. The obligation to sell is not fulfilled until ownership of the goods transfers. A debtor cannot escape money damages liability by claiming he employed the standard of care that an ordinary person would use.<sup>22</sup>

### 2.1.1.2 Obligations requiring adoption of a particular standard of care

These obligations impose a duty to perform an act without guaranteeing a certain result. Usually, the obligor is obligated to take the care that a normal, reasonable person would have used. Thus, the obligation can be fulfilled even if the actual goal of the obligation is unfulfilled.

The standard of care that a normal person would use can change across cases depending on the situation, so trial courts determine the standard a normal person would use on a case-by-case basis.<sup>23</sup> You will recall our discussion about Article 822 from earlier in the chapter, which discusses how someone can meet the standard of care if he uses the care that he would habitually or normally use in that particular situation. Another common example is that of a contract between doctor and patient. The doctor is bound to take reasonable steps to cure his patient, but he is not liable if, despite taking reasonable steps, the patient is not cured.<sup>24</sup> For an example from the Civil Code, consider Article 1638, Clause 1, which governs the obligations of a safekeeper, which is a third party that guards and administers property until the dispute over it is settled.

#### Civil Code

##### Article 1638

(1) Safekeeper shall be obligated to preserve and administer the property under safekeeping and it is necessary that he exercises care in this regard as much as an ordinary person.

Even if the property is destroyed while the property is in the safekeeper's care, the safekeeper will not be liable for damages if he exercised reasonable care in protecting the property. The aggrieved party must first prove fault (the non-performance of the contract), and then that the debtor did not safeguard the property as a normal administrator would have done so.<sup>25</sup>

Sometimes the standard of care will not be the reasonable-person standard either because the standard of care is changed by the code or because the parties changed the standard of care by mutual agreement. Some obligations must be performed only by the standard of care that the obligor would have used to perform the obligation as he would have for himself. Courts treat this standard as requiring less diligence than the reasonable-person standard.<sup>26</sup>

## Civil Code

### Article 1564

If agency is pro bono, agent shall be obligated to take such precautions in performing agency that he takes in his personal affairs and in no way he shall be obligated to take more care than of an ordinary person.

Article 1564 governs the standard of care required of an attorney who agrees to provide pro bono representation, which is to give legal representation without the expectation of compensation. The Civil Code expressly clarifies that the pro bono attorney will not be held responsible for diligence in excess of an ordinary person.

Parties can change the minimum standard of care in the terms of the contract. However, any terms purporting to limit damages liability for fraud or gross negligence are invalid. Additionally, it is possible for the parties to agree that the pledger will be responsible for money damages in the event there is non-performance because of an act of god or a forced cause.

## Civil Code

### Article 830

(1) Agreement of parties on bearing liability for unforeseen and force majeure events by undertaker shall be permissible.

(2) Also, it is permissible for parties to agree on acquitting undertaker of any kind of liability due to failure to perform his contractual obligations. Liability due to fraud and big fault of undertaker person by agreement of parties may not be acquitted. Undertaker may stipulate acquittal of his liability in case of fraud and big fault of persons recruited for performance of obligation.

(3) Any kind of agreement by parties on acquittal of liability due to illegal action shall be void.

### 2.1.1.3 Comparing obligations of result and obligations to adopt a standard of care

Obligations of means and obligations of result are misleadingly simple in two ways. First, any particular contract can generate both types of obligation.<sup>27</sup> The doctor is under an obligation of result with the success of his treatment, but he may be under an obligation of means with respect to the safety of the instruments he uses. For example, Mahmoud sees Dr. Aziz for a broken arm, and Dr. Aziz put Mahmoud's arm in a cast. When Mahmoud wakes up the next morning, he discovers the cast itself fractured, and Mahmoud's broken bone worsened. If the injury was caused by Dr. Aziz's negligence in making the cast, Mahmoud will have a claim for an obligation of means. If Dr. Aziz performed competently but asserts that the cast disintegrated because the product used to make the cast was defective, he will have to show it was the product maker's responsibility under Article 783 of the Civil Code. This will be an obligation of result.

Second, it can be difficult to determine the basis for the incidence of the type of obligation. The character of the obligation depends on the nature of the contract. Most often, the nature is determined by the character of the debtor's undertaking. If the promised performance would usually be expected to be achieved, it is an obligation of result. For example, if you purchase a ticket to travel by train, you do not think of your arrival at your destination as a speculative matter, and the obligation is for result. However, if you are undergoing surgery, you must accept that there is greater uncertainty with respect to the outcome. Additionally, the active participation of the creditor in an obligation increases the uncertainty. For example, if you are participating in a horse race, the owner of the race track has an obligation only of means with respect to the injuries caused by a horse that might run off the track.<sup>28</sup>

#### 2.1.1.4 Obligation of warranty

An obligation of warranty is the only obligation in the Civil Code contained within truly strict liability provision. In all cases, the debtor is held strictly liable, regardless of fault or the presence of an external cause. In a contract for lease or hire, the lessor guarantees both quiet possession and the absence of such defects that would make the premises unusable. In a contract to rent, the seller guarantees the buyer against eviction and against latent defects.

Consider Article 1347:

##### Civil Code

###### Article 1347

Lessor shall be obligated, after taking delivery of the designated rent that is stipulated to be paid immediately, to deliver the property that is being leased, together with its supplements, to lessee according to the prior agreement in such a way that utilization of the leased property, according to its nature, shall be possible.

Additionally, Article 1351 exemplifies the absence of fault that is characteristic of an obligation of warranty.

##### Civil Code

###### Article 1351

Lessor shall be obligated to adjust and repair defects inflicted on the leased property that impede desired utilization of it.

#### 2.1.1.5 Burden of proof

With both the obligation of result and the obligation to provide a standard of care, the burden of showing that the debtor has not performed his obligation lies, as usual, with the creditor. However, the critical difference is that, since the failure to take care is an essential element in the non-performance in an obligation to provide a standard of care, the burden of proof of fault is with the creditor. But in an obligation of result, the creditor has to show only that the result has not been achieved, and it is then the *debtor's* responsibility to show that the harm originated from an external cause and was without his intention.

##### Discussion Questions

Are the following obligations of means, obligations of result, or obligations of warranty?

1. A seller's obligation to transfer ownership of the thing sold to the buyer.
2. A seller's obligation to keep custody of purchased goods until the goods are delivered to the buyer.
3. An employer's obligation to pay wages for labor ordered.
4. A builder's obligation to construct a structure according to prescribed specifications.
5. A security services firm's obligation to provide surveillance.

### Discussion Questions: Answers

1. Obligation of result. The transfer is the object of the performance of the contract.
2. Obligation of means. The seller does not guarantee the integrity of goods but instead can do only what is reasonable under the circumstances to preserve the thing. A dairy wholesaler would be expected to refrigerate purchased milk, but might not be required to run a generator if electricity fails and causes the milk to spoil.
3. Obligation of warranty. The employer is strictly liable for the wages.
4. Obligation of result. The object of the contract is the construction of the structure according to specifications.
5. Obligation of means. The security services firm does not guarantee that no thefts will occur. The firm must make reasonable efforts to provide security and surveillance of the premises.

## 2.2 Causation

The innocent party will not recover damages unless the breach of the contract can be traced to at least negligent conduct. Article 730 provides an example of the principle:

### Civil Code

#### Article 730

If undertaker cannot fulfill the exact obligation of contract or postpones the fulfillment beyond the designated time, court may condemn him to guarantee, unless it is proved that impossibility of fulfillment of obligation or its delay has been caused by something beyond his will.

The focus on the pledger's association with the cause of the breach in Article 730 means the pledger will be responsible for damages caused negligently or intentionally, but not for damages that are purely accidental or caused by an act of god.<sup>29</sup> This association is defined by directness and foreseeability. Directness is the causal link between the debtor's fault for the non-performance and the loss. The debtor is liable for such direct damage as was foreseeable if his directness is something less than deception or fraud. If it is an intentional act, the debtor will be responsible for all of the loss and not just the foreseeable damages.<sup>30</sup>

### Example 1

Unsurprisingly, determining "directness" can be an imprecise exercise. A popular hypothetical from the French jurist Robert Joseph Pothier illustrates the concept.

A man sells a cow to a farmer, but only the man knows the cow is infected. The farmer's other animals catch the infection and die. Without any animals, the farmer is unable to cultivate his land, which causes him to default on repaying his debts. The farmer's creditors seize and sell his property. Are the farmer's damages direct and foreseeable by the man who sold the diseased cow?

The loss of the cow and the farmer's other animals is directly connected to the seller's fraud. However, the loss the farmer suffers from his creditors selling his property is too remote because it has no necessary

relation to the seller's fraud. Pothier hesitates with the loss resulting from the inability to cultivate crops. It is not absolutely necessary since the farmer could have avoided the loss by purchasing or hiring other animals, but he still would have suffered losses and is entitled to some compensation for those damages.<sup>31</sup> Pothier's theory conceptualizes directness as "necessary," but no one theory has gained majority acceptance in civil law states.

### Common Law Comparison

Afghanistan's reliance on causation is in stark contrast to the practice in common law countries, where damages are awarded without consideration of fault with only a few exceptions, such as impossibility. The Restatement (Second) of Contracts § 346 states, "The injured party has a right to damages for *any breach* by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged."

### 2.3 Damages

The text of the Civil Code says relatively little about the assessment of damages. This accords the judge broad discretion in figuring the damages total. Article 734, however, provides at least some guidance. Article 734 discusses the two types of damages that are available to the creditor: the expectation interest and the reliance interest. The **reliance interest** is what the party has put into the transaction. The **expectation interest** is what the party expects to get out of the transaction. The creditor can claim both.

After the type of damage is identified, the process for claiming those damages is the next important step. Article 827 requires notifying the debtor before the creditor can make the claim for damages. Article 828 and 829 provide rules for making the notification.

### Civil Code

#### Article 826

Performance through compensation shall take place in accordance with provisions of law.

#### Article 827

Entitlement to compensation shall not realize before notifying undertaker, unless law has provided otherwise.

#### Article 828

Notifying undertaker shall happen by written notice or whatever that can substitute notice. Agreement of parties to the effect that mere arrival of date of performance of obligation without any other measure shall be considered as notifying may also be considered as substitute of notice.

#### Article 829

Notifying undertaker shall not be necessary in following cases:

- (1) If specific performance of obligation has become impossible by personal act of undertaking person.
- (2) If subject of undertaking is compensation for damages caused by illegal act.
- (3) If subject of undertaking is returning something that has been stolen, and undertaker has knowledge of it or he has knowingly delivered it unjustly.
- (4) If undertaker has stated his refusal in writing.

Losses are usually financial, but it is well settled now in the civil law tradition that some non-financial damages should be recognized and given monetary damages. For example, courts have awarded damages

for the sentimental loss resulting from disappearance of a family portrait, the damage to an actress's reputation when a theatre failed to put up her name in letters in the agreed size, and even the grief caused by the death of a horse.<sup>32</sup>

### **Civil Code**

#### **Article 1411**

Farming is a contract on cultivation of land between owner and farmer in such a way that harvest shall be divided between them in shares that they have agreed in contract.

#### **Article 1416**

(1) Farmer shall be obligated to take such care of farming and preservation of cultivation that he takes of his own property. Farmer shall be liable for destruction of land during utilization, unless he proves that he has made efforts as much as an ordinary person to preserve and protect it.

(2) Farmer shall not be obligated to compensate for destroyed livestock and tools that are not depreciated due to his fault.

#### **Article 1417**

Farmer may not, without permission of owner of land, sublease it to another person or waive leasing it for another person. In case of violation of this, owner may rescind contract or claim compensation from farmer.

#### **Article 1427**

If crops perish, completely or partially, by acts of god, both parties shall bear the loss equally, they may not refer to each other.

### **Theories of Damages**

In both Afghanistan and common law states, the broad purpose of damages is to compensate the creditor for a loss he suffered from non-performance of the contract. However, the systems disagree on what a "loss" is. The fault distinction in the Civil Code and other civil law systems is a reflection of a different conception of a contract—one where contracts have a moral and philosophical element. Under the civil law concept of a contract, a party can be forced to keep his promise to perform or not perform. Liability attaches to the debtor when he behaves otherwise than as agreed in the contract.

Fault does not have the same role in common law countries. Common law is more economic and pragmatic. Contract liability is objective, and fault is not needed to identify the existence of a breach of a contract. Under common law, the requirement that a contract be performed in accordance with its terms is absolute. There is no defense for absence of fault. However, fault can become relevant in assessing damages. Instead of making commitments to each other, as in civil law countries, common law contracts are undertaking risks without moral duties to perform a contract. Every contract gives every party the option of performance or payment of damages instead of performance.<sup>33</sup>

Though the theories underneath the common law and civil law systems are quite different, the practical differences have been lessened as both systems have softened. The absoluteness of common law contracting has been relaxed by the introduction of implied terms, reliance theory, and in some cases, tort liability for deliberate breach of contract. The fault requirement in civil law has been softened with strict liability, the obligations of warranty described above and the burden-shifting obligations of result.<sup>34</sup>

### Discussion Question: Whistler's Reprise

Recall the story of Whistler and the portrait of Lady Eden from the previous section.

Mr. Whistler's attorney made the following argument: "[I]t is my duty to tell you what Sir William is, as this has a direct bearing on the question of damages you will have to decide. Sir William Eden who passes for an amateur is in fact an amateur dealer. I shall show you that he does not have his wife's portrait painted for his family or with any idea of handing it down to his children. His commissions for portraits of his wife and children are speculations. He offers them for sale and makes a profit on them!"<sup>35</sup>

Why would Whistler want the court to treat Sir William as an art dealer instead of as commissioner of his wife's portrait?

### 3. TERMINATION

Termination is a party's right to end the contract and void unperformed, future obligations. Until now, we have discussed a creditor's remedies when the debtor fails to perform his obligation: specific performance and damages. This section discusses the effect of non-performance on the *creditor's* obligation. Must the creditor perform his obligation if the debtor fails to perform? Sometimes, the creditor will want restoration of his own performance or termination will be preferable to specific performance or damages.<sup>36</sup>

#### 3.1 Shari'a Law

Shari'a law does not recognize termination as a permissible consequence of breach. Specific performance and money damages are the only remedies possible when a contract is not performed.<sup>37</sup> The Federal Court of the United Arab Emirates has described the principle: "The fundamental principle of classical Islamic law is that contracts are to be performed specifically; and the court must enforce their terms. Islamic law did not allow termination for breach. The aggrieved party had no option but to request specific performance."<sup>38</sup>

Though termination for breach is not part of traditional Islamic law, it has been argued that it could be adopted as furthering principles of justice and equity.<sup>39</sup> The Civil Code permits dissolution of contract in two manners. First, the one or both the parties may seek cancellation of the contract through one of various means (Articles 739-746). Second, the parties may mutually agree to dissolve the contract (Articles 747-750).

#### 3.2 Principles of termination under the Civil Code

If one party breaches his promise, the aggrieved party may be able to terminate the contract. The central section for termination is Article 739 of the Civil Code. To terminate under the Civil Code, the contract must be bilateral, there must be breach, the party seeking termination cannot be in default, and the aggrieved party should be able to restore the **status quo ante**, which is to return the parties to the position they were in before performance of obligations.

### Civil Code

#### Article 739

If one of contracting parties, in contracts that bind the parties, does not perform his obligations, the other party may demand rescission of contract and, if necessary, compensation. Contracts that are naturally non-binding or include an option that will entail rescission, shall be excluded from this provision.

Termination is an alternate remedy from specific performance. The aggrieved party has the option to choose termination instead of specific performance.<sup>40</sup>

### **3.2.1 The contract must be bilateral**

Termination is available only for **bilateral contracts**, which are contracts that have reciprocal and interdependent obligations, such as contracts of sale, partnership, hire, and lease.

The creditor cannot invoke termination for breach of **unilateral contracts**, which are contracts involving obligations that bind only one party, such as obligations for gifts.<sup>41</sup> With unilateral contracts, the aggrieved party will not gain anything from demanding termination of the debtor's failure to perform. Instead, insisting on the performance of the unilateral contract will be in the aggrieved party's best interest.<sup>42</sup>

### **3.2.2 There must be breach**

To make a claim for termination, one of the contracting parties must have failed to carry out his obligation. In principle, the level of non-performance should have no bearing on the aggrieved party's right to demand termination. Mere delay or partial or defective performance is as much breach as complete non-performance.<sup>43</sup>

Procedural notification requirements may delay the creditor's ability to obtain termination at the first moment of non-performance. Though not expressly written in the text of the Civil Code, it is a general principle of contract law in civil law Arab countries that breach must be brought to the debtor's attention before termination. Typically, the aggrieved party will officially notify the defaulting party of his failure to perform. Without notification, the creditor is treated as having tolerated the debtor's failure and having sustained no loss. Bringing a lawsuit against the debtor is also a form of notification. Formal notification is not necessary if the debtor has expressed his unwillingness to perform or to continue performing the obligation.<sup>44</sup>

### **3.2.3 Performance and readiness to perform**

Two important prerequisites for termination that do not explicitly appear in the text of Article 739 are the requirement that termination is available only to a party that is not in default and can comply with the requirement that the status quo ante be restored. The Egyptian Court of Cassation explained the rule barring termination if the aggrieved party is in default:

To rule on termination it is not enough that the contract is reciprocal in nature, and the non-performance is attributed to one of the contracting parties; it is important as well, that the party demanding termination is ready to perform his side of the obligation. Thus if the claimant is himself in breach, he should not be granted termination for the other party's failure to perform.<sup>45</sup>

The requirement to return the parties to the status quo ante ensures the aggrieved party does not benefit from an unjust enrichment. For example, if a seller has only delivered part of the goods that he sold to the buyer, the buyer cannot terminate the contract unless he can return the goods that were already delivered.<sup>46</sup>



### 3.3 Court discretion in granting termination

Unless the contract contains an express provision for termination resulting from breach, the aggrieved party is required to obtain a court order to terminate the contract. Courts have considerable discretion in considering a request for termination.

Under Article 740 of the Civil Code, the court might grant the debtor a moratorium to perform the obligation instead of terminating the contract. A **moratorium** is a legally sanctioned period of delay in the performance of an obligation.<sup>47</sup> Whether to grant the moratorium is a question of fact left entirely to the court to evaluate in light of each case's particular circumstances. A court might authorize the grace period if the debtor demonstrates a willingness to resume performance of the obligation or if the unperformed part of the obligation is very small in comparison to the rest of the obligation. A judge might grant a moratorium even if the debtor does not request it. However, judges are reluctant to grant grace periods if the additional time would inflict serious harm on the creditor or if the debtor has acted in bad faith.<sup>48</sup>

#### Civil Code

##### Article 740

While serving the rescission, court may grant debtor moratorium on performance of his obligation.

If the debtor does not perform his obligation before the moratorium expires, the contract is immediately terminated without any further action required. The creditor is not required to go to court again, and his right to damages for the delay in performance is not prejudiced.<sup>49</sup>

Under Article 741, a judge might refuse a creditor's request for termination if the court decides the non-performance is not a sufficiently serious breach to merit termination. Like the decision to grant a moratorium, this standard is flexible and committed to judicial discretion. For example, the non-performance might affect only an insignificant part of the contract, it might not destroy the subject matter of the contract, or the unperformed obligation might be subsidiary so that the non-performance does not disturb the presumed equilibrium of the contract. If the equilibrium is intact after the non-performance, a court will probably refuse to grant termination and instead will award damages with or without an order for specific performance. Additionally, it is generally accepted that the debtor can escape termination by resuming his delayed performance at any time before the court rules on the creditor's request for termination, unless denying termination would cause serious harm to the creditor.<sup>50</sup>

#### Civil Code

##### Article 741

If what debtor has not performed is trivial, compared to the obligation, court may reject the claim for rescission.

### 3.4 Termination pursuant to prior agreement

Under Article 742 of the Civil Code, the parties can take the termination decision from judicial discretion and make specific rules for the conditions under which the contract will be terminated. The creditor must still follow the notification rules discussed above in subpart 2, unless the parties expressly agree that notification will not be required for termination.

## Civil Code

### Article 742

Parties of contract may agree to rescind it, without court ruling, if contractual obligations are not performed. This agreement shall not exempt them from service of rescission, unless they have agreed in writing on exemption of the service.

Article 742 is meant to provide the parties an opportunity to deprive the court of its broad discretion to decide when to terminate the contract. The express terms improve the parties' certainty of the consequences should a particular type of non-performance occur. The court cannot give additional time for performance or refuse to grant termination once an express condition is triggered, and the debtor cannot avoid termination by resuming his performance after a condition is triggered. The court's only role is declaring that the explicit terminating condition is present.<sup>51</sup>

### 3.4.1 Stipulating for termination

The parties must be unambiguously clear on their intention to provide for termination pursuant to Article 742 in case of breach. These provisions will not deprive the creditor of the right to demand specific performance instead of termination. Only the creditor can invoke and benefit from an explicit terminating provision. The debtor cannot invoke termination for his own failure to perform.<sup>52</sup>

In addition to setting the conditions for termination, the parties can arrange for the procedure required to exercise a right to termination. Consider three examples.<sup>53</sup>

#### Example 1

This contract will be terminated if either of the parties fails to perform his contractual obligation.

Example 1 basically reaffirms what is already provided in Article 739. The creditor must follow the normal procedures for effecting judicial termination by notifying the debtor and bringing an action in court to terminate. The clause has little practical significance.

Even though Example 1 uses the mandatory language "will," the creditor could avoid termination by choosing not to notify or not bringing the action to terminate the contract.

#### Example 2

This contract will be terminated without a court order if either of the parties fails to perform his contractual obligation.

Example 2 relieves the creditor from the responsibility to go to court to obtain a court order for termination, but it still requires the creditor to formally notify the debtor of his breach. Upon notification, the contract is terminated. The practical significance of Example 2 is that the parties can avoid going to court if it is beyond dispute that the debtor breached and to shift the responsibility of bringing a suit in court from the creditor to the debtor if there is disagreement. The debtor can challenge the creditor's decision to terminate by denying that the debtor failed to perform or by arguing that the creditor is to blame for the debtor's non-performance.<sup>54</sup>

### Example 3

This contract may be terminated without a court order and without notification if either of the parties fails to perform his contractual obligation.

Example 3 relieves the creditor of all the procedural requirements typically required for the termination remedy. The creditor does not need to serve a formal notification or seek a court order to enforce termination. Like Example 2, Example 3 the debtor retains a right to challenge the creditor's choice to terminate the contract.

### Discussion Questions

1. Think about how the procedural requirements of formal notification and obtaining a court order relate to particular types of contracts. For what types of contracts would you advise your client to stipulate to removing one or both of the procedural requirements?
2. As discussed, the remedy of termination was not part of traditional Shari'a law. Why do you think this is? How would contracting be different without the remedy of termination?

### 3.5 Dissolution of contract by mutual consent

The last item that we need to discuss is dissolution of contract by mutual consent, which is the second way by which a contract can be terminated under the Civil Code. Dissolution by mutual dissents means that both parties to a contract agree to nullify a perfectly valid contract. Just as the consent of both parties is required to form a valid contract, mutual consent is also needed to end a valid contractual relationship. Stated differently, one party cannot decide to terminate a contractual relationship without penalty without first receiving approval from the other contracting party. Consider Article 747:

#### Civil Code

##### Article 747

Parties may dissolve, by mutual agreement, contract after its conclusion. Dissolution by mutual agreement shall nullify contract.

Contracts subject to dissolution by mutual consent are not limited to those that are formally codified in a document. In fact, Article 748 further clarifies that a contract formed through **barter**, or an exchange of goods, also qualifies as valid offer and acceptance. Because a valid contract is formed through barter, such contracts are also allowed to be mutually dissolved by the parties.

#### Civil Code

##### Article 748

Barter shall substitute for offer and acceptance and dissolution by it shall be considered valid.

One final important point is that, in order to be able to dissolve a contract by mutual consent, the subject of the contract actually needs to exist. For example, if the parties can no longer achieve their contractual obligations due to impossibility or some other reason, the contract will be considered **void**, meaning that it simply not legally enforceable. However, if it is possible for the parties to still fulfill at least part of the contract, that remaining part will be able to be validly dissolved by mutual agreement. Article 749 articulates these principles.

## Civil Code

### **Article 749**

Stability and existence of subject of contract at the time of dissolution by mutual agreement is necessary. If the subject perishes before the dissolution, it shall be void. If part of the subject perishes, the dissolution of the remaining part shall be considered valid.

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- <sup>1</sup> Adnan Amkhan, "Specific Performance in Arab Contract Law," *Arab Law Quarterly* 9 (1994): 324, 330.
- <sup>2</sup> *Ibid.*, 329.
- <sup>3</sup> Amkhan, "Specific Performance," 330.
- <sup>4</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," *Harv. L. Rev.* 10 (1897): 459.
- <sup>5</sup> Karl N. Llewellyn, "What Price Contract?—An Essay In Perspective," *Yale L. J.* 10(1931): 724.
- <sup>6</sup> *Ibid.*, 334.
- <sup>7</sup> "Whistler's Paris Suit Ended," *New York Times*, December 18, 1897. The case gained such notoriety that Whistler published a book reproducing letters to the editor, transcripts from the oral argument, and the French Court of Appeal's short judgment. James McNeill Whistler, *Eden Versus Whistler: The Baronet & The Butterfly* (New York: R.H. Russell, 1899). Whistler, however, is better known for an earlier suit against the art critic John Ruskin for libel after Ruskin criticized a Whistler painting. Whistler recorded his account of that trial in a separate book. James Abbott McNeill Whistler, *The Gentle Art of Making Enemies* (New York: R.H. Russell, 1890).
- <sup>8</sup> Whistler, *Eden Versus Whistler*, 19.
- <sup>9</sup> *Ibid.*, 27.
- <sup>10</sup> *Ibid.*, 55.
- <sup>11</sup> *Ibid.*, 73-74.
- <sup>12</sup> *Ibid.*, 32.
- <sup>13</sup> *Ibid.*, 77.
- <sup>14</sup> "Whistler's Paris Suit Ended," *New York Times*, December 18, 1897.
- <sup>15</sup> Amkham, "Specific Performance," 337.
- <sup>16</sup> Nicholas, *French Law of Contract*, 222.
- <sup>17</sup> *Ibid.*, 222.
- <sup>18</sup> Adnan Amkhan, "Specific Performance in Arab Contract Law," *Arab Law Quarterly* 9 (1994): 324, 338.
- <sup>19</sup> Adnan Amkhan, "The Concept of Fault in the Arab Law of Contract," *Arab Law Quarterly* 9 (1994): 171, 174.
- <sup>20</sup> *Ibid.*, 175.
- <sup>21</sup> Pejovic, "Civil Law and Common Law Two Different Paths to the Same Goal."
- <sup>22</sup> Amkhan, "Concept of Fault in the Arab Law of Contract," 177.
- <sup>23</sup> Amkhan, "Concept of Fault in the Arab Law of Contract," 177-78.
- <sup>24</sup> Pejovic, "Civil Law and Common Law: Two Different Paths to the Same Goal."
- <sup>25</sup> 6 La. Civ. L. Treatise, *Law Of Obligations* § 5.3 (2d ed.).
- <sup>26</sup> Amkhan, "Concept of Fault in the Arab Law of Contract," 178.
- <sup>27</sup> Nicholas, *French Law of Contract*, 54.
- <sup>28</sup> *Ibid.*, 55.
- <sup>29</sup> Caslav Pejovic, "Civil Law and Common Law: Two Different Paths to the Same Goal," *Victoria University of Wellington Law Review* 32 (2001): 817, 825.
- <sup>30</sup> Nicholas, *French Law of Contract*, 228-29.
- <sup>31</sup> *Ibid.*, 229.
- <sup>32</sup> Nicholas, *French Law of Contract*, 227.
- <sup>33</sup> "A contract is a promise or set of promises for the breach of which the law gives a remedy." Restatement (Second) of Contracts § 1 (1981).
- <sup>34</sup> 1 Transnational Business Transactions § 4:46
- <sup>35</sup> James McNeill Whistler, *Eden Versus Whistler: The Baronet & The Butterfly* (New York: R.H. Russell, 1899), 38-39.
- <sup>36</sup> Adnan Amkhan, "Termination for Breach in Arab Contract Law," *Arab Law Quarterly* 10 (1995): 17.
- <sup>37</sup> Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford: Oxford University Press, 2007), 283.
- <sup>38</sup> Amkhan, "Termination for Breach in Arab Contract Law," 18 n.8.
- <sup>39</sup> *Ibid.*, 18.
- <sup>40</sup> *Ibid.*, 23.
- <sup>41</sup> *Ibid.*, 21.
- <sup>42</sup> *Ibid.*
- <sup>43</sup> *Ibid.*
- <sup>44</sup> *Ibid.*, 21-22.
- <sup>45</sup> *Ibid.*, 22. It is worth noting that Egypt, like Afghanistan, does not have two requirements explicitly contained in the Civil Code of Egypt. Rather, these requirements in Egyptian law developed through the judiciary and in doctrine.
- <sup>46</sup> *Ibid.*
- <sup>47</sup> *Merriam-Webster Online*, s.v. "Moratorium," accessed April 23, 2014, <http://www.merriam-webster.com/dictionary/moratorium>.
- <sup>48</sup> Amkhan, "Termination for Breach in Arab Contract Law," 23-24.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> *Ibid.*, 25.
- <sup>51</sup> *Ibid.*, 26.

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<sup>52</sup> Ibid., 27.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., 27.

## CHAPTER 1: INTRODUCTORY CONCEPTS

### INTRODUCTION

The law of obligations is a component of the private law regime in our civil law tradition.<sup>1</sup> It generally governs the relationship between people.<sup>2</sup> A private party may sue another in court when it believes the other party has caused it harm (for example, financial or physical harm), and the parties disagree about the facts or fault. While the precise meaning of an obligation has evolved over time, the legal term “obligation” now generally refers to a two-sided relationship: one party has a right to claim something, and the other party has a duty to provide it.<sup>3</sup> The claim could be to a sum of money, or another object, service, or action. The party with the right to the claim is called the **creditor**, and the party with the duty to perform is called the **debtor**.<sup>4</sup>

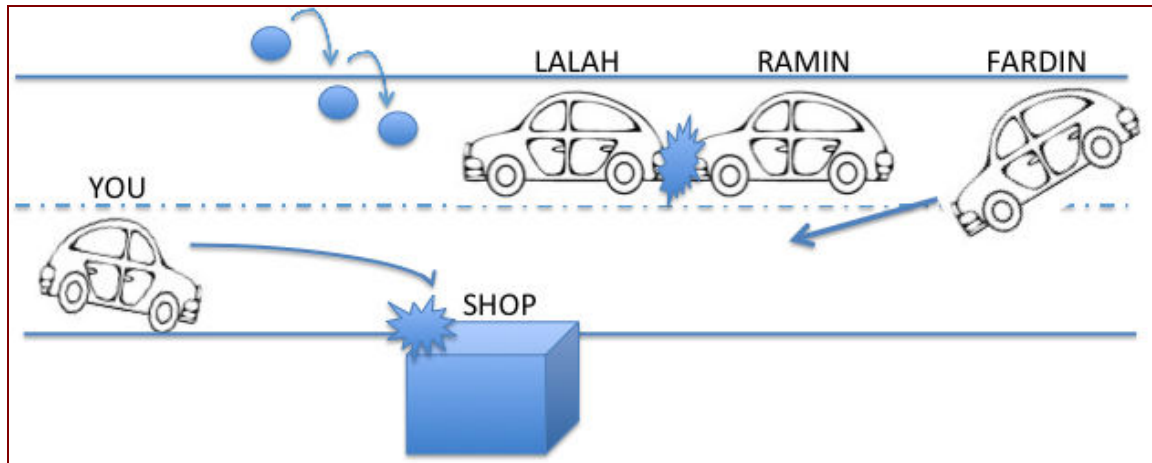
There are two main types of obligations: obligations by agreement (contractual) and obligations created through actions (delictual). From there, the law of obligations is essentially divided into four subcategories: contract law, quasi-contract law, delict, and quasi-delict. In this book, we will be discussing delict and quasi-delict, which comprise the law of civil responsibility.<sup>5</sup>

#### 1. AN ILLUSTRATION OF CIVIL RESPONSIBILITY

Civil responsibility may sound complex at this point, but you are likely already familiar with its concepts, since instances of these obligations may arise regularly in your life.

For example, suppose one day you are driving to work, and about one hundred meters ahead of you, a child’s toy ball bounces into the street. The driver in the car coming from the opposite direction, Lalah, presses quickly on the brake, worried that the child is about to run in front of the car to catch the ball. The driver behind that car, Ramin, is talking on his mobile phone and does not notice the sudden change in traffic. He crashes into the back of Lalah’s car. The driver behind him, Fardin, seeing the accident, swerves into your lane. You try to stop, but realize the brake is not functioning properly in your car. To avoid crashing into Fardin, you swerve off the road and hit a small stall on the side of the road. Fortunately, the shopkeeper is not inside. However, the goods inside are all destroyed as they crash to the floor.

When the incident is over and the car horns stop blaring, you look around at the consequences. At the least, Lalah’s car, Ramin’s car, and your car have physical damage. Perhaps someone has injured a limb in the crash as well. The shopkeeper’s building has collapsed, and she may not be able to re-open her business for many days. The chain of events may have caused costly damage, but who is *responsible* for the results? The civil responsibility branch of the law of obligations seeks to establish who (if anyone) is liable, or responsible, for damages that result from people’s actions—and how those at fault should compensate those who are injured. Throughout this chapter, we will use this hypothetical example of the multiple-car crash, and others, to introduce and illustrates some important concepts of civil responsibility.



The law of civil responsibility identifies obligations that arise among parties based upon their *actions*. You may already be familiar with **contractual obligations**, which are legal duties accepted voluntarily between parties. Civil responsibility establishes extra-contractual obligations—liabilities that people incur as a matter of law. This reflects our societal determination that certain results are not fair or desirable, and so those who have suffered should be repaid. The individual whose actions caused the harmful result has a responsibility to undo or make up for the damage. Acts that give rise to civil responsibility may be intentional or unintentional. In both, we find the actor to be the cause of a particular harm and, therefore, responsible to compensate for the negative consequences that result.

Civil responsibility is an old area of law. The Roman Empire had a well-established system of civil responsibility that attached obligations to defined categories of conduct, including: theft, robbery (with force, or violence), attack on a person, and attack by a person on property.<sup>6</sup> The law of civil responsibility initially covered such **intentional acts**. Quasi-delicts then developed to cover **unintentional acts**: responsibilities people had for damages caused indirectly. For example, an unintentional act might be one caused by someone’s young children or because of one’s things. Today, the categories of delict and quasi-delict no longer strictly cover these distinct areas—their boundaries vary by jurisdiction. More importantly for now, you should understand that today’s law of civil responsibility encompasses liability for broader harms caused both directly and indirectly by one’s choices.<sup>7</sup> We will explore the extent of this in Afghanistan further in the coming chapters.

### The Influence of the Mejelle

The Mejelle is an interpretation of a subset of Islamic jurisprudence. It was codified by the Ottoman Empire and is in line with Hanafi doctrine. It explains many rules and guidelines for individuals in their spiritual and secular actions.<sup>8</sup> Along with the Justinian Codes of the Roman Empire, the Mejelle has shaped the modern law of obligations.

The Mejelle identifies many principles that are directly relevant to civil responsibility. For example, one of the maxims of Islamic jurisprudence highlighted in the Mejelle states that “a person who performs an act, even though not intentionally, is liable to make good any loss caused thereby.”<sup>9</sup> Moreover, the Mejelle recognizes that someone can generally handle her property as she likes, but an owner can be limited from using her property if that use harms others.<sup>10</sup>

The Mejelle is particularly relevant to civil obligations when it comes to ownership of physical objects, but it does not directly discuss more intangible harms, such as damage to someone’s reputation. We will refer to the Mejelle throughout this book, in its relevance to the Afghan law of civil responsibility.



## **Discussion Questions**

1. Why do you think our society needs a code of civil responsibility?
2. What would happen if there were no organized system for fairly compensating those who are injured?
3. What if an individual who was wronged had no recourse?
4. What if an individual could take any vengeance she saw fit? What are the limits to the regime of civil responsibility?

## **2. DEFINING THE SCOPE OF CIVIL RESPONSIBILITY**

### **2.1 Civil vs. criminal responsibility**

Over the centuries, a distinction has emerged among acts that lead to a harm against society and acts that lead to a harm against an individual. Harms against society may range from “victimless crimes” to those acts where many are affected but no individual is targeted. Think about someone who abuses an illegal drug or fails to pay his or her taxes. A law has been broken, and there are certainly negative effects, but who specifically is the victim? These acts are typically handled in the criminal courts, where the prosecutor represents the State or the People as the party that suffers harm from the defendant’s act. In Islamic jurisprudence, these crimes against society may also encompass violations of the rights of God (hakuk Allah)—they are inherently wrong, for moral reasons.<sup>11</sup> Hakuk Allah seek to ensure public welfare and are theoretically the responsibility of the State or community to uphold.

On the other side of the spectrum are acts that harm an individual directly—whether or not they harm society more generally. These implicate the rights of man, or hakuk al-ibad, in Islamic jurisprudence. Hakuk al-ibad mainly protect private interests, but they are upheld by our community to facilitate an orderly society.<sup>12</sup> For instance, an individual’s horse may eat his neighbor’s plants—we do not think keeping a horse is inherently wrong, but we do realize the owner of the plants has suffered harm. This is an example where liability may emerge in civil law.

There may be acts that create both criminal and civil liability. In a theft, for example, the thief has harmed society by undermining general property rights—others will feel that their person or possessions are at risk. Simultaneously, the thief has harmed the individual from whom he stole—and therefore has an obligation to replace the value of the object. Similarly, an assault gives rise to both criminal and civil liability: we believe there is a societal harm created when one person physically attacks another, as well as an obvious direct harm to the person injured (and maybe even those who depend on him or her). Both wrongs must be addressed.

### **2.2 Civil vs. contractual responsibility**

There are also important distinctions and overlaps between obligations that arise in civil responsibility and those that arise in contract law. As we have discussed elsewhere, contractual obligations in Afghanistan emerge when the four criteria for a valid contract are met: sighthah (or valid offer and acceptance), capacity, subject, and cause. The acts of offer and acceptance must be voluntary. If one party does not complete its end of the bargain, the counterparty can compel the other party to uphold its obligation or claim damages if the obligation can no longer be fulfilled. Furthermore, the capacity of the two parties to voluntarily enter into the contract is a core feature of the obligation that results. On the

contrary, civil obligations are not voluntary—the individual parties do not establish the nature of their relationship in advance of the actions that result in the obligation.

The court will still analyze the initial actor's capacity and will before a party is held civilly responsible for a particular act, but these will be assessed in relation to that party's independent actions rather than its agreement with the counterparty. The two parties need never even know the other exists for an obligation to arise under civil liability. The duty owed between the two parties is not optional. Rather, the law prescribes such duties. For example, a chemist who mixes pharmaceutical drugs owes every patient who may use them the assurance that the ingredients are not only what they claim to be, but also of a particular quality. He or she may never interact with a customer who falls sick as a result of an error with the drug.

However, an obligation need not be exclusively contractual or extra-contractual in nature. The same act may give rise to liabilities in both contract and civil responsibility. For instance, if someone sells you a car that falls apart the next day, the dealer may be liable in contract (for not giving you the functioning car that you expected and accepted) or in civil responsibility (for fraudulently selling you a malfunctioning car). Depending on the facts of the case and the rules of the court, the individual who bought the car may file suit under either regime.

So what distinguishes obligations that emerge under civil responsibility? Unlike in criminal law, we are not necessarily condemning the act as inherently wrong. At least, that is not our sole or even primary purpose. Even when the act is one society approves, an obligation emerges when the effect is worth condemning. In holding the actor accountable, the law of civil responsibility upholds the right of parties not to be harmed as a result of another's actions.

In order for us to protect one's right, we first have to explicitly or implicitly acknowledge that personal right (or hakuk al-ibad). For example, in our opening example of the multiple-car crash, Lalah, Ramin, and you all have a property or possessory interest in your vehicles. You can defend that interest if someone else's actions decrease the value of the car. Likewise, the shopkeeper whose stall you hit has an interest in the structure of the store and value of the contents, but also in the livelihood it provided. If the accident has decreased his ability to earn money from this shop, he has a right to enforce it. The personal right must be exercised by the person to whom it belongs (a third-party bystander may not sue Ramin for crashing into Lalah's car), but there may be multiple people who may suffer from the same act or injury. For instance, suppose Saman is a passenger in Lalah's car and that she breaks her arm in the accident. Saman may be owed an obligation for her right to bodily safety. Or, if Lalah unfortunately dies as a result of her injuries from the accident, the obligation she is owed may transfer to her children, or they may have a new obligation in their rights to her as a parent (for example, for the income she earned or the love she provided). After we identify the personal right that has been affected, we trace back the cause of that injury. If the cause is another person, that individual may then owe an obligation under civil responsibility.

### **Case Example: Spite Fence**

Note that one may incur an obligation, even when one is exercising a positive right. Suppose that Nik and Beltoon are neighbors. Their houses overlook a beautiful valley, and Nik lives just downhill from Beltoon. The two get into a disagreement, and as a result, Nik decides to build a large, false chimney above his house to block Beltoon's view. Can Beltoon sue his neighbor?

Many courts have considered similar cases—which often involve neighbors building chimneys or fences, or posting ugly art to make their neighbors upset. These structures are on their own property—so the actor in question is arguably exercising his valid property rights. As early as 1855, though, a court in France found the individual who built the obstacle (Nik, in the scenario above) civilly liable to his neighbor. The

court decided that the chimney served no purposes other than to harm the other party and ordered the one who built it to bring it down.<sup>13</sup>

In a similar manner, the Mejlle acknowledges restraints on one's use of one's own property, asserting that while someone should not be prevented from dealing with his wholly-owned property, "if such person by so doing causes great injury to any other person, he may be prohibited therefrom . . . ."<sup>14</sup>

### 3. PRINCIPLES OF CIVIL RESPONSIBILITY

In this book, we will critically analyze the laws of Afghanistan, as they are relevant to Civil Responsibility. The articles pertaining to the exercise of rights are particularly important, as they articulate which actions may subject someone to liability for harms sustained by another—even if the actor believes they are within his or her own rights.

#### 1977 Civil Code of the Republic of Afghanistan

##### Article 4

A person who resorts to obtain a right before its due time, he shall be condemned to deprivation of that right.

##### Article 5

State of emergency does not invalidate rights of another

##### Article 6

Loss shall not be compensated by reciprocal same action.

##### Article 7

Repelling evils have priority over securing benefit.

##### Article 8

Legal permission negates responsibility. One who exercises his rights within legal limits is not liable for ensuing damages

##### Article 9

(1) A person who transgresses his rights shall be responsible.

(2) Transgression of rights occurs in the following cases:

1—Actions against custom.

2—Having the intention to infringe rights of another

3—Triviality of interest of the person as compared with the harm inflicted on another.

4—Impermissibility of the interest.

Considering these articles of the Civil Code, do you see how our law tries to balance individual interests with broader societal benefits? Article 4 provides that certain rights may be available only to certain people, who either qualify (for example, they are of a certain age to smoke) or are not disqualified (for example, they have not committed a serious crime). Article 5 protects individual rights, even in chaotic situations. For example, after an earthquake or natural disaster, it is still not legal to break into someone else's home and take that person's belongings. Article 6 seeks to prohibit extra-legal revenge. For example, if someone damages our property, it is not proper or productive to just go and damage their property. Article 7 indicates that an action that causes harm is generally to be avoided, even if there is also a benefit that comes from that action. For instance, if someone likes to smoke cigarettes or enjoy loud

music, that person's ability to do so freely may be limited if others suffer in that process. To the contrary, Article 8 suggests that if the law proactively protects an action, the actor may not be responsible for harms that result if he is within the regulations. For instance, if someone has a license to own a factory in a particular neighborhood, that person may not be responsible for reductions in local property values. Finally, Article 9 highlights general limits to our assumed individual rights, particularly when their exercise is against custom, purposefully infringes upon the rights of others, is clearly outweighed by another's interests, or defends an untenable end. We will return to these ideas throughout the book. For now, consider their principles at a general level and how they may shape Afghan public policy.

### **The Role of Cultural Values**

As students of the law, you can appreciate that the law is neither written nor applied in a vacuum. Our culture and our laws shape each other. This is particularly relevant in civil responsibility, where we make individuals inherently responsible to each other for their actions. We also hold debtors up to standard of prudence, which incorporates how we as a society want people to act.

Internationally, civil law systems may have consistent principles written into their statutes—but their application may also vary depending on the culture of the jurisdiction. For instance, the Constitution of Afghanistan makes Islam the “religion of the state” and provides that “no law can be contrary to the beliefs and provisions of the sacred laws of Islam.”<sup>15</sup> These tenets will render the law of obligations in Afghanistan different from non-Islamic or secular civil law jurisdictions.

Moreover, the Civil Code acknowledges the role that custom plays in societal interaction. These customs may vary within Afghanistan. For instance, if you review Article 9, you will notice that one's rights may be transgressed if the actions are “in contravention of customs and tradition.” In the contractual branch of the law of obligations, the Civil Code discusses that a particular practice must be widespread to be considered a custom.<sup>16</sup> Therefore, the boundaries of a custom may be difficult to define, but the law may recognize the practice if its existence can be demonstrated.

## **4. THE OBJECTIVES OF CIVIL RESPONSIBILITY**

If imperfectly, civil responsibility offers the injured party some form of **compensation**. Of course, monetary payment is potentially insufficient—if not incapable of making up for or undoing the harm caused. In certain cases, monetary payments may be satisfactory, as may be more likely with damage to physical goods. In other cases, though, money may be much less meaningful, such as when dealing with bodily injuries.

Whether the act was necessarily wrongful or intentional, the law of obligations may also serve the purpose of punishment. Unless one has an infinite source of funds, a fine is typically an outcome he or she would rather have avoided. If so, must the obligation of payment be higher for those who are wealthier? Do we expect that a higher penalty would better prevent the harmful act? In this theory, the law of obligations may also serve as a form of **deterrence**. If people know that they will be financially accountable for their actions, they may be more careful in their conduct. For instance, suppose Pirooz is a homeowner who is debating not shoveling his snowy walkway one cold morning. He realizes he may have to pay the cost if anyone slips on the ice and is injured—so he decides to go outside and clear the path. Likewise, if Roya knows she will have to repay her neighbor, Tabesh, if her horse eats his apples, she may take the necessary steps to prevent the horse from getting too close to Tabesh's orchard.

### **Discussion Question**

1. Is the theory of deterrence in civil responsibility applicable only if the harmful action is taken intentionally?

What if the fine is not sufficient to deter a party? Can you think of circumstances in which the fine may be worth the act, even if it causes damage? In the example of Roya's horse, suppose she is unable to find other healthy food for the horse, or it is too expensive for Roya to put a fence around her field. Under these circumstances, it may be cheaper for Roya to let her horse wander into Tabesh's orchard and then repay him the cost of the lost apples. In particular instances, civil responsibility may facilitate economic efficiency. By making clear the costs of certain actions, obligations help ensure that only those parties that can afford to pay the consequences take certain actions. If someone still chooses to proceed knowing the cost, we would assume she derives a greater value from the act than the obligation costs her. If the obligation is priced accurately, the act would theoretically be taken only if it creates overall value. Perhaps you have discussed such examples with contractual obligations, where it may be cheaper for a party to breach its contract than to continue with the arrangement.

### Discussion Questions

1. Do you accept the argument that civil responsibility leads to economically efficient actions?
2. How feasible is it for the state to accurately "price" the cost of harmful conduct?

Take a moment to consider the policy implications of civil obligations. What would the impact be if the actor is very wealthy and the injured party is very poor? Would the law of civil responsibility be effective if those who could afford it trespassed against the rights of others and then just paid for the damage? What if the actor were a large corporation, and it decided to just pay a fine for releasing its toxic waste into a river near a village? In such cases, it may be worth issuing a punitive fine that exceeds the cost of the damage—solely to deter such conduct. Conversely, what would the impact be if the actor is very poor and cannot afford to repay the injured party for the damage? Is the law of civil responsibility effective if the actors are unable to pay for the results of their actions? In such cases, would we care if the act was purposeful or a mistake?

### Discussion Questions

1. Which purpose of civil responsibility do you find most compelling: compensation, punishment, deterrence, or economic efficiency? Is there another objective you see to these types of laws?
2. Are these objectives exclusive of each other, or can multiple objectives be applicable to the same obligation?
3. Is an injury worse because the actor intended to cause the harm? Or does the injured party suffer the same regardless—and therefore their compensation should be no different?

In this book, we will learn the details and nuances of civil responsibility. As you go through the exercises, keep in mind how these concepts fit with the other areas of law you have studied: not only criminal law and contractual obligations, as we have highlighted above, but also topics like property law, family law or constitutional law. What role do civil responsibilities play in the rule of law? We will discuss complex events and relationships in order to analyze who—if anyone—bears an obligation. While this area of the law may not be simple, any obligation derived in civil responsibility is anchored in the same basic components:



As a preliminary matter, damages are necessary to invoke civil responsibility—without an articulable injury, there is no legal case. Assessing damages is a matter of determining *what*, specifically, has been harmed. Tracing cause is an analysis of *how* the damages resulted. Determining liability is a question of *who* bears fault for that injury. The party claiming an injury bears the burden of demonstrating each of these elements. We will proceed through these concepts at a basic level in this chapter before exploring each more fully in the subsequent chapters. We will start with the question of liability to understand if the alleged debtor has a responsibility to the potential creditor.

## 5. LIABILITY

As we have briefly mentioned, civil obligations do not inherently require blame, or a judgment that someone is morally wrong. However, an obligation does require responsibility—or some attribution of fault. At a minimum, the law asserts that someone could have and should have acted differently. How do we define fault separate from culpability? One common theory is to compare the questioned actions against that which a reasonable person would have taken instead. A reasonable person is not necessarily the average person—but a person who acts as society would hope or expect. It is an admittedly difficult comparison. In theory, if someone acted as a prudent, or intelligent and careful, person in her position would have acted, then we should not hold her liable for the potential damages that result from the conduct.

### Discussion Questions

1. Are there circumstances in which we would expect a particular person to act with a higher standard than we would expect of ourselves or other ordinary people?
2. Are there circumstances in which we would hold a particular person to a lower standard?

### Case Example: A Professional

The reasonable person standard may vary depending on many things, such as the circumstances of the case, the local tradition, or the actor's level of knowledge. We may be more likely to hold parties responsible for negative consequences if they possess a higher level of training or hold themselves out to have more than ordinary skill. For example, a physician who makes a mistake in a routine operation may be liable for the injury—even though the average person may have done a poorer job. Alternatively, the physician may not be liable if he or she followed the same protocols as other local physicians, even if doctors in another part of the country knew the likelihood of a better outcome was higher with a different procedure.

Perhaps most apparently, civil responsibility holds individuals responsible for actions they take themselves. However, a person may sometimes also be accountable for the actions of other people. Moreover, there are also situations in which someone is held responsible for the effects of an animal or

thing. We will introduce each of these regimes, or orders or forms, of liability briefly, before addressing them in more detail in the following chapters.

## **5.1 Liability for one's own actions**

### **5.1.1 Acts**

In assessing the liability one may carry for his or her actions, there are two important dimensions to consider: conduct and intent. The conduct is the underlying action that causes the harm. The intent assesses the actor's mindfulness in carrying out the action. It is this aspect of intent from which we often derive the idea of fault (unless the law calls for strict liability, which we will discuss later). The act is one a court can objectively analyze: the facts indicate that it happened or it did not. However, intent is subjective—it is what allows us to compare the actor against what would be reasonably expected in a similar situation. As we will discuss in more detail later in this book, civil liability applies if the conduct itself was wrongful, the actor should have realized the consequences, or the actor certainly realized the consequences.

For a simple example, let's consider a situation where someone moves his or her foot with some degree of speed. Does the person mean to move the foot? Does he or she have physical control over the limb? If so, the action may be a kick—and the person may be held liable for the consequences of the kick. What if Naveed kicks his foot to the side but does not see Sohrab walking up behind him—did Naveed kick Sohrab? If Sohrab is injured by the kick, does Naveed have an obligation to compensate Sohrab? Certainly, if Naveed sees Sohrab and decides to kick him, we would agree that he is liable for the injuries that result. However, does it matter whether Naveed purposefully moved his foot or whether he moved his foot to purposefully touch Sohrab? Should he have known that kicking his foot risked hurting another? Moreover, what if Naveed and Sohrab are resting, and Naveed involuntarily kicks in his sleep? Should he be responsible for his kick in such a situation? What if Naveed is a young child and does not yet recognize his physical strength? Alternatively, consider a particular intent that is not matched in conduct. Suppose Naveed decides he will kick Sohrab—but Sohrab suddenly moves away before Naveed's foot makes contact. Did Naveed kick him? Does it matter if Sohrab saw Naveed's conduct and moved as a reaction or if Sohrab happened to move for unrelated reasons?

For another example, consider a purposeful conduct with mistaken intent. Suppose that one afternoon, Jannat is doing her homework in the library. She quickly packs her bags to rush to class but mistakenly picks up Beena's computer. She does not realize it until later that evening when she returns home—and by that point, Beena has reported the computer stolen. Did Jannat steal Beena's computer? What if Beena missed an important deadline for her job or already ordered a replacement? Jannat purposefully took the computer, but she did not purposefully take Beena's computer. Does she now bear a civil obligation to compensate Beena?

Alternatively, consider an intentional act that is then affected or made harmful by another actor. Suppose Khalid briefly stops his car in front of a shop and runs inside to buy something. Ramesh, noticing the car with the keys inside, decides to steal the vehicle. Driving in a chaotic manner to get away, Ramesh hits someone walking along the side of the road. Is Khalid liable for the damage caused by the thief? Would a prudent person leave keys in the car? Reconsider this example as we discuss liability for the actions of others and the principle of causation.

### **5.1.2 Omissions**



As you can see, parties may bear civil liabilities for their affirmative actions. But should we hold people responsible for the failure to act? Conduct and intent can also be used to assign someone liability based upon an omission.

Some cases may be quite obvious: suppose the individual in question fails to complete a duty expected of him or her. If a driver plans to turn his vehicle but fails to indicate this intended action with any signal, he may be liable for the consequences of his omission. This likely assumes that traffic in the area is orderly and that other drivers expect a signal when someone is changing direction.

Other cases may be more complicated. Do people have a duty to maintain their own property at a certain standard? What if a landlord does not sweep the footpath or shovel the snow in front of his property and that someone who is walking by slips and falls. Is the landlord responsible because he failed to remove the danger? Likewise, do people have a duty to warn others if they are aware of a threat? Suppose an animal dies of a contagious illness, but the people who know about the disease do not warn the butcher. If the butcher or his customers get sick, are those who knew of the disease civilly liable? In 1935, a French court of appeals considered a similar case and decided that those who kept silent were at fault and therefore incurred an obligation to those who caught the disease.<sup>17</sup>

Furthermore, do people have a duty to help others in need? Suppose someone falls into a river and does not know how to swim. Do others on the banks have a duty to help the drowning person? If they do not, are they liable for the injuries that may result? While the law of civil responsibility may permit parties to be liable for their omissions, many countries have also passed laws that require people to help someone in danger when the rescuer can do so without serious risks.

### Discussion Questions

1. Reconsider Article 9 of the Civil Code, which states that “[t]ransgression of rights occurs [in cases where] [t]riviality of interest of the person as compared with the harm inflicted on another.” Does this require a civilian to help someone in danger, if he can do so without putting himself at great risk?
2. Should the law require individuals to proactively help others? What might the benefits and harms be of such a statute?

### 5.1.3 Defenses

There are circumstances in which the party demonstrates the conduct and intent that cause the harm—but the party acted reasonably in doing so. Suppose Sakina is walking home in the evening, and her friend Aziz thinks it would be funny to hide behind the corner and surprise her. If she hits him in alarm, we would probably not blame her. Some of these defenses may be parallel to those in criminal law. For instance, if someone injures a thief who has broken into his home, he would likely not be expected to compensate the thief.

Another plausible defense might be that the actor in question did cause the damage, but the damage would have been worse if they had acted differently. Let’s return to the example above of the person drowning in the river. Suppose Azad jumps into the river to rescue the individual. In the process, he knocks the person unconscious or breaks a bone in an attempt to return to shore. While Azad’s actions caused these injuries, we do not find him to be at fault because the injured party may have drowned otherwise. Given the circumstances, Azad acted as a prudent person would—perhaps even more nobly than we might expect.



Alternatively, it may be a defense to civil liability that one caused minor harm to one party in order to avoid more severe harm to another. In the opening hypothetical to this chapter about the multiple-car crash, you swerve into the store in order to avoid crashing into Fardin, who is blocking your lane. One or both of you is likely injured. While your conduct and intent was to swerve the car, the damage you caused avoided something far worse.

Necessity may also be a reasonable defense if the individual must act a certain way to save him or herself—to no fault of the actor or the injured party. Imagine a ship captain who finds himself caught in a sudden storm. He decides to seek some shelter from the wind in a harbor or dock without its owner's permission. The ship may cause damage to the dock as it knocks around in the storm—or the owner may feel his property rights have been trespassed—but a court would likely find that the captain acted reasonably. The captain or the company owning the ship may be asked to pay to repair the harbor, but the liability would likely be limited.

We will discuss further affirmative defenses in Chapter 7.

## 5.2 Liability for the actions of others

A party may also bear responsibility for the consequences of others' actions. This is typically relevant when the party in question has some authority or control over the actor. In these cases, we attribute the actions of the actor to the higher party. One rationale for this might be that the authority figure is responsible by omission—failing to stop the act. Another rationale might be that the action is an indirect extension of the authority's decision. Why else might we hold certain parties responsible for the actions of others?

Consider the actions of a child. If a minor takes an action that causes a harm, should we hold the child liable or his or her parents? Practically speaking, would it actually make a difference? Or alternatively, should we say that no one is responsible (and the injured party has to deal with the consequences) because a minor cannot be responsible or can afford to pay only a limited amount? At what age should a person be held civilly liable?

Alternatively, consider the actions of an employee. If a worker causes a harm while doing his or her job, who is responsible? For example, suppose that Farahnaz owns a dairy business and that she hires workers to deliver milk to her clients each morning. One of her drivers, Ashraf, crashes his delivery car into a customer's front gate and causes damage to the entryway. Is Farahnaz or the driver civilly liable for the cost of repairs? Or suppose Kamelah hires a construction company to add a new room to her house. While working, one of the builders forgets to unplug his blowtorch and starts a fire. Who should pay for the damage to Kamelah's house? Would your answer vary depending on the facts of the case, or would you always hold either the employer or the employee liable? Liability that is assumed or automatically assigned to a second party (such as an employer) for the actions of another (such as an employee) is called **vicarious liability**.<sup>18</sup>

As you discuss to whom you should assign liability, think back to the economic efficiency goal of civil responsibility. Which party is better able to afford the damage? Which party is better able to avoid it? How might insurance factor into this analysis? Do you think it is preferable that employers buy insurance to pay for the damages their workers may cause?

### Discussion Questions

1. How might assigning liability for the actions of others fit into the purpose of civil responsibility as a means to facilitate economic efficiency?
2. In these examples and others that you might discuss, which party is better able to afford the damage?
3. Which party is better able to plan or manage to avoid it?
4. How might insurance factor into this analysis?
5. Do you think it is preferable that employers buy insurance to pay for the damages their workers may cause?

### 5.3 Liability for animals and things

When we evaluate someone with regard to his or her own acts, we assess the nature of the harmful act or the subjective intent in order to determine whether that person is liable for the resulting harms. When we evaluate that person's liability with regard to the actions of others, we can analyze the relationship between the two parties to attribute who should bear the fault. When an animal or a thing directly causes the harm, there may not be any intent or fault to find. In such cases, civil law sometimes adopts a rule known as a presumption of fault or, alternatively, strict liability. A **presumption of fault** means that fault is presumed on the alleged debtor, but that party may rebut, or disclaim, liability by showing that he took the proper steps to limit any harm. **Strict liability** means that a particular party is liable for the damage, regardless of their intent, conduct, or knowledge of the cause of the harm.

#### Discussion Questions

1. Why do we sometimes want a presumption of fault that can be rebutted, and at other times, strict liability?
2. Do you think the concept of strict liability is fair? In what circumstances do you think strict liability is warranted?
3. From a policy perspective, how might strict liability be useful?

One rationale for strict liability is that we want particular parties to invest in making the item or activity safe. Perhaps the dangers would not be evident to others or that a party has the capacity to inspect for risks. For instance, some jurisdictions hold certain companies strictly liable for the injuries caused by the products that they manufacture or sell. If a customer purchases a machine, she may not be able to immediately tell if something inside is broken. For example, suppose Belour buys a new scooter and that it catches fire while she is driving because the internal wiring is incorrect. She might not know exactly which part malfunctioned or how—but she may be able to hold the manufacturer or the store civilly liable. If the law allows her to sue the store, the store may be able to then sue the company that made the scooter or the particular sub-part that caused the injury.

Alternatively, we may want that party to invest because it is best able to afford the costs of increasing safety. Consider the example of certain public transportation systems, where many people accept a small risk but the overall value is positive. If a company receives a contract to build a train line, we may want them to take extra measures to ensure its safety. If the train throws sparks while operating and a field or house along the tracks is damaged as a result, the injured party may be able to hold the company liable.

Another rationale may be that the initial party invited the risk—whether or not he or she set of the specific harm in the case in question. Accordingly, strict liability is often applied to abnormally dangerous activities. For example, companies that utilize explosives like dynamite to construct tunnels may be strictly liable for the damages they cause. If the explosion causes an unexpected or even unforeseeable harm, they have an obligation for the injury. The justification is that the company should take the utmost caution to ensure safety if it is going to introduce such risks. Alternatively, strict liability may apply to people who keep dangerous animals as pets. If someone tries to domesticate a poisonous snake in an urban setting, that person will likely be considered responsible if the snake attacks someone in that setting—even if the owner keeps the animal in a secure space or is absent when the attack happens.

#### **5.4 Plaintiff's conduct**

The preceding regimes of liability assume that an outside force is responsible for the damage. This may ignore an important actor: the injured party itself. If the plaintiff himself was taking a risk or doing something dangerous, how much liability should he bear for the injury—even if another party directly caused it? If a victim in a car crash is not wearing a seatbelt and her injuries are more severe as a result, is the driver that wrongly caused the accident fully liable? Alternatively, suppose the injured party is particularly susceptible to injury. If Uzayr is frail and gets knocked over by Samir, is Samir responsible if Uzayr suffers worse injuries than the average person would have? Or imagine that Uzayr keeps exotic birds in his apartment, and they are badly injured because Samir plays drums loudly in the neighboring apartment. Is Samir liable for the harm to the birds?

As we work our way through these regimes of liability in the next few chapters, be thoughtful to analyze the scenarios from the perspective of both parties. Consider what harm the injured party has suffered and what right that has been affected. In addition to weighing the actor's conduct and intent, also consider how you would defend him or her as your client.

### **6. CAUSATION**

Causation is what traces the alleged harm back to the responsible act. It is a complex legal notion that tries to prove how a particular result came to be. Sometimes the cause of an action may seem obvious—but without rigorous analytical parameters, or boundaries, the resulting liability will be unfair (to the one who is accused or the one who is injured). Thinking practically, when people experience injuries, it may be understandable that they would like to blame someone else. It is not only your responsibility as a lawyer to help ensure that those who are injured receive redress, but also to avoid another harm by forcing the wrong person to pay for it.

Sometimes the chain of causation may be quite direct. In the opening hypothetical about the multiple-car accident, Ramin is not paying attention to traffic as he drives because he is talking on his mobile phone. Ramin's car crashes into Lalah's and therefore causes the harm that results. In other cases, the chain of causation may be more indirect. In this same hypothetical example, was the eventual destruction to the shopkeeper's store caused by you, because you crashed into it with your car? Fardin, because he suddenly switched into the wrong lane? Ramin, for talking on his phone? Lalah, for halting her car so quickly? Or the child's parent, for allowing her to play with a ball near a busy street? Since Ramin was talking on his phone, he may have caused an accident regardless of Lalah's sudden stop—is he responsible for everything that came after he crashes?

There are many theories of causation we could adopt in civil responsibility. We could limit the assigning of an obligation only to the action that immediately preceded it, or we can draw out an extended chain of acts and their effects.

One common nuance to assess is whether an act was necessary to cause the damage or simply sufficient to cause the damage. In the example where Khalid leaves his keys in his car, that act is necessary to cause the ultimate harm, but the act is not sufficient to cause the harm, because the thief's independent choices lead him to hit the pedestrian. In such a scenario, the court may not hold Khalid responsible because an independent actor (the thief) intervened in the chain of events. Another important consideration in analyzing causation is whether the injury is foreseeable, or reasonably anticipated. If the sequence of events is such that the initial actor had no way of predicting that an injury may result, the causation may not be sufficiently strong to hold him or her liable. If a particular act was necessary to cause the injury and that injury was foreseeable as result of the act, causation is readily apparent. However, if the act was not necessary to cause the injury or the injury was not reasonably foreseeable, the analysis of causation may be more complicated.

We will analyze the theories of causation more robustly in Chapter 8.

## 7. DAMAGES

An injury is the theoretical starting point of an obligation triggered in civil responsibility.<sup>19</sup> Unless harm has been suffered, we do not need to hold anyone liable. In civil responsibility, the term damages refers to any measurable harm for which the creditor is seeking compensation. Once someone or something is harmed, we can trace back the cause and determine who is at fault. Remember that this may vary somewhat from criminal law, in which the law may punish an act even if it lacked serious consequence. What kinds of injuries result in civil liability?

In order for an injury to be recognized in civil responsibility, it has to diminish or violate a recognized right of that person or party. In Islamic jurisprudence, this is similar to the rights of man reflected in hakuk al-ibad. Some of these rights are mentioned in the first few articles of the Civil Code, as discussed above. The many rights articulated under this perspective can generally be categorized as: rights in the security of the person (nafs), rights in reputation (harmah), rights of ownership and various rights **in rem** (of property), rights sourced from the civil code or from contract (tassarufat), and family rights (such as zawjia, wilaya, wiratha, and nafaka). In some jurisdictions, like Germany, the code specifies a narrow set of rights that, if directly affected, may evoke an obligation from the liable party. In other jurisdictions, like France, the code more loosely identifies the kinds of harms that will carry an obligation—but essentially permits parties to sue and recover compensation for an indirect harm to a personal right that can be logically linked to a right identified in the code. As we work through the Civil Code, assess whether you think it defines injuries narrowly or broadly for the purposes of civil liability.

When we think of injury, perhaps our first notion is of bodily harm. Everyone has a basic right to physical safety. If someone causes us physical harm, we are no doubt injured. In some circumstances, money may be sufficient to compensate for the wound—for instance, for hospital bills or time lost from work. In other situations, even a large amount of money may not fix the loss—for instance, if a limb is amputated or someone is disabled or killed.

Another clear category of injuries comes from damage to property. In these instances, there is often a clear financial loss. If someone throws a rock at your window or steals your bicycle, your injury is at least as high as the cost of replacing those items. Injuries to property may also be more subtle or indirect. For example, imagine a farmer whose only source of income comes from his crops. If someone diverts or pollutes the river that irrigates those crops, the harvest may be reduced in quality or quantity. Alternatively, take the example of someone who owns an outdoor café. If another enterprise opens next door (such as a loud factory or a smelly landfill), the person who owns the restaurant may see a decline in the value of her property. Furthermore, the primary damage to property may also lead to secondary damages in other rights. We opened this chapter with the hypothetical example of you crashing your car

into a stall on the side of the road. This will not only cost the shopkeeper the price of repairing the facility, but his means of earning a living may be temporarily suspended. What if he cannot pay the rent on his house as a result? Remember that property need not be physical. Suppose Asma is a scientist who is doing research on a new treatment for a disease, but Saad finds her notes and publishes an article in a scientific journal claiming the findings to be his own? Has Asma been injured? Alternatively, suppose Asma invents a prescription medicine to **mitigate**, or lessen, the disease. Her company markets and sells the drug, but then Saad, who owns a competing pharmaceutical company, determines the chemical formula and copies the drug to sell as well. What injury has Asma or her company suffered? What right was violated? Depending on the jurisdiction, Saad's acts could be a violation of Asma's intellectual property rights.

There are other injuries that may also be intangible, or not physically detectable. For example, if a newspaper publishes something negative about a local politician—and that information is false—has that individual suffered an injury? What if the politician, who was favored to win the election, loses after the false article is published? Even if she wins the election, has she suffered harm because of the wrongful story? What right has been violated? Alternatively, suppose a publication prints a personal picture of a celebrity when she thought she was in a private situation. She might be physically unharmed, but she may feel injured nonetheless. These could be categorized as moral injuries. In the first example, the politician has a right to her reputation and the value it brings her indirectly. The act of publicizing disgraceful but false information is called **slander**.<sup>20</sup> In the second example, the celebrity has a right of privacy, which facilitates her security and dignity. Depending on how the photograph was taken, she may be able to sue for a violation of her privacy.

Emotional injuries may be even more abstract—but no less real. In the cases of the physical injuries we have discussed so far, the victim may also endure pain, or related emotional difficulties. In our hypothetical about the multiple-car accident at the beginning of this chapter, envision again that Saman is a passenger in Lalah's car. She breaks her arm badly in the accident, and the doctors decide to amputate it. This will obviously be painful, and Saman may suffer intense sadness as a result of the loss of her arm. Can someone compensate Saman for her loss? Should they? Alternatively, contemplate again that Lalah dies in the car accident. Her children may be able to sue for the financial loss they suffer as a result – but what about the emotional injury of her untimely and expected death? Her spouse has lost a lifetime of her companionship and partnership—should this create civil liability for whoever caused the accident? Of the many friends and relatives who suffer from Lalah's loss, who should be able to sue as a result of her death?

### Discussion Questions

1. What other categories of injury do you believe are necessary or appropriate under civil law?
2. With intangible injuries, how should the court evaluate how much compensation is owed?

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<sup>1</sup> Private law is the segment of our legal system, which governs the direct interactions of individuals and groups. In private law, the Government is not a party in the suit – at least, not in its role as the State (representing the people).

<sup>2</sup> The Law of Obligations emerged from the Law of Property, which governed the relationship between people and things. (D. J. Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford, 1999).

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- <sup>3</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.1
- <sup>4</sup> The Law of Obligations: Roman Foundations of the Civilian Tradition. Zimmermann, Reinhard, P.1
- <sup>5</sup> The law of contract and quasi-contract is discussed in the Contracts chapters, which complements this volume.
- <sup>6</sup> Ferrari, Franco. "Comparative Remarks on Liability for One's Own Acts." *Loy. L.A. Int'l & Comp. L.J.* 15 (1993): 813-46. Pages 813-14.
- <sup>7</sup> In common law systems, civil responsibility is tort law (with tortious liability deriving from particular acts, or torts).
- <sup>8</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 15 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.
- <sup>9</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2013. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>. Article 92.
- <sup>10</sup> The Moslem law of Civil Delict as Illustrated by the Mejlle. P. 64.
- <sup>11</sup> Abdel-Wahab, Salah-Eldin. "Meaning and Structure of Law in Islam." *Vanderbilt Law Review* 16 (1963): 115-30. Page 127. *HeinOnline*. Web. 20 July 2013.
- <sup>12</sup> *Id.*
- <sup>13</sup> Catala, Pierre, and John A. Weir. "Delict and Torts: A Study in Parallel." *Tulane Law Review* 38 (1964): 233.
- <sup>14</sup> "The Ottoman Courts Manual (Hanafi)." *AL-MAJALLA*. International Islamic University of Malaysia, 16 Nov. 2005. Web. 10 Feb. 2014. <[http://www.iium.edu.my/deed/lawbase/al\\_majalle/al\\_majalleintro.html](http://www.iium.edu.my/deed/lawbase/al_majalle/al_majalleintro.html)>.
- <sup>15</sup> Constitution of Afghanistan, Articles 2-3.
- <sup>16</sup> Refer to articles 720-725 of the Civil Code.
- <sup>17</sup> Catala, Pierre, and John A. Weir. "Delict and Torts: A Study in Parallel." *Tulane Law Review* 37 (1963): 619.
- <sup>18</sup> In common law jurisdictions, the doctrine of **respondeat superior** holds employers liable for the actions their employees take within the context of doing their assigned job.
- <sup>19</sup> Although in court, damages are sometimes the last component of the case to be analyzed and measured.
- <sup>20</sup> In some jurisdictions, slander may also be a criminal offense—instead of, or in addition to a civil charge.

## CHAPTER 2: LIABILITY FOR ONE'S OWN DEEDS

### INTRODUCTION

As discussed previously, civil responsibility differs from both contract law and criminal law. In contract law, two parties voluntarily reach a legal agreement. The agreement applies only to those two parties and involves only the subject of the contract (such as exchanging money for a new phone). By contrast, civil responsibility is an obligation that each person has to every other person and their belongings not to cause harm.

So how does civil responsibility differ from criminal law? Criminal law, after all, is also a set of rules to prevent conduct that causes harm. Three of the major differences between civil responsibility and criminal law are the parties, the intent required for the criminal charge, and the punishment. In a civil lawsuit, the parties are usually two private parties (as opposed to the government), liability does not require specific intent (that is, you can be liable for taking negligent actions, even if you did not mean to create the harm), and the punishment is usually monetary damages (or returning property). In a criminal lawsuit, by contrast, the government brings a lawsuit against an individual for violating criminal laws, and the punishment is usually probation or prison time, as opposed to a fine. Consider the following example.

#### Civil vs. Criminal Law: The Rules of the Road

Rahim is driving through the streets of Kabul. He is late for a meeting, so he is driving very fast in an effort to make it on time. As he speeds around a corner, he realizes the cars in front of him are stopped and runs into the car of the person in front of him, Malik, while going substantially over the speed limit. Malik's car sustains serious damage, and Malik has a number of serious bodily injuries.

Did Rahim violate his civil obligations or criminal law?

The answer is probably both.

As we will discuss in detail later, there is clearly a civil claim to be brought against Rahim for the damage to Malik. It does not matter a great deal if Rahim *intended* to run into Malik's car. He has a civil responsibility not to harm Malik and Malik's property, even if he was not intending to destroy the property. If he violated his civil responsibilities, the punishment, which is called **damages** in civil responsibility, will generally be monetary. Therefore, a court will have to determine how much money is necessary to adequately compensate Malik for the damage to his car and body.

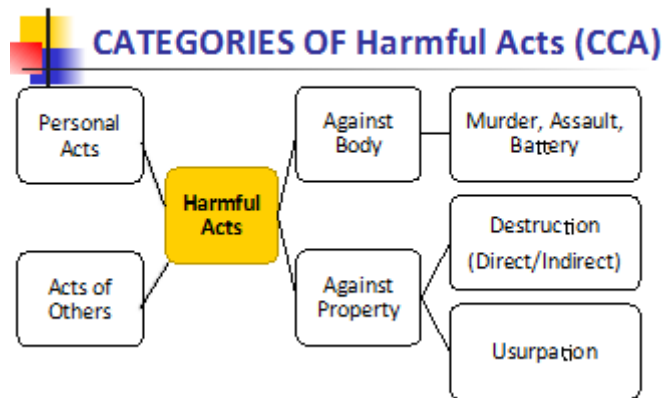
There also may be a criminal case against Rahim for his actions. The criminal case differs from the civil case in three main ways: the parties, the intent for the charge, and the punishment. Unlike the civil claim, which is between two private citizens in this case, criminal prosecutions are conducted only by the government. Breaking a criminal law is viewed as a crime against the state, which is why the government conducts the prosecution. Violating a civil obligation, by contrast, is viewed as harming another individual, not society as a whole. The second difference is the charge and intent. Under criminal law, Rahim might be charged with a crime such as battery. A charge like this usually involves some degree of mental culpability on Rahim's part. He would have had to intend to harm Malik or to have been so reckless that his actions justify the charge. Lastly, the punishment is different. A violation of civil obligations will result in damages—the individual liable will have to pay the harmed party. Breaking criminal laws, however, carries the possibility of a monetary fine, suspension of license or even spending time in prison, also known as **incarceration**.

In this chapter, we will begin to explore an individual’s *civil* obligations. Specifically, this chapter will focus on the most fundamental concept in civil responsibility: the responsibilities an individual has for his or her own actions. Later in the book, we will explore additional topics such as an individual’s responsibility for his or her animals or unique relationships, such as parents and children. For now, however, we do not need to worry about that. We need to focus only on what actions an individual is prohibited from taking.

## 1. CATEGORIES OF HARMFUL ACTS

The study of harmful acts is complicated. It is important to keep in mind both the subject (who is causing the harm) and the type of harm created. Harm can be caused by either personal acts or the acts of others. There is a wide range of harms that can be created, either by personal acts or the acts of others. Some major categories include harmful acts against the body (such as assault) and harm against property. These categories are displayed in the diagram below.

**Categories of Harmful Acts**



In this chapter, we will deal with personal acts that create harm—the top branch of the chart and everything that follows. To begin, read Articles 776 and 777.

### Civil Code

#### Article 776

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

#### Article 777

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

As you probably noticed, **fault** is a broad concept. Fault is defined as the intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person. The concept of fault is related to **liability**. Liability is defined as being legally obligated or accountable. Fault and liability are related. As the previous chapter explained, determining liability is a question of who is at fault.



Articles 776 and Article 777 govern the principles of fault and liability for personal acts—the action a person takes. Article 776 says an individual must compensate loss if “harm is inflicted on another.”<sup>1</sup> There are no limitations on particular types of harm. It can even apply when the infliction occurs by error or mistake.<sup>2</sup> Similarly, Article 777 applies to “any” invasion that causes harm (subject to limited exceptions discussed elsewhere in the book).

For example, imagine that Nabil owns a large property with many animals. One day, he closes the gate (or so he thinks) before leaving for a trip. Unfortunately, one of his animals manages to escape and destroys a neighbor’s crop by trampling it and eating it. Should Naqib be at fault, and therefore liable, for the animal’s action? According to Articles 776 and 777, Naqib is probably liable for the animal’s action. Even though he tried to close the gate, the animal still escaped.

Broad civil obligations to prevent harm are consistent with the important principle of “no damage” in Islamic law. The Prophet Mohammad, for example, stated in a Hadith that “[t]here is no harming and retaliation in Islam.”<sup>3</sup> By imposing economic liability for harming other individuals, the law creates large disincentives for creating harm or retaliating. In common law jurisdictions, the principle of fault works a bit differently. The next box introduces you to the common law concept of negligence, which is frequently used to determine fault.

### The Common Law Concept of “Negligence”

In civil law jurisdictions, an individual is generally responsible for the damage that his or her actions cause. If an individual damages a neighbor’s property, that individual is responsible. In common law, the concept of **fault**—whether an individual is responsible for the actions—is a bit less well-defined. Common law relies heavily on the concept of **negligence**. The concept of negligence is based on what actions a “reasonable person” would take under the circumstances. If the individual acted the same way that a reasonable person would act in those circumstances, the individual is not liable. If, however, a reasonable person would not have acted as the individual did, the individual is liable.

The common law concept of negligence is illustrated nicely by the case of *Hammontree v. Jenner*.<sup>4</sup> In *Hammontree*, an individual was driving a car when he had an epileptic seizure. He crashed into another car during the seizure, causing extensive damage to the other car. The driver had a history of epilepsy, but he complied with all of the necessary requirements to regularly take his medication and periodically visit a doctor.

Should the individual be liable for the car accident?

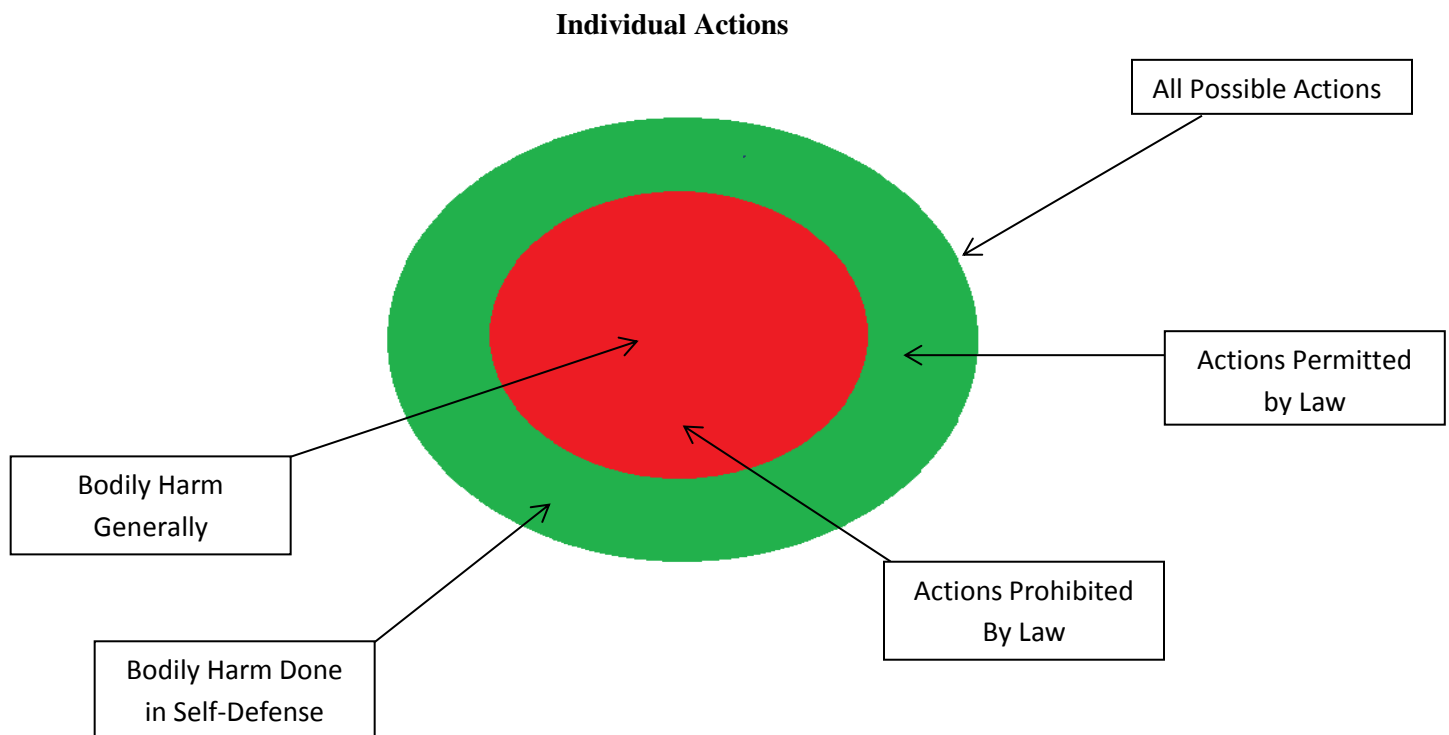
A court in the United States, a common law jurisdiction, found that the defendant was not liable because the defendant had taken the necessary precautions, including medication and visits to the doctor, to seriously minimize the chance of a seizure while driving.

In a civil law jurisdiction, by contrast, it is more likely that the driver would be liable for his actions because fault is a more straightforward yes or no question: did the person crash their car into another car? In civil law, as one commentator explains, the doer “is liable not primarily because he ought to have avoided causing the damage, but because he did the damage by an act of his not allowed by law.”<sup>5</sup> This explanation mirrors Articles 776 and 777 of the Civil Code.

## 1.1 Action and inaction

In order to determine whether an individual has violated a civil obligation, it is useful to think about four types of conduct: legally permitted actions, legally prohibited actions, legally permitted inactions, and legally prohibited inactions. These possibilities are illustrated in the table on the next page.

Many violations of civil obligations involve a specific action by the person at fault. Actions can include anything from driving your car improperly to using physical force to starting a fire that causes destruction. Although almost anything can be an action, the critical question is whether the action is legally prohibited. Not all actions are legally prohibited. This is illustrated in the diagram below. The law of civil obligations prohibits actions that fall within the red circle but not actions that fall within the green circle. The challenge is determining which circle an action falls within.



The law makes an important distinction between **misfeasance** and **nonfeasance**. Misfeasance generally refers to an affirmative act that causes harm. Nonfeasance, by contrast, refers to a failure to act which results in harm. Although the distinction is often blurry, consider the following example to explain the distinction. Imagine that you are changing the oil in your car. Some of that oil leaks on the sidewalk, and someone walking by slips and falls, breaking a leg. Your action is misfeasance because you left the oil on the sidewalk without cleaning it up. If, however, you see an oil spill on the sidewalk that someone else created and fail to warn a passerby who slips and falls, that is nonfeasance because you chose not to take an action that resulted in harm. With these categories in mind, there are two primary distinctions to master: whether an action is permitted or prohibited and whether not taking an action (inaction) is permitted or prohibited. The chapter addresses each in turn.

### 1.1.1 Action: permitted vs. prohibited

Generally, there is a civil obligation not to engage in misfeasance because it causes direct harm to an individual.<sup>6</sup> These actions fall within category three and the inner red circle of the diagram. There are

some affirmative actions, however, that are legally permitted. These actions fall within category one and the outer green ring of the diagram. There are two primary categories of legally permitted actions. First, some actions are simply not illegal. Walking down the street is not illegal, listening to music is not illegal, and talking on the telephone is not illegal. This idea is reflected in Article 8 of the Civil Code, which states that “Legal permission negates responsibility. One who exercises his rights within legal limits is not liable for ensuing damages.” The Mejlle also includes this principle and provides an example.<sup>7</sup> It states that if an “animal belonging to A falls into a well which B has dug on his own property held in absolute ownership and such animal is destroyed,” no compensation can be claimed.<sup>8</sup> It is a perfectly legal action for someone to dig a well on his own private property without being responsible for harm that may occur to an animal that wanders onto the property. By contrast, if A digs a well in the public highway and an animal falls in and dies, A is responsible.<sup>9</sup>

Consider an example that occurred in a relatively recent case. In the mid-1990’s, two oil companies, Bidas and Unocal, were trying to negotiate with the government of Afghanistan (and Turkmenistan) for the right to construct oil pipelines. Bidas paid Barhanuddin Rabbani, the leader of one of the major factions in Afghanistan, approximately 56,471,400 Afghanis for the rights to construct pipelines on Afghan territory. After the contract was finalized, another faction in Afghanistan forced Rabbani out of Kabul and into the northeastern corner of the country. Unocal made several attempts to conclude an oil pipeline agreement with other factions in the country.

Ultimately, Bidas filed a lawsuit against Unocal in the United States, arguing that Unocal was guilty of civil conspiracy and tortious interference (two common law doctrines)—essentially arguing Unocal impermissibly undermined the contracts Bidas made in each country. The court, after determining that Afghan law should apply to the dispute,<sup>10</sup> had to determine whether the actions allegedly taken by Unocal—interfering with Bidas’ contracts—violated Afghan law. Based on what we have learned about Afghan law, including Article 8, did Unocal violate Afghan law by trying to get oil pipeline contracts despite the contract Bidas signed with Rabanni?

The U.S. court, applying Afghan law, agreed with the defendant Unocal that Afghan law does not recognize civil conspiracy or tortious inference, and therefore that the defendants had not violated Afghan law. The court referenced the findings of a number of expert witnesses who testified that Afghan law does not recognize these causes of actions. In particular, the court noted that:

Professor Edge testified that under Article 91 of the Mejlle, a “harm” is not compensable under the Shari’a if it resulted from a lawful act. He stated that “entering into a contract is a lawful act, which, even if it causes harm to somebody else, doesn’t result in liability.” Consequently, according to Professor Edge, because Unocal’s act of entering into a contract with the Afghanistan government was a lawful act, Bidas could have no cause of action against Unocal under the Shari’a even if Unocal’s contract had the effect of interfering with Bidas’s prior contract with the Afghanistan government.<sup>11</sup>

In addition to actions that are simply legal, there are also some actions that may normally be illegal but are not in certain circumstances. For instance, as we will cover in more detail later, individuals have a civil obligation not to cause bodily harm. Nonetheless, there are some exceptions. Imagine that Sadiq attacks Taraki. Can Taraki attack Sadiq, even though it causes bodily, because he is defending himself? Generally, yes. If someone causes bodily harm because he or she is legitimately acting in self-defense it is usually not an illegal action because the law allows self-defense.<sup>12</sup> While this bodily harm would normally be prohibited and fall within the red circle, the fact that it was conducted in self-defense moves it from the red circle to the green circle. Both examples are plotted on the diagram.

### 1.1.2 Inaction: permitted vs. prohibited

Determining whether an individual took a legally prohibited action is usually fairly straightforward. Inaction is often a bit trickier. Similar to the diagrams in the action section, there are legally permitted forms of inaction and legally prohibited forms of inaction. While actions are generally presumed to create civil obligations (misfeasance), the presumption flips the way for inaction. Generally, deciding not to take an action does not trigger a civil obligation (nonfeasance). This idea is reflected in Article 8 of the Civil Code, discussed above. It is also reflected in the Mejlle maxim that “[f]reedom from liability is a fundamental principal.”<sup>13</sup> Creating broad civil obligations for an individual to act, even when they would not have acted otherwise, substantially infringes on an individual’s freedom and liberty to make their own decisions. Consider an example. Imagine that the law of civil responsibility states that all people have an obligation to rescue people that are in danger. Baraat, a young child, falls into a pool where many people are present. If every person had a legal obligation to rescue Baraat, it could cause a number of problems. It could cause chaos and confusion if every person was supposed to save him. Moreover, it may force people who are unable or unwilling to rescue Baraat to take an action against their will. In reality, there is no such obligation. Although there is not a *legal* obligation to rescue Baraat, there may still be social expectations to do so: people would not want a child to drown and very well may come to his aid.

Nonetheless, there are some instances in which an individual has a civil obligation to take an action. Broadly speaking, there is a civil obligation to take an action when failing to take an action would violate the responsibility an individual has to others. Put differently, this category covers situations where Article 8—legal permission negates responsibility—no longer provides a shield because the person is required to take an action. Recall Article 9, covered in the previous chapter. Article 9(2)(3) specifically states that a “[t]ransgression of rights occurs” when the “[t]riviality of interest of the person as compared with the harm inflicted on another.” How should courts determine when the harm inflicted on another outweighs the triviality of interest?

Although Article 9(2)(3) is fairly general, consider a couple of examples to better understand the concept. One area where inaction can violate a civil obligation is **failure to warn**. There can be a civil obligation to warn others about the danger of your actions in certain circumstances. **Products liability** is a good example of when courts may prohibit inaction. Products liability refers to when a manufacturer’s or seller’s tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product.<sup>14</sup> For instance, many countries require cigarette companies to place a warning on their packages that smoking can cause negative health effects. Partner up with another person in the class. One of you should be a member of the public concerned about the health impact of cigarettes; the other person represents a cigarette company. Come up with a list of the arguments why cigarette companies should be required or should not be required to put warnings on their packages.

What were some of the best arguments on each side of the debate? Those favoring warning labels may argue that cigarettes can cause very serious health problems (such as cancer and possibly death), that it is not very difficult for a cigarette company to put labels on the packages, and that warnings are a much less intrusive option than setting strict regulations about the contents of cigarettes, where they can be sold, and who can purchase them. The cigarette company, by contrast, will argue that cigarettes are not that bad for you, that warning labels are cumbersome to create but do little to deter people from smoking, and that the country can take steps such as public awareness campaigns, which do not require telling a corporation how to market their product. Which side has the better arguments?

Many countries require cigarette companies to place warnings on their labels. If a cigarette company decides not to place warnings on their packages, it is a form of inaction but nonetheless one that violates civil obligations. Under the framework of Article 9(2)(3), this requirement is quite defensible. Warnings

may help prevent very serious health problems, but the interest of the cigarette companies is fairly low. They may lose a little bit of profit, and adding warnings to package may cost a little bit of money, but overall those are fairly “trivial” compared to the health effects of cigarettes.

Another example where inaction could violate a civil obligation is sometimes called the duty to rescue. Imagine that Faqir is a relatively young child. During a walk with his family in the mountains outside of Kabul, he got lost. He is alone, broke his leg during a fall, and fears that his life may be in danger. Does anyone have a legal duty to rescue Faqir? Recall that earlier in the chapter, we said that everyone at a pool does not have to rescue someone who fell in—it would be a very broad obligation that would significantly intrude on every individual’s freedom not to take an action. Article 9(2)(3) suggests, however, that this freedom not to act is not absolute. While every person living in Kabul certainly would not have an obligation to rescue Faqir, what about those that live on the mountain where he is trapped? Using the Article 9(2)(3) balancing test, how great are each set of interests? Even here, it may be difficult to create an obligation because the people may not know Faqir is trapped, and it may be difficult to reach him (Where exactly is he trapped on the mountain? How difficult would it be to rescue him? Are they elderly?). What if one of the best soldiers in the Afghan army was walking directly by Faqir on the mountain, clearly saw he was a child and injured, and had all of the equipment to easily rescue the child? Here, Article 9(2)(3) may create an obligation for the soldier to rescue the child because it would be easy for him to do so, and it would have very large benefits for the stranded child.

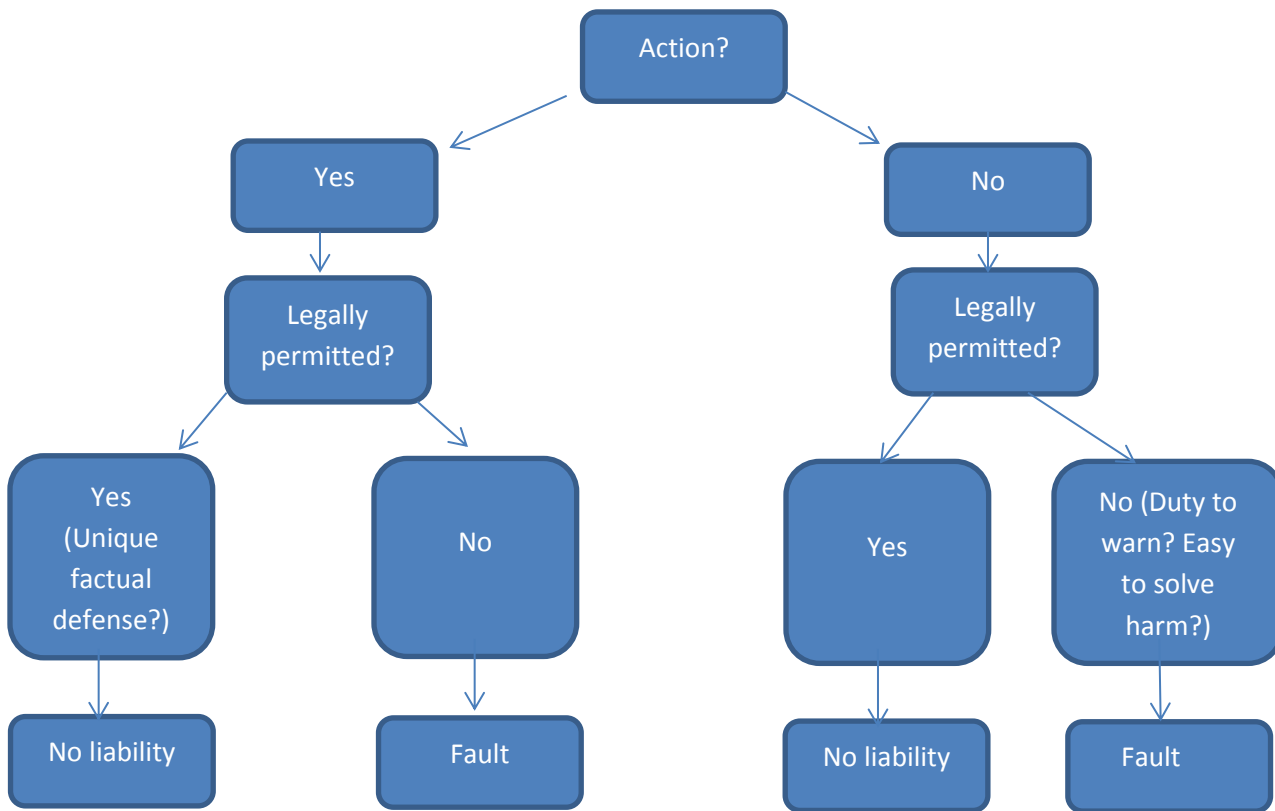
### 1.1.3 Putting it all together

In order to determine whether an individual has violated a civil obligation, it is useful to think about four types of conduct: legally permitted actions, legally prohibited actions, legally permitted inactions, and legally prohibited inactions. Each type of action is displayed, along with an example, in the chart below.

	<b>Action</b>	<b>Inaction</b>
<b>Legally Permitted</b>	<b>Category 1</b> <b>(Listening to music; Attack in self-defense)</b>	<b>Category 2</b> <b>(All people at pool not required to rescue Baraat)</b>
<b>Legally Prohibited</b>	<b>Category 3</b> <b>(Attacking someone, unless self-defense)</b>	<b>Category 4</b> <b>(Cigarette warning labels; Afghan soldier who sees Fariq in mountains)</b>

In addition to the table, the flowchart below can help guide you through determining whether an action triggers a civil obligation. After you read through the flowchart, complete the “Obligation or No Obligation” exercise that follows.

### Fault Flowchart



#### Application Exercise: Obligation or No Obligation

In each of these examples, did the individual violate a legal obligation?

1. Bahram is driving down the street one day and runs into Parisa's goat. The goat dies.
2. Faqir is in a crowded bazaar and sees that Latif is having a stroke. He assures the crowd that he knows how to handle the situation but then suddenly loses confidence in his abilities. He does not want to make the situation worse, so he leaves. Latif suffers serious brain damage.
3. Sabrina builds an elevated porch on her property so she can enjoy sitting outside in the evenings. Hamid, a curious teenager, decides to explore Sabrina's property without permission. While on the porch, Hamid loses his balance and falls, injuring his arm badly.
4. Adeeb is kidnapped by Tarakai. For a long time, Tarakai has disliked Javid. Their rivalry goes back to when they were children. Tarakai tells Adeb to light Javid's house on fire or he will kill him. Not surprisingly, Adeb lights the house on fire. Javid sues Adeb for destroying his property.

### Application Exercise: Obligation or No Obligation—Suggested Answers

1. This violates Bahram’s civil obligation to prevent harm. It is an action that is legally prohibited.
2. This probably violates Faqir’s civil obligations. Although an individual normally does not have an affirmative obligation to assist someone who is injured, Faqir’s assurance to the crowd probably creates an obligation because other members of the crowd will assume that he will help Latif and that they do not have to worry about it.
3. This probably does not violate Sabrina’s civil obligations. Sabrina did not take an affirmative action that creates harm, and there is probably not a duty to warn. The existence of the patio and the height of the patio is self-evident, even for a teenager.
4. Adeeb probably did not violate his civil obligations. Although lighting a house on fire is generally impermissible, Adeeb has a strong argument that he was under duress at the time he committed the action.

## 2. PROPERTY DESTRUCTION

In addition to the broad prohibitions on harmful actions in Articles 767 and 777, the Civil Code also includes a number of articles covering four specific topics: property damage, usurpation (also called appropriation), bodily damage, and intellectual harm.

Property destruction is one of the most common ways that an individual violates his or her civil obligations. The concept is known as **itlaf** in Islamic law. The basic rules against property destruction are included in the box below.

### Civil Code

#### Article 758

Person who destructs property of another person shall be obligated to compensate for the caused damage.

#### Article 759

Person who destructs property of another, whether in his possession or his trustee, intentionally or unintentionally, shall be liable for compensation of the damaged caused by his action.

#### Article 761

In case of full destruction, compensation for all of the property and in case of partial destruction, compensation for the loss of price of property shall be obligation of destroyer.

As with the general articles prohibiting harm, the articles prohibiting the destruction of property are quite broad. Article 758 does not include any qualifications—it simply states that destruction of property must be compensated. Next, re-read Article 759 and answer these two hypotheticals:

### **Application Exercise: Property Destruction**

1. Pamir is driving down one of the main roads in Kabul. Although he is properly within his lane, there is a carriage carrying a large amount of produce on the side of the road close to Pamir's lane. When Pamir drives past the carriage, he does not realize that his car accidentally clipped the carriage, breaking the storage compartment and spilling produce all over the road. The produce is ruined. Should Pamir be responsible for the destroyed produce?
2. Ramazan is a wealthy man. He creates a land trust whereby he allows the American University of Afghanistan to use one of his houses at all times. One day, some bandits cause substantial property to the house. If Ramazan sues the bandits, can they be held legally responsible for the property damage?

### **Application Exercise: Property Destruction—Suggested Answers**

1. Pamir is probably responsible. Even though he was properly in his lane, Article 759 is clear that a person is responsible for the destruction of another's property even if done unintentionally.
2. Yes. The bandits are legally responsible for the property damage. Article 759 states that a person is responsible for the destruction of a person's property even if it is in the possession of his trustee, which is the case here.

Article 761 is also important. It outlines the damages for property damage. Essentially, it states that damage for property shall be proportional. If you destroy a quarter of a person's property, you are responsible for paying them a quarter of the value of the property. If you destroy the entire property, you must pay them the value of the entire property. Although this concept is straightforward, it can get complicated. Imagine, for instance, that Zabi drops Hadi's iPhone. The screen on the phone is completely destroyed, and Hadi cannot see anything on the phone. Apple, the company that made the phone, says there is not an easy way to replace just the screen. Should Zabi be responsible for a portion of a new phone, given he only destroyed the screen, or an entirely new phone?

The Civil Code also contains provisions that deal with three unique property destruction circumstances: indirect liability, joint actors, and destruction of property by juveniles.

#### **2.1 Indirect liability**

A lot of property destruction is straightforward: an individual may clearly damage the property of another. Imagine, for example, someone who lights a fire on his or her property that spreads to the property of the neighbor. The person who started the fire is directly responsible for destroying the neighbor's property. Other times, however, it will be less clear whether an individual is responsible for destroying property. If, for example, you open your neighbor's front door, and the dog runs out into the street and gets hit by a car, should you be responsible? Read Articles 760 and 764.

### **Civil Code**

#### **Article 760**

As creation of cause of destruction shall bring about liability to compensate, failure to provide possible means for taking necessary precautions shall also entail compensation for the damage.

#### **Article 764**

Instigator shall only be obligated to pay compensation if his action has caused the damage.



The Civil Code covers two types of property destruction: **direct destruction** and **indirect destruction**. Destruction can be caused by action or inaction. Direct destruction of property was covered in the previous section. If you drive your car into the side of someone’s house, you are responsible for the damage. Indirect destruction, however, is a bit more attenuated. As Article 888 of the Mejlle explains, “[i]ndirect destruction consists of being the cause of the destruction of a thing.”<sup>15</sup> Article 888 goes on to provide a couple of useful examples to illustrate the distinction between direct destruction and indirect destruction:

1. The cord of a hanging lamp is cut. The lamp falls down and is broken. The person cutting the cord is the direct cause of the destruction of the cord and is the indirect cause of the destruction of the lamp.
2. A person splits a water-skin in half, and oil contained therein escapes and is lost. Such person is the direct cause of the destruction of the water-skin and the indirect cause of the destruction of the oil.

The concept of indirect destruction is reflected in Articles 760 and 764 of the Civil Code. Article 760 prohibits the “creation of cause of destruction” which causes surety of the caused harm. Sometimes, the line between indirect destruction (which violates a civil obligation) and legal action (which does not violate a civil obligation) can be difficult. Consider an example. Imagine Ehsan is driving his car and presses the horn for a long time. The sound of the horn frightens Nadia’s livestock on the side of the road. The animals scatter, and Nadia is unable to find some of them. Should Ehsan be responsible for the lost livestock? What are the best arguments on each side? Does it matter why Ehsan honked his horn? What if he honked his horn because another car was about to hit him? What if he honked the horn because he thought it would be funny to frighten the animals?

Complete the following exercise to test your understanding of the distinction between the two concepts.

#### **Application Exercise: Indirect Destruction**

For each of the questions below, is the action an example of indirect destruction or action that does not violate a civil obligation?

1. During a quarrel, Fahim grabs Rasoul. When Fahim does this, Rasoul’s iPhone falls out of his pocket, hits the ground, and breaks.
2. Without justification, Jawad cuts off the water that flows to Malia’s field. The crops and plantations dry up and the crops are destroyed.
3. Mahmood, a hunter, fires a gun, and Kamal’s animal runs away.
4. Abdullah opens the door of Basir’s stable. An animal therein runs away and is lost.
5. Farhad fires a gun with the intention of frightening Rahila’s animal.
6. Iqbal opens the door of a cage belonging to Elina. Elina’s bird flies away.

#### **Application Exercise: Indirect Destruction—Suggested Answers**

Each of the questions in this exercise is based on an example from the Mejlle. The names and items of property are slightly different but the concept is the same. Answers:

1. Indirect destruction. This is one of the examples in Article 922 of the Mejlle of indirect destruction.
2. Indirect destruction. This is one of the examples in Article 922 of the Mejlle of indirect destruction.
3. No civil obligation. Article 923 of the Mejlle makes clear that this does not violate a civil obligation.
4. Indirect destruction. This is one of the examples in Article 922 of the Mejlle of indirect destruction.
5. Indirect destruction. Article 923 of the Mejlle states that, in contrast to the factual situation in Problem #3, this is indirect destruction.
6. Indirect destruction. This is one of the examples in Article 922 of the Mejlle of indirect destruction.

In addition to indirect liability, Article 760 also states that failure to provide “necessary precautions” can be a basis for fault. For example, if a company decides to build a toxic chemical plant, it needs to place signs on its property indicating that toxic chemicals are present and that people should be careful. If an individual comes onto the property and suffers injuries, the company may be liable for the injuries because it failed to warn the individual about the risks of entering the property

## 2.2 Multiple actors

### Civil Code

#### Article 763

In case of association of actor and instigator, either of them who has taken action or has been relied upon shall be liable. In case of joint action, both of them shall jointly be considered liable to compensate.

Although property damage often involves only two people, there are many examples of property damage that involves more than two people. For instance, a group of children might decide to harm a person’s land or a group of criminals might destroy a house in the process of robbing it. Read Article 763 carefully. There are a couple of important points to notice about Article 763. First, it is quite broad. When there is an “association” between two or more people, any of them can be liable if they have “taken action” or have “been relied upon.” Therefore, even if someone in the group does not commit the primary action that destroys the property, that person can still be liable because he or she was complicit in the action. If Aarash pays Dastgir to break into a car, both are liable because Aarash instigated the crime and Dastgir was the actor that carried out the crime.

There can also be more difficult situations. Imagine that Mahmood pays Malalai to perform a dance routine. During the routine, Malalai accidentally knocks over an expensive vase. Are both parties liable for the destruction of the vase? Recall the discussion earlier in the chapter about the relationship between Article 8 and Article 9(2)(3). Should they both be liable? What are the best arguments for either side?

Article 763 also introduces the idea of **joint liability**. Joint liability is a doctrine that states that all of the defendants who are liable are responsible to pay the plaintiff the economic damages owed. Let’s look at an example. Assume that Elias and Nadia are each driving a car. Their cars collide into one another and then collide into a car carrying Parviz. Parviz sustains 3,000,000 Afghanis in damages because he suffered a number of serious injuries, resulting in many expensive medical bills. Should Elias or Nadia be responsible for paying the cost? Under the theory of joint liability, both are responsible. Should Parviz receive 3,000,000 Afghanis from both parties? The law generally prohibits Parviz from receiving 3,000,000 Afghanis from each party (6,000,000 total) because he would unfairly receive an extra

3,000,000 Afghans. Instead, the court would divide the amount of the damage between the parties at fault. Therefore, a fair division might be that each is responsible for paying Parviz 1,500,000 Afghans.

To review multiple actors, complete the problem about “Rashid’s Terrible Day.”

### Application Exercise: Rashid’s Terrible Day<sup>16</sup>

Baseer, Deena, and Rashid are long-time friends who enjoy shooting guns together. One weekend, they took a trip outside of town to do some shooting. After setting up camp, the three of them went out to try to shoot some birds. The group saw birds a couple of hundred meters away. The birds were located fairly close to a house, and it appeared that there might be someone working in the field outside the house. Nonetheless, Rashid really wanted to do some shooting and was confident in the group’s shooting abilities. He told the group “Let’s do it! Nothing bad will happen.” Baseer, Deena, and Rashid took aim and began to shoot at the birds. Unfortunately, one of their bullets ended up hitting and killing Sahar, who was working in his field at the time. An investigation later showed that Baseer or Deena must have killed Sahar because Rashid was using a different type of bullet than the one that killed Sahar.

Can Baseer and Deena be held liable for Sahar’s death?

If we do not know if it was Baseer or Deena who caused the death, can they still be held liable?  
Can Rashid still be held liable for Sahar’s death?

Under Article 763, Baseer and Deena can likely both be held liable for Sahar’s death. They are both “actors” who decided to go shooting with Rashid’s encouragement.

The fact that it is not possible to prove whether the bullet came from Baseer’s gun or Deena’s gun probably does not matter. Both were still actors involved, so they are jointly held liable.

Rashid is probably also liable along with Baseer and Deena. His encouragement to the group—“Let’s do it!”—probably makes him an instigator. Even though his bullet did not kill Sahar, his encouragement played an important role in convincing the group to engage in dangerous shooting.

## 2.3 Juvenile destruction of property

Lastly, the Civil Code also contains a provision, Article 762, which governs juvenile destruction of property. It states that a juvenile, whether discerning or undiscerning, “shall be paid from his own property.” This article makes clear that juveniles are not exempt from the civil obligation not to destroy property. It does provide, however, that the juvenile is entitled to a moratorium on the compensation if he or she does not have the property at the time. The article also states that “[g]uardian, executor, and administrator shall not be liable for the destructed property, unless court obligates them for compensation of the property, in this case they have the right to refer to the destructor.” Generally, this means that parents and guardians will not be required to compensate an individual if their child destroys property, but it does allow courts the flexibility to decide otherwise. Liability for the deeds of others will be covered in the following chapter.

## 3. USURPATION

The second type of action explicitly prohibited by the Civil Code is **usurpation**. Usurpation refers to the forcible taking of another’s property. For example, it is usurpation if Fateh takes Jamal’s animal and begins to use it. This concept is known as **ghasb** in Islamic law. Usurpation has three elements: (1) the act

of exercising control over a property, (2) the property should belong to someone else, and (3) the owner's consent is missing.<sup>17</sup> It does not matter if the person took the item by mistake. Compensation is still owed. Article 5 goes so far as to say that even an emergency is not enough to avoid compensation.

### Civil Code

#### Article 765

(1) Usurper is obliged to return whatever he has usurped.

(2) If harm is caused by usurpation, usurper shall be liable to compensate for the harm, in addition to returning the usurped property at the place of usurpation.

#### Article 766

If the usurper uses up the usurped property or all or part of it perishes while in his possession or if it is destroyed due to his abuse or without it, he shall be considered obligated to compensate for the usurped property.

#### Article 767

If the usurped property changes while in possession of usurper, the person whose property has been usurped may claim the property with compensation for the harm inflicted or compensation for the whole property from the usurper.

#### Article 768

Results of the usurped property belong to owner, in case the results perish or are used up by the usurper, he shall be liable for compensation.

Article 765 and 766 establish the basic rule prohibiting usurpation. Article 765(1) requires that a **usurper** returned whatever he has taken. The usurper is the person that takes property belonging to another. Article 765(2) also states that a usurper can be liable for harm caused by usurpation. If, for example, Tahir steals Lima's horse that is crucial to farming, Tahir may be responsible for the lost profits because Lima could not farm. Article 766 expresses the basic idea of damages: a usurper is responsible for the destruction of property or the depreciation in value. If Tahir steals Yasir's car, drives it for many kilometers, and breaks the engine, Tahir is responsible for the reduction in the value of the car as well as any financial loss that Yasir may suffer due to not having his car.

The Civil Code also includes provisions dealing with three specific usurpation circumstances. The first circumstance is **modification**. Modification occurs when an individual usurps property and then changes it. If property usurped property is modified, what should be the remedy? Read Article 767. To help understand modification, the Mejele provides examples of two types of modification: **positive modification** and **irreversible modification**. In Article 898, the Mejele states that if a person usurping property adds to it, the rightful owner of the property can either claim the value of the property or pay the value of the increase.<sup>18</sup> To illustrate this principle, the Mejele provides an example. If a person wrongfully appropriates clothes and dyes them (thereby increasing the value of the cloth), the owner of the cloth can either (a) be reimbursed for the original value of the cloth, or (b) pay the price of the dye that was added to the cloth to the usurper. Either choice is consistent with the basic principal behind usurpation: a property owner should be compensated for the value of their property. Because the property owner did not pay for the dye added to the cloth, he should not receive that benefit without paying the usurper.

The other type of modification discussed in the Mejele is **irreversible modification**. Irreversible modification occurs when property is changed so significantly that it does not reasonably resemble its

original form. In the cloth example, the property is still fairly similar—it just has dye in it now. Irreversible modification, by contrast, changes the property so much that it is no longer recognizable in its original form. The Mejele provides two useful examples<sup>19</sup>:

1. A wrongfully appropriates certain wheat and grinds it into flour. He is obliged to make good the loss and the flour becomes his property.
2. A wrongfully appropriates wheat and sows it in his own field. He is obliged to make good the loss and the crops become his property.

As you can see in these examples, the usurper has changed the property so much that there is no way for him to return it to the owner in a substantially similar form. What if the owner of wheat, for instance, was intending to use the wheat for something other than flour? Returning him the flour does no good. Therefore, the usurper is required to pay the value of the wheat, as opposed to return the flour.

The second specific usurpation circumstance covered by the Civil Code and the Mejele is the increase or decrease in value of usurped property. The value of property is frequently changing. The market may have more or less demand for it, the property may depreciate from use, or the property may begin to produce value (such as a chicken that begins to produce eggs). The basic rule is straightforward: any increase or decrease in the value of the property belongs to the rightful owner of the property unless it was caused by the usurper. This idea is reflected in Article 768 of the Civil Code, included above. Again, the Mejele provides some useful examples to illustrate the concept.

The first example is when the value of property increases while in the usurper's possession. In this case, "[a]ny increase in the property wrongfully appropriated belongs to the owner thereof."<sup>20</sup> For example, if someone usurps an animal, any milk produced by the animal is an increase in value that must be given to the rightful owner of the property. Similarly, the Mejele also notes that the "[t]he honey of bees which make their home in a garden belongs to the owner of the garden. If any other person takes and consumes such honey, he is liable to make good the loss."<sup>21</sup>

The second example is when the value of the property decreases. Here, the critical question is whether the decrease is due to the usurper's actions or not. Article 900 of the Mejele states that "[i]f price and the value of a thing decrease after the wrongful appropriation thereof, the owner may not refuse to accept it." For example, imagine that Ehsan takes 100 sheep from Nabil. At the time he took them, the sheep were worth 4,000 Afghanis each. After the sheep are taken, the price of the sheep declines to 3,500 Afghanis each because there are a lot of sheep currently for sale, dropping the market price. If Ehsan tries to return the sheep to Nabil, Nabil cannot refuse and request to be paid 4,000 Afghanis per sheep. Ehsan is not responsible for the market decline, and therefore is not responsible for compensating the decrease in value. However, if Nabil can show that he had a buyer ready to acquire the sheep at 4,000 Afghanis, then he may be able to claim "compensation of harm" under Article 767.

Mejele Article 900 goes on to state, however, that a usurper must compensate for a decrease in value if the usurper is responsible for it. For example, if "A wrongfully appropriates an animal and restores such animal to its owner in a weakened condition[,] A is bound to make good the decrease in the value of the animal."<sup>22</sup> Therefore, if Ehsan worked Nabil's animal in the hot sun for many days, causing it to become sick, Ehsan will be responsible for the decline in the animal's value.

The last specific usurpation circumstance that the Civil Code addresses is land. Read Article 769.

## Civil Code

### Article 769

- (1) If the usurped property is real estate, usurper shall be obliged to return it to owner or pay its market price.
- (2) If usurper has constructed building on real property or planted trees therein, owner may remove them or, if usurper agrees, pays their price when removed.
- (3) In case of destruction of real property or decrease of its price, even if usurper has not committed abuse, he shall be obligated to pay compensation

Article 769(1) provides the basic rule for land usurpation: usurped property must be either returned to the owner or compensation paid. Mejlle Article 905 adds to this idea, stating that if a usurper is responsible for the decrease the value of land (also known as **real property**), the usurper must make good on the decrease in value.<sup>23</sup> The Civil Code also addresses specific additions to land. Read Articles 769(2) and 769(3). Article 769(2) deals with additions to property. If someone who usurps property adds to it by, for example, building a shed, the person who owns the property can either destroy the shed or pay a reasonably agreed upon price to the usurper.<sup>24</sup> Article 769(3) creates a form of indirect liability for destruction of real estate. It provides that a usurper is responsible for the destruction of property even if that person is not the invader.<sup>25</sup> Complete the “Real Estate Usurpation Exercise” to work through these concepts.

### Application Exercise: Real Estate Usurpation

For each of the questions below, how much compensation is the landowner entitled to from the person who usurped his or her property.

1. Jamil owns a house but he is away on vacation. While Jamil is away, Nabil lives in the house. Nabil acts wildly and accidentally destroys a number of expensive pieces of pottery while living in the house. Is Nabil required to compensate Jamil for the value of the pottery?
2. Makai owns a large piece of land. Omar builds a very nice new shed on the edge of her property (but entirely on her property). Makai does not like sheds, and she has the shed destroyed. Is Makai required to pay Omar for the cost of building the shed?
3. Farhad owns a large amount of land. He leaves Afghanistan, however, for one year to pursue business opportunities in Asia. While he is gone, Laiqshah plants many crops on Farhad’s land. Laiqshah harvests all of the crops and sells them at the market. Farhad’s land, however, is worth significantly less because Laiqshah used many intensive cultivation techniques that make the land unusable for many years. Is Laiqshah required to pay Farhad money?

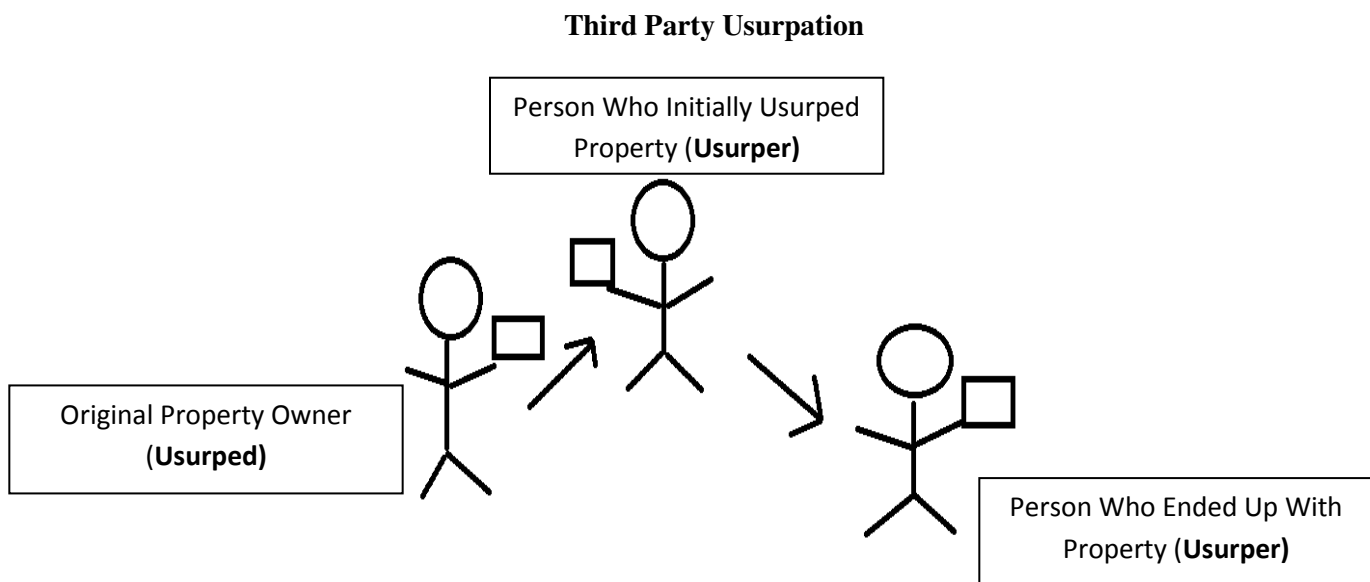
### Application Exercise: Real Estate Usurpation—Suggested Answers

1. Yes. Nabil is required to compensate Nabil for the property he destroyed while living in the house. This situation is similar to Article 905(1) of the Mejlle. It provides the following example: “A wrongfully appropriates a house and destroys a part thereof, or ruins it by living in it. If the value thereof decreased, he is bound to make good the amount of such decrease.”
2. No. Makai is not required to pay Omar for the cost of the shed. Article 769(2) of the Civil Code states that the owner of the property can destroy an addition *or* agree to pay a reasonable price for it.

3. Yes. Laiqshah is required to pay Farhad for the depreciation in the value of his land. This situation is similar to Article 907 of the Mejlle. It provides the following example: “If a person wrongfully appropriates a piece of land belonging to another and cultivates it, and the owner obtains the return thereof, the latter is also entitled to be indemnified for any decrease in the value of the land arising out of such cultivation.”<sup>26</sup>

### 3.1 Third party usurpation

In the last section, we covered the topic of usurpation—the taking of another’s property without consent. The Civil Code also deals with an idea this book we will call **third party usurpation**. Standard usurpation involves one person usurping property from the rightful owner of the property. Third party usurpation occurs when a third party usurps property that has already been usurped once. The illustration below introduces the idea.



With these terms in mind, let us look at the major provisions of the Civil Code addressing third party usurpation.

#### Civil Code

**Article 770**

Usurper of usurper is treated the same as usurper. If the abused property perishes while in his possession or if he destructs it, both usurpers shall be liable towards the person whose property is usurped.

**Article 771**

If the second usurper returns the usurped property to the first usurper, only the former shall be acquitted and if the property is returned to owner, both usurpers shall be acquitted.

**Article 772**

If usurper exchanges or donates the usurped property in consequence of which all or part of the property is destroyed, both of the usurper and the person to whom possession is given shall be recognized liable. The person whose property has been usurped may claim compensation from either of them.



Before we begin discussing the rules of third party usurpation, let us begin with an example. Imagine that Aaron just purchased a new iPhone, which he is very excited about. Bashir, jealous of the phone, steals it from Aaron. Bashir does not keep close watch of the phone, however, and Camila ends up taking it from Bashir.

In many respects, the rules for third party usurpation are the same as the rules for normal usurpation. Article 770<sup>27</sup> establishes that the rules for the usurper—the third individual that actually ends up with the property—are the same as the rules for the first person that took the property. As you will recall from the last chapter, the usurper has an obligation to return the property and must pay for damage to the property. Here, Camila has an obligation to return the iPhone to A.

Because there are two people responsible for usurping property, there are also a couple of unique rules for third party usurpation. Third party usurpation creates obligations very similar to the concept of joint liability discussed earlier in the chapter. Article 770 recognizes that “both usurpers shall be liable” for compensation. Similarly, Article 772 states that if “all or part of the property is destroyed,” the usurped can demand compensation from either the first usurper (Bashir) or the second usurper (Camila). In our example, both Bashir and Camila are responsible for compensating Aaron for the cost of an iPhone.

Is this rule fair? If Camila currently possesses the phone, why should Bashir be responsible for compensating Aaron for the harm? There are a couple of justifications for this rule. First, Bashir is not without fault. Bashir is the initial person that took the iPhone from Aaron, so Bashir should bear some of the responsibility for compensating Aaron’s loss. This rule may also incentivize Bashir to try to find the property and return it to Aaron. When Camila has the iPhone, Bashir gets no benefit from the stolen property but nonetheless remains responsible to compensate Aaron for the damage.

The last important issue third party usurpation topic covered in the Civil Code is the relationship between Bashir and Camila. Article 771<sup>28</sup> states that if Camila returns the iPhone to Bashir, Camila is exculpated from liability, and all the liability shifts back to Bashir, the original person that took the phone. If Camila gives the phone directly back to Aaron, however both Bashir and Camila are exculpated.

#### **4. BODILY DAMAGE AND INTELLECTUAL DAMAGE**

##### **Civil Code**

###### **Article 774**

Person who commits harmful act such as murder, injury, assault or other injuries to a self, he shall obliged to compensate for the inflicted harm.

###### **Article 775**

Person who causes murder or death of another person by injury or any other harmful act, he shall be obligated to pay compensation to people whose alimony has been the deceased’s responsibility and have been deprived of it due to the murder or death.

###### **Article 778**

(1) Compensation shall also include evaluation of intellectual harm.

(2) If, due to death of person who has been assaulted, intellectual harm is inflicted upon his spouse or relatives, court may rule for compensation to the spouse and relatives up to second category.

(3) Compensation for intellectual harm shall not be transferable to others, unless its amount is fixed by agreement of the parties or by final ruling of court.



The Civil Code also includes articles preventing **bodily harm**. As discussed in the introduction, both criminal law and civil law contain prohibitions against bodily harm. The civil obligation against bodily harm is Article 774. It states that, in the event that an individual creates bodily harm, that individual must compensate the harmed person for the damages.

Article 775 deals with damages for bodily harm in the event on death. If bodily harm causes death, the individual “shall be obligated to pay compensation to people whose alimony has been the deceased’s responsibility.” Put differently, an individual who kills another individual will be responsible to pay **alimony** to those under the deceased’s responsibility. Alimony is a court-ordered allowance intended for maintenance and support of the recipient. Therefore, if Ghulam kills Omar, Ghulam will have a civil obligation to pay an allowance to those that were under Omar’s responsibility. This would include wives, children, and perhaps close relatives.

In addition to physical harm, the Civil Code also prevents **intellectual harm**. Article 778(1) broadly states that compensation must be paid for “intellectual harm.” When you hear “intellectual harm,” how would you define the term? What are some specific examples? Intellectual damage includes two different types of harm: non-physical harm and reputational harm. **Non-physical harm** includes injuries that are not susceptible to easily being observed or measured. Three common forms of non-physical harm are pain, emotional distress, and nervous shock. As we will see, “non-physical harm” is not a completely accurate term because pain in particular is still physical. Nonetheless, pain, suffering, and nervous shock are included in a separate category because it is not easy to calculate the damages for these injuries.

Let’s consider an example. Imagine that Rasoul and Bahara are happily married. They are driving to the store one day when Fardeen, driving very fast, hits their car. Rasoul suffers a number of injuries, including a broken leg and a broken arm. His family’s car is also destroyed. Most importantly, Bahara also dies. During Rasoul’s hospital recovery, he is in immense physical pain. His arm and leg obviously hurt, but so does the rest of his body. Even getting up to go to the bathroom is very painful. Most of all, Rasoul is extremely distraught about the loss of his wife, whom he loved very much. Rasoul never wants to get near a car again because he constantly has flashbacks to the terrible accident.

The damages Fardeen will be responsible for paying Rasoul include many types of harm. The damages for part of the accident are straightforward: Fardeen will need to pay the cost of fixing Rasoul’s car and paying for the medical bills to fix his broken arm and leg. There are other damages, however, that are more difficult to calculate. The general pain and the emotional stress that Rasoul felt in the hospital fall within Article 778(1), included above. Although the payment of damages will be covered in greater detail later in the book, it is important to note for now that Rasoul’s compensation for the accident will need to include the general pain he felt and the emotional distress he suffered. Specifically, Article 778(2) also states that if “intellectual harm is inflicted upon” a spouse or relative in the event of death, the “court may rule for compensation to the spouse and relatives up to second category.” In our example, Rasoul is clearly entitled to compensation for the intellectual harm he suffered as a result of the car accident. Islamic law also provides for compensation of nervous shock, provided that the nervous shock is caused by an event that is not too remote.<sup>29</sup> Here, Rasoul probably would not have difficulty proving that the nervous shock was a result of the car accident itself.

In addition to non-physical harm, the other type of intellectual harm prohibited by Article 778 is **reputational harm**. Reputational harm is an untrue attack that harms another’s dignity. It can be done orally (such as through speech) or in writing (as in a newspaper article). While common law jurisdictions are fairly skeptical of reputational harm claims, most civil law jurisdictions show a “wholehearted acceptance” of claims for injury to feelings and other non-monetary loss.<sup>30</sup> The law will not provide

damages for every attack on a person's reputation, but the case study of Pakistan's Qazf ordinance provides a good example of how the law can prohibit reputational harm.

### Case Study: Pakistan's Ordinance Prohibiting Qazf<sup>31</sup>

In Islamic law, **qazf** is a false accusation of **zina**—unlawful sexual intercourse. Part of the Pakistani ordinance against qazf is excerpted below. Qazf is a good example of reputational harm. Because unlawful sexual intercourse is such a serious crime, there is a specific provision prohibiting false accusations of the crime. If there were no prohibition against falsely making the accusation, people could be more inclined to make false accusations for illegitimate reasons, such as spite or revenge. As you read the excerpt, pay particular attention to the exceptions. Why are the exceptions included? Do you agree with them?

#### 3. Qazf

Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes [sic] an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said except in the cases hereinafter excepted, to commit qazf.

...

First Exception (Imputation of truth which public good requires to be made or published): It is not qazf to impute zina to any person if the imputation be true and made or published for the public good. Whether it is for the public good, is a question of fact.

Second Exception (Accusation preferred in good faith to authorized person): Save in the cases hereinafter mentioned, it is not qazf to prefer in good faith an accusation of zina against any person to any of those who have lawful authority over that person with respect to the subject matter of the accusation.

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<sup>1</sup> F. M. Goad, “The Moslem Law of Civil Delict as Illustrated by the Mejlle,” *Journal of Comparative Legislation and International Law* 21 (1939): 65 (“If one person by his act directly causes material damage to another person's property, the doer is primarily responsible. No question of . . . ‘negligence’ strictly arises.”).

<sup>2</sup> For a piece analyzing the role of strict liability in Islamic law, see Abdul Basir Bin Mohamad, “Strict Liability in the Islamic Law of Tort,” *Islamic Studies* 39:3 (2000): 445-462. The piece argues that “Muslim jurists agree unanimously that a person is not liable for what is lost or destroyed unless there has been negligence (tafit) or transgression (ta’addi) on his part.” *Ibid.* at 452.

<sup>3</sup> Marie-Noelle Bachllier et. al, *Series of law of obligation: Volume 2: Unilateral will, legal events* (Paris: International Institute for Comparative Studies, 2013), 65.

<sup>4</sup> 20 Cal. App. 3d 528 (1971).

<sup>5</sup> F. M. Goad, “The Moslem Law of Civil Delict as Illustrated by the Mejlle,” *Journal of Comparative Legislation and International Law* 21 (1939): 67 (“If one person by his act directly causes material damage to another person's property, the doer is primarily responsible. No question of . . . ‘negligence’ strictly arises.”).

<sup>6</sup> For this paragraph, see generally Franco Ferrari, “Comparative Remarks on Liability for One's Own Acts,” *Loyola of Los Angeles International and Comparative Law Review* 15 (1993): 813.

<sup>7</sup> Al-Majalla Al Ahkam Al Adaliyyah (The Ottoman Courts Manual (Hanafi)) Article 91 (1877) [hereinafter Mejlle]. Article 91 states “An act allowed by law cannot be made the subject of a claim to compensation.”

<sup>8</sup> Mejlle Article 91.

<sup>9</sup> Mejlle Article 90.

<sup>10</sup> Even though the lawsuit occurred in the United States, the U.S. court determined that Afghan law should govern the case under “choice of law” principles. Choice of law is beyond this course.

<sup>11</sup> *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 904 (Tex. App. 2000).

<sup>12</sup> F. M. Goad, “The Moslem Law of Civil Delict as Illustrated by the Mejlle,” *Journal of Comparative Legislation and International Law* 21 (1939): 68. As you might imagine, the doctrine of self-defense—covered in detail in a criminal law class—has limits. If someone lightly pushes you, you cannot shoot the person.

<sup>13</sup> Mejlle Article 8.

<sup>14</sup> For a look at products liability law in Egypt, see Howard L. Stovall, “Product Liability Law in Egypt—An Overview of Some Civil and Commercial Code Rules,” *Law Office of Howard L. Stovall*.

<sup>15</sup> Mejlle Article 888.

<sup>16</sup> These facts are adapted from *Orser v. George* 252 Cal. App. 2d 660 (1967).

<sup>17</sup> Mejlle Article 881.

<sup>18</sup> Mejlle Article 898.

<sup>19</sup> Mejlle Article 899.

<sup>20</sup> Mejlle Article 903.

<sup>21</sup> Mejlle Article 904.

<sup>22</sup> Mejlle Article 901(1).

<sup>23</sup> Mejlle Article 905.

<sup>24</sup> Mejlle Article 906 also addresses this idea.

<sup>25</sup> Article 769(3). This idea is also expressed in Mejlle Article 901.

<sup>26</sup> Mejlle Article 907.

<sup>27</sup> Article 910 of the Mejlle is similar to Article 770.

<sup>28</sup> Article 911 of the Mejlle maps closely onto Article 771.

<sup>29</sup> For an overview of nervous shock in Islamic Law, see Abdul Basir bin Mohamad, “Nervous Shock: Is it Available in The Islamic Law of Tort?” *The Journal of Rotterdam Islamic and Social Sciences* 1 (2010): 1-26.

<sup>30</sup> P.F. Hanford, “Moral Damage in Germany,” *International and Comparative Law Quarterly* 27 (1978): 851.

<sup>31</sup> The Offence of Qazf (Enforcement Of Hadd) Ordinance, The Government of Pakistan, February 9, 1979, *available at*: [http://www.pakistani.org/pakistan/legislation/zia\\_po\\_1979/ord8\\_1979.html](http://www.pakistani.org/pakistan/legislation/zia_po_1979/ord8_1979.html).

## CHAPTER 3: RESPONSIBILITY FOR THE ACTIONS OF OTHERS, FOR ANIMALS, AND FOR THINGS

### INTRODUCTION

At this point in the textbook, you have been exposed to the law of civil responsibility as it is applied to individuals who have caused harm to others. Civil responsibility law can also impose liability on individuals who have not directly caused harm, but who have a legally significant relationship to a person or thing that caused harm. Examples include parents bearing responsibility for children and herders bearing responsibility for their animals. These different relationships, and the means by which they transfer liability to a third party, are the focus of this chapter. We will first explore the elements of liability that are at issue in these relationships before exploring the relationships themselves.

#### 1. GENERAL FEATURES: ELEMENTS OF STRICT AND SECONDARY LIABILITY

In general, there are five core elements that must exist to establish liability under civil responsibility law. The basic narrative of these core elements is this:

- Harm occurred
- The individual that we believe to be liable engaged in some conduct prior to the harm
- The conduct was wrongful
- The conduct caused the harm
- Therefore, the individual who engaged in the conduct is at fault, and is liable for the harm

At any point in that narrative, if one of those five essential elements is missing or cannot be proven, then liability cannot be imposed. The general principle of law is that an individual is obliged to provide compensation only if he is the cause of the damage.

#### Civil Code

##### Article 776

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

This chapter will discuss situations where there may not be fault or wrongful conduct, but there is still liability.

The law recognizes that things, animals, and certain categories of people are by their very nature incapable of being held legally responsible for their actions. However, harm may still result from contact with these things, animals, or people. Most societies—including Afghan society—decided long ago that it is not fair for the person or persons who were harmed to bear the full loss resulting from that harm and began looking for ways to spread the loss around more fairly. This is not always possible, but in some cases, an individual or group of individuals exist that have a specific type of relationship with the thing, animal, or person that caused the harm. These specific relationships—explained below—make these individuals liable for any harm caused by contact with the thing, animal, or person in question. The logic is this:

- Harm occurred
- The injured person was in contact with a person, animal, or thing prior to the harm
- The contact caused the harm

- The law does not consider the person or animal responsible for their own conduct
- Some other individual is legally responsible for the conduct of the person or animal
- Therefore, that other individual is liable for the harm caused by the conduct

This logic oversimplifies the many nuances of the relationships involved and the considerations at each stage, which shall be detailed in this chapter. However, it should be clear that this pattern is significantly different than the pattern observed in the more direct civil responsibility situation described above, and it contains elements of two significant legal concepts: strict liability and secondary liability. **Strict liability** is a general term used to describe liability that exists even in the absence of fault. For example, the government may decide that it is dangerous for people to drive above a certain speed on roads. If the government decides to punish people who drive above that speed, whether or not they did so intentionally, the government is imposing strict liability for this offense. **Secondary liability** is the general term used to describe an instance where one party has assumed legal responsibility for the actions of another party (such as a father who is responsible for the actions of his son). This chapter deals with liability borne by third parties, both with and without regard to fault. In short, it covers many cases of secondary and strict secondary liability.

## **2. DIFFERENCES IN THE GOALS OF CIVIL RESPONSIBILITY LAW IN CASES OF STRICT SECONDARY LIABILITY**

The civil responsibility law fulfills a variety of social functions: (1) it provides compensation for harm by shifting losses from the person harmed to the person responsible for that harm, (2) it protects interests and promotes investment by assuring people that they will not have to suffer losses that result from someone else's error, (3) it promotes social order and cohesion by providing a just and consistent system for resolving certain types of disputes, (4) it reinforces social values by articulating a preferred set of behavioral rules related to how individuals should treat other members of society, and (5) it deters people from behaving in potentially injurious ways by teaching personal responsibility through the expectation that they would bear the loss for any harm they cause.

In cases of secondary strict liability—in other words, where the person held liable did not cause the harm and is not at fault—not all of these functions are relevant.

In certain situations, the relationship between the instigator of the harmful act and a particular individual warrants that the individual rather than the wrongdoer be held responsible. For example, in the case of children, society does not expect that child will be fully aware of the consequences of his or her actions. Parents or guardians must take the necessary precautionary measures to ensure that the child does not commit a harmful act. If a harmful act is committed, the relationship between child and parent warrants that the parent be held responsible.

## **3. HARM CAUSED BY OTHER PEOPLE**

### **3.1 Harm caused by juvenile children or the insane**

Several key relationships can lead to the imposition of secondary or strict secondary liability for the actions of another person. The first of these is father-child.

#### **3.1.1 Theory of liability**

## Civil Code

### Article 790

Father and grandfather shall, respectively, be liable to compensate for damage inflicted by minor, unless they prove that they had taken necessary care in this respect or that harm would have occurred notwithstanding the necessary care.

### Article 791

(1) Person who, by provision of law or agreement, has obligation of supervision of person shall be responsible for harmful actions of person under his supervision, such as minor and insane.

Children are still in the process of learning society's morals, values, and behavioral expectations. For this reason, society does not always consider children to be wholly responsible for their actions. Just as parents are responsible for the health and safety of their juvenile children, they are also presumed to be at fault for any harm that their children may cause. For example, if a child throws a stone and breaks a window, the father is presumed to be at fault. If a father is unable to provide compensation for harm caused by his child, then the victim of the harm is permitted to seek compensation from the grandfather of the child.

If a person or institution undertakes by contract to be responsible for a child—at an orphanage or boarding school, for example—then that person or institution will be subject to secondary liability on the same terms as a natural parent. Similarly, an individual may by operation of law or contract become responsible for a person who is insane and cannot be held responsible for his or her own actions. This individual will also be subject to secondary liability on the same terms as a natural parent.

### 3.1.2 Defenses against claims

While these circumstances are examples of secondary liability, they are not purely strict secondary liability because liability is not imposed (1) if the father can “prove that they had taken necessary care,” or (2) the father was not paying necessary attention, but the damage would still have occurred if the father had been paying necessary attention. These exceptions create two possible defenses that the father can raise to the claims against him. Both defenses are based on negligence, or the failure to take actions that a prudent parent would take to prevent foreseeable harm to others. To present a defense under the first exception, the father would need to demonstrate that he had not been negligent. To present a defense under the second exception, the father would need to demonstrate that the harm would have occurred whether he was negligent or not. If the father can provide such a defense, the child will still be liable, as described in Article 762 below.

## Civil Code

### Article 762

If discerning or undiscerning minor or person considered as subject to provision of undiscerning minor destructs property of another, compensation for the destructed property shall be paid from his own property. If he does not have property, moratorium shall be granted until he gains property. Guardian, executor and custodian shall not be considered liable for the destructed property, unless court obligates them to compensate for the property; in this case they have the right to refer to the destructor.

At this point, we leave Articles 790 and 762 and switch to the situation envisioned in Article 791.

If a person or institution undertakes by contract to be responsible for a child—at an orphanage or boarding school, for example—then that person or institution will be subject to secondary liability. It is somewhat unclear whether the person or institution will face liability on the same terms as a natural parent or if the person or institution will be subject to strict liability, because unlike Article 792, Article 791 provides no exception that allows for a defense. Similarly, an individual may by operation of law or contract become responsible for a person who is insane and cannot be held responsible for his or her own actions. This individual will also be subject to secondary liability on the same terms as a natural parent.

### **Application Exercise: Walking Home**

An eight-year-old boy and his father are walking home from school. The boy is a little bit ahead of his father, kicking stones as he walks. While they are walking across a bridge, the boy kicks a large piece of metal that flies off the bridge and hits the windshield of a car below. The windshield breaks, and the startled driver crashes into another car.

1. Was the father at fault?
2. If he was at fault, is he liable for the damage caused in the crash?
3. Does it make any difference if the boy was 16 years old (presumably old enough to understand potential consequences of his actions)?
4. Does it make any difference if the boy had not been kicking rocks and had been well behaved before he kicked the metal off the bridge?

### **Application Exercise: Walking Home—Suggested Answers**

1. The father probably was at fault. He saw that his son was kicking rocks and could have foreseen that some harm would occur. He could have directed his son to stop and prevented the harm.
2. Since a father is responsible for the actions of his child, the father would be liable for damage that resulted from the crash caused by his son unless he can prove that he had taken adequate precautionary measures.
3. It makes no difference whether the boy understood the consequences of his actions. The father is still liable under the law. However, the amount of care that the father would have to demonstrate to show precaution may be less than it would be if the child were younger, in which case the child may be liable rather than the father.
4. It is possible, though not likely, that this fact could be used as evidence that the father had not been negligent. Boys do kick things from time to time without warning. If the court decides that this fact is proof that the father was not negligent, the father would likely escape liability.

## **3.2 Harm caused by employees**

The other major relationship that can expose someone to secondary liability for the actions of another person is the employer-employee relationship.

### **3.2.1 Theory of liability**

## Civil Code

### Article 790

Father and grandfather shall, respectively, be liable to compensate for damage inflicted by minor, unless they prove that they had taken necessary care in this respect or that harm would have occurred notwithstanding the necessary care.

### Article 791

(2) Employer shall be considered liable for harms inflicted by his employee due to committing illegal act during work or due to the work, unless otherwise provided by law or agreement.

Liability under this relationship is based on a special sub-category of strict secondary liability known as vicarious liability. **Vicarious liability** imposes liability on individuals for the actions of their agents. An **agent** is a person who acts on behalf of—and with the apparent authority of—another individual. There are two recognized goals of vicarious liability: (1) to ensure that someone who directs another person to take action that results in harm will bear responsibility for that harm, and (2) to provide the person who is harmed with a greater chance of obtaining compensation equal to the loss he or she suffered.

The theory behind the first goal is that, if the conduct that resulted in harm would not have taken place without the employer's direction, then the employer bears some responsibility for that action and should be forced to participate in the compensation process. The second goal is designed help injured parties quickly obtain compensation, but it is also designed to help spread losses in such a way that no one person bears too much of a burden. Society recognizes that employers generally have greater financial resources than employees and are able to spread losses out over various aspects of their business. This allows employers to avoid financial ruin where an employee could not. For example, if a server at a restaurant burns a patron with a hot plate and that patron decides to sue to recover medical expenses, the restaurant owner is more likely to have the financial ability to pay for the damage.

### 3.2.2 Defenses against claims

The primary defense against claims of vicarious liability is to prove that the person who engaged in the harmful conduct was not acting as an agent of the employer when engaging in that conduct. People considered to be acting as agents if: (1) they were instructed by the employer to engage in the harmful conduct, (2) the harmful conduct was for the employer's benefit, or (3) the risk that the conduct would take place was foreseeable when the employer established the relationship with the employee. If the injured party can prove any one of those three things, then the employer is liable for the injury.

The first two aspects of the defense show that the relationship is of presumed liability rather than strict liability. If either of those first two conditions is met, then the employer is liable. The presence or absence of the third factor depends on negligence. The employer will be judged based on whether the risk was foreseeable and on the actions the employer took to limit the risk. If the employer could have foreseen the risk and took steps similar to what any ordinarily prudent person would have taken to prevent the harm from occurring, then the employer can escape liability. If not, the employer will be held liable for the conduct of his or her employee.

Two nuances are worth mentioning. First, there is a difference between agents undertaking contractual work for a specific project or period of time and employees working for an indefinite period of time. Only the latter gives rise to vicarious liability. Second, if the employer instructs the employee to do something illegal, the employer is vicariously liable only if the employee does not know that the activity is illegal. If the employee is aware that the activity is illegal, then both parties are liable.



### **Application Exercise: Security Guard**

Parwaiz is a security guard outside of a local factory. His employer provides him with a one-hour break for lunch each day. During his lunch break, he usually drives down the street to eat at a restaurant instead of eating in the factory dining room. One day, while driving back from lunch, he crashes into a car while turning into the parking lot at the factory, but before he is on company property.

1. Is Parwaiz operating as an agent of his employer at the time of the crash?
2. If so, is the employer liable for the damage caused in the crash?
3. Does it make any difference whether or not there was a sign up at the guard post saying that “guards must eat lunch in the dining room”?
4. Does it make any difference whether Parwaiz had spent an hour and twenty minutes at lunch, instead of the hour his employer allows?
5. Does it make any difference whether the driver of the other car was driving negligently?

### **Application Exercise: Security Guard—Suggested Answers**

1. It is not certain, but there is a strong argument that Parwaiz was taking action for his employer’s benefit. By taking a break and getting lunch, Parwaiz was more likely to be an effective security guard than if he was distracted by hunger.
2. If the court is persuaded by the argument in answer one, the employer would be liable for the damages. However, the employer could later try to gain compensation from Parwaiz as described in the “Compensation from Primary Actors” section below.
3. If Parwaiz was acting against his employer’s instructions when he drove to lunch, the employer has a very strong argument that Parwaiz was not acting as an agent and that he should be solely liable for the damages.
4. Again, the fact that Parwaiz was permitted only an hour and took more time to return could help his employer escape liability. However, the argument is not as strong as in answer three. There could be outside reasons that he returned late: he may have had mechanical problems with his car, there may have been heavy traffic, or the restaurant may have taken too long to deliver his bill. The court may find any of these factors persuasive in determining that he was still acting in the course of his employment.
5. It is possible that if the other driver were driving negligently, Parwaiz and his employer might have their liability reduced or eliminated entirely based on the conduct of the other driver.

### **3.2.3 Compensation from primary actors**

Note that a person forced to pay damages through secondary liability for the actions of another can also go to court to obtain compensation from the person who actual engaged in the libelous conduct.

**Article 792**

Person liable due to act of another may claim the doer compensation for he has paid.

In practice, it is very unlikely that an individual could recover compensation he paid as a result of a child's or an insane person's conduct. However, this code provision is much more likely to be used when an employer is forced to pay compensation for an employee's conduct.

**4. HARM CAUSED BY ANIMALS OR THINGS**

Animals can act only as is natural for them to act. They cannot be held liable for their conduct. When their conduct results in harm to the persons or property of others, their owner is liable. Similarly, if an individual's property causes harm, the owner is responsible. There are exceptions to these general rules that will be discussed below.

**4.1 Harm caused by animals**

As indicated above, ownership is the principle relationship that gives rise to liability for the actions of animals.

**4.1.1 Theory of liability****Civil Code****Article 793**

Criminal event t caused by animal shall not create any liability. Owner shall be liable to compensate for damages caused by animal if his failure to take necessary precaution, because to preventing the event has been proven.

**Article 794**

If owner sees animal while inflicting harm on property of others and does not prevent it or he has had been aware of defect of animal but has not protected it, he shall be considered liable.

What is interesting in these articles is that there is no presumption of liability. Rather, the owner is presumed to be innocent unless the wronged party can show that adequate precautions were not taken to prevent the harm. One way to show that precautions have not been taken is described in Article 794, in the case that the guardian or owner of the animal does not stop the animal from causing harm when he sees it doing wrong. There are two reasons for imposing secondary liability on the owner of the animal: (1) the owner is presumed to know the nature of his animal and should be encouraged limit the risks of damage that may occur when the animal acts according to its nature, and (2) the owner derives benefit from the animal and therefore should also bear the risks of owning that animal.

**4.1.2 Defenses against claims**

The two code provisions above overlap in their effect, but they do not have identical effects. Together, they ensure that an owner is liable for harm caused by his animal: (1) when he knows that his animal is causing harm but takes no steps to prevent further harm, or (2) when he is negligent in failing to take steps to limit foreseeable harm.

In short, if the owner does not know that harm is taking place and was not negligent in preventing it, then the owner is not liable for the harm. Typically, this will require the intervention of a third party whose actions make it partially or entirely liable for the animal's actions. For example, if an animal is securely locked in a pen and a third party releases it without the owner's permission, the owner will not be liable. Harm that results from the release of the animal is the responsibility of the person who released it, not the owner of the animal (Article 795).

### Civil Code

#### Article 795

If person enters an animal into property of other without his permission, he shall be liable to compensate for the the inflicted damage.

#### Application Exercise: Escaped Dog

Fariad owns a large dog, and keeps her in his yard. One day, when Fariad leaves home for work, he forgets to latch the gate. The dog wanders into his neighbor's yard, where she dug up the neighbor's bushes.

1. Is Fariad liable for the damage to the neighbor's bushes?
2. If Fariad did latch the gate, but later a neighborhood child came to play with the dog and accidentally let her escape, who is liable?
3. If Fariad had previously told the child in Question 2 that he could come visit the dog anytime, who is liable?

#### Application Exercise: Escaped Dog—Suggested Answers

1. In this simple situation, Fariad is clearly liable. He owns the animal that caused the harm, and his negligence made the harm possible.
2. Under these circumstances, the child's negligent conduct allowed the dog to enter onto the neighbor's property, and the father of the child would be liable for his conduct.
3. This situation is slightly more complex. As in Question 2, the child was negligent. However, Fariad could have reasonably foreseen that a child would not be sufficiently careful and that the dog might escape. Both the child's negligence and Fariad's negligence contributed to the harm. It is likely that both Fariad and the child's father would share liability for the damage.

## 4.2 Harm caused by things

There are two main categories of people that have relationships with material things that can expose them to liability for harm caused those things. The first and most obvious is the owner of the thing. The second is the current possessor or protector of the thing.

### 4.2.1 Theory of liability

## Civil Code

### Article 796

(1) Caretaker of building, even though he may not be its owner, shall be liable for damage caused by destruction, even if the damage is minor, unless it is proved that destruction was not due to negligence in caretaking or it has happened due to oldness or defect of the building.

(2) If person faces risk by building of another person, he may demand its owner to make necessary arrangements in order to prevent the risk. In the owner does not take any action, person may, upon obtaining permission of court, made those arrangements on the account of owner.

### Article 797

If person possesses technical instruments or other objects that need special attention in order not to inflict harm, in the case of infliction of harm by these objects and instruments, he shall be recognized liable, unless he proves that he has taken adequate precautions for prevention of harm. Special provisions, in this respect, that will later be enacted shall be observed.

The owner of a piece of property may not always directly control it. A house could be rented by another person, as could a piece of machinery or other technical instrument. The law here tries to ensure that the individual with the greatest opportunity to prevent a given type of harm caused by a thing is responsible for compensating the victim if that harm does occur. If a building catches fire because the electrical wiring is old, the tenants are not held responsible because the owner has control of the building's structure. However, if the building catches fire because a tenant left the stove on when he went to work, then that tenant is responsible for the harm caused. In short, Article 796 places responsibility on the caretaker of the property rather than the owner.

This chapter covers several types of civil responsibility liability, but liability involving buildings is unique. Where a party foresees that some defect in a building may cause harm, that party may obtain permission from the court to prevent the harm if the owner fails to do so. There are two elements to the law's reason for providing this course of action: (1) more than anything else that may cause harm in this chapter, buildings are immovable and enduring, and (2) because of this, it is possible to foresee a potential harm far enough in advance to prevent it the formal justice system without disrespecting the owner's property rights.

### 4.2.2 Defenses against claims

As with elsewhere in this chapter, the threshold for liability is negligence on the part of the person with the most direct control over the thing that caused the harm. The person attempting to escape liability must either demonstrate that he or she was not negligent or that the harm would have occurred regardless of whether there was negligence or not. Returning to the example of the building fire above, a tenant leaves the stove on when he goes to work, but the building catches fire because of old electrical wiring, then the tenant is not responsible and will not be held liable. Because the harm would have occurred whether or not he was negligent, his negligence is irrelevant.

### Application Exercise: Landlord and Tenants

Hatem lives in an apartment on the second floor of a three-story building. One day, as he is home watching television, water starts to drip through the ceiling and onto his leather furniture.

1. If the leak is caused by a broken pipe in the wall, who is liable?

2. Does the liability shift if the leak was caused by a faucet that was left running?
3. If Hatem notices the leak and does nothing to stop it, who is liable for damages?

#### **Application Exercise: Landlord and Tenants—Suggested Answers**

1. If the leak was caused by a broken pipe or any other serious flaw in building maintenance, the owner of the building would be liable.
2. Under this set of facts, it appears that the person on the third floor negligently left the water running. The third floor tenant would be liable to the landlord for the damage to the building and to Hatem for the damage to his property.
3. In this scenario, the third floor tenant would be liable for the damage above Hatem's apartment, if the leak was the result of his negligence, as well as for any damage that took place before Hatem noticed the leak. In theory, Hatem should be liable for damage that occurred after he had the opportunity to stop the leak and chose not to do so. This means that he should not be compensated for any damage to his property after that point, and he would also be liable for any further damage to the building that occurred and for any damage to property belonging to the tenant below him. In practice, however, it would be very difficult to prove that Hatem had noticed the leak and chosen not to stop it, unless Hatem admitted this fact.

## **5. OTHER MODIFICATIONS TO LIABILITY**

The Civil Code provides for two modifications to liability for harm caused by animals or things: one of time and another of amount. Together, the below articles increase the efficiency of civil responsibility law and ensure that the law better conforms to the values of society.

### **Civil Code**

#### **Article 798**

Claim of compensation for damage caused by any kind of harmful act shall not be heard after lapse of three years since the date of knowledge of the harmed and the inflictor of the occurrence of damage and, in all circumstances, after lapse of 15 years since the date of occurrence of harmful act.

#### **Article 799**

If person, even undiscerning, gain, without legitimate cause, profit to the harm of another person, he shall be obligated to compensate for the inflicted, within the limits of what he has gained.

The first article is a practical limitation on the time period in which a person can attempt to obtain compensation for harmed suffered. It is designed to protect individuals and the court system from claims arising out of damage in the distant past. If a person who suffered some harm could wait indefinitely to bring a lawsuit to recover their losses, then nothing would stop them from bring lawsuits for minor harms in the distant past. This could give property owners a significant fear of being sued at any time for events they did not know occurred. This would be a powerful disincentive for ownership and would have a negative impact on economic activity. The simple solution was to place limits on when a case could be brought.

The second article reflects both a social and economic aversion to unjust enrichment. **Unjust enrichment** occurs when one person profits directly from harm or losses suffered by another. Society finds this

morally distasteful and imposes an obligation on the unjustly enriched person to compensate the harmed individual. Unjust enrichment is also economically problematic because deriving profit from harm can reduce the incentive to prevent that harm. This could make people more careless and could cause more harm. Thus, if any profit is gained by the harmful act, the person that has suffered from the harmful act may also claim the profits that have accrued due to the harmful act.

## **CONCLUSION**

In this chapter, you have studied the relationships that can give rise to secondary liability and the standards for assigning liability within those relationships. When attempting to assign liability, first try to understand the relationships at issue, then attempt to reconstruct the facts of the situation that led to harm. In all cases, identify intervening third parties and other elements that might shift liability from one person to another. Understanding liability under civil responsibility law depends on gaining an accurate understanding of these facts and relationships.

## CHAPTER 4: RELATIONAL LOSS—ECONOMIC LOSS AND SECONDARY VICTIMS

### INTRODUCTION

This chapter will discuss two ideas of relational liability, which is liability that is less direct than the other forms of harm that we have seen in this book. Both of these theories of liability involve compensation to someone who was not harmed directly. First is the idea of pure economic loss. Under this theory of liability, someone might be held liable for damage that is not physical in nature, but that involved only an economic or financial harm to the victim. Second is the idea of secondary victims. Under this theory of liability, someone might be liable to a relative of the victim instead of the victim himself.

#### 1. ECONOMIC LOSS

Think about a situation where Mustafa is building his own house in Kabul on an empty plot of land. But he is digging negligently. He is not paying attention to what he is doing. He is digging too quickly, and his neighbors told him that city gas pipes might be located underneath the ground. As he is digging, he cuts a gas pipeline that provides all the energy to a nearby factory. The factory is forced to shut down for a week while it waits for the repairs to the gas pipeline to be complete. None of the machinery at the factory is damaged, and no one at the factory is hurt. All of the damage is economic loss. In other words, it is nonphysical. The factory loses the profit that it would have made by selling the products it would ordinarily have produced during that week of operation. Instead, the machinery lay silent. This chapter will discuss Mustafa's liability in such scenarios.

The Civil Code creates liability for damage to people and property. So where does nonphysical damage fit in? Can the factory that has to shut down operations for a week recover any money from the man who negligently cut the gas pipeline? Remember that Article 758 and Article 760 of the Civil Code refer only to the destruction of property of another person, and other articles refer to injury to people. But Article 776 is potentially more relevant because it refers to more general “harm.”

#### Civil Code

##### Article 776

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

Article 776, therefore, is a general “catch-all” provision of law that potentially covers various types of harm. But because Article 776 is ambiguous about what types of harm might create liability. The possibility that it covers “economic loss” is simply one possible interpretation, based on a comparative analysis of equivalent rules in the French system. As a lawyer, whenever a law is vague, comparative analysis can help you make arguments that the law is favorable to your client.

The equivalent French civil code articles discuss damage in even more general terms. The French civil code has remained largely unchanged for hundreds of years, especially the famous two articles that form the basis of French delictual obligations. They read as follows:

## French Civil Code

### Article 1382

Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

### Article 1383

Each person is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.

Article 1382 of the French civil code is written in very broad language. It simply creates an obligation not to cause harm.<sup>1</sup> Because the French civil code never defines the concept of “damage,” there is no hierarchy in the classification of different types of interests and different types of damage. The French civil code creates a general fault liability, which is developed by courts on a case-by-case basis.<sup>2</sup> All rights and interests are protected equally and not ranked based on whether, for example, they are physical or nonphysical. Therefore, even pure economic damage can lead to a legal recovery if the damaged party can show that it meets the ordinary requirements of fault or negligence.

Do you think that Article 776 of the Civil Code supports liability for economic loss in the same way that Articles 1382 and 1383 of the French civil code support such liability?

## The Pipeline and Cable Cases

Our scenario with the broken gas pipeline is based on a real series of cases. In 1970, the Cour de Cassation, a French appeals court, decided a case where a bulldozer broke a methane gas line that provided energy to the plaintiff’s factory. The production was interrupted and damage resulted. The court ruled that the plaintiff’s case was well founded based on Article 1382 of the French civil code. The court determined that the economic loss was a “direct consequence” of the broken gas pipe. In France, this series of cases is known as the “Cable Cases.”

A similar case involved workers accidentally cutting a power cable that shut down the operations of Electricité de France. Because work at the factory had to stop, the Court of First Instance, a trial court, decided that compensation had to be paid up to the amount of the salaries of what the workers would have made during the days that they were not paid because the factory was closed. On appeal, the court agreed that the damage was a “direct consequence” of the plaintiff’s action.

In a third and especially striking case, the Court of First Instance awarded compensatory damages to the City of Marseille for loss of **revenue**, which is income collected by the city for the purpose of public functions. A negligent car crash caused traffic on the streets, immobilizing city buses and causing the supposed loss of revenue for which the court ordered compensation. The Cour de Cassation upheld the award, writing that the damage to Marseille was not indirect and was not hypothetical.<sup>3</sup>

As you can see, French law is generally open to the possibility of compensating a victim for pure economic loss, but judges require that the harm be a “direct” result of the defendant’s actions. In other words, the plaintiff must show that there was close **proximity** between the action and the damage. Proximity means closeness between things. In this case, the proximity must be closeness of cause and effect, not of physical distance. The more remote the cause is from the economic loss, the less likely the court is to rule that there was liability. For example, in the case of Mustafa, we can think of scenarios where Mustafa’s actions were even more remote than in the example at the beginning of the chapter. What if Mustafa parks a truck on the plot of land, even though there is a “no parking” sign, and the



weight of the truck breaks the old gas pipe located many meters underneath. In this case, a court might be less likely to rule in favor of pure economic loss liability because Mustafa's actions are more remote from the factory's loss in profits.

When Courts of First Instance award monetary compensation for economic loss, appellate courts in France rarely overturn Court of First Instance judges who award damages for economic loss or secondary loss, which we will discuss later in this chapter. Some judges even award compensation to employers who lose days of productivity when an employee is injured or killed by some other third party. Skeptical observers of French courts have commented that the definition of "direct" is practically meaningless "because the judges declare damages to be direct or indirect in accordance with their desire to award, or not to award, an indemnity."<sup>4</sup>

Germany is not as open to the possibility of compensation for pure economic loss as France is, and neither, generally, is a common law country. Under the common law, compensation probably would not have been awarded in any of the cable cases.

Liability can arise out of contract even if it would not arise out of a delict. But it is important to note that, even in legal systems where it is very difficult to recover any sort of compensation for pure economic loss, it is still possible to contract around that difficulty. In other words, if you think economic loss could potentially be an issue with a party that you are negotiating with, you can negotiate a provision for compensation in the contract in the event that an economic loss is suffered. Courts will respect this contract even if they would not have awarded compensation in the absence of the contract.

### **1.1 Policy arguments for and against the compensation of pure economic loss**

The primary argument against compensating victims of pure economic loss is what is known as the **floodgates** argument. A floodgate is a barrier that controls and regulates the flow of a body of water. Typically, the floodgates argument is that once you open the floodgates even slightly and allow a little bit of something to flow through, it will be impossible to keep the floodgates from swinging all the way open, and there will be more of something than you intended. In this case, the floodgates argument is that once you allow compensation for economic loss, there will too many claims and too much compensation. Even small obligations created by a minor accident, like cutting a gas pipe, could lead to claims for compensation that would spiral out of control. One gas pipe might be connected to more than one factory. The pipe might lead to entire neighborhoods and industries. Do we really want to hold one man financially responsible for all of the economic loss created?

Countries like France try to limit this floodgates issue by developing tests of "directness" and "causation" that help draw lines in the amounts and situations in which compensation would be awarded. It seems to work, since France certainly does not have any major crisis of delictual compensation in its courts.<sup>5</sup>

Another difficulty with compensating victims of pure economic loss is more theoretical, in the sense that it focuses on the relative importance of various public goods. The argument is that if a judge awards compensation for pure economic loss, then it becomes very difficult for members of the public to properly assess the risk of various types of behavior and to plan accordingly. For example, the man digging in the lot does not know in advance whether he will accidentally cut a pipe or not. He should clearly be liable for the damage to the pipe itself, which is physical damage to property, but there is no way that he would know in advance whether that pipe leads to a house or a factory. He might be liable for 100 Afghans, and he might be liable for 1,000,000 Afghans. Because economic loss is more about the earning power of the victim, it is very difficult for the future defendant to know how much risk is involved in his day-to-day activities. To plan your actions in advance, in almost any type of behavior, you have to understand the limits and legal consequences of the risks that you are taking as clearly as possible. If liability is difficult

to predict—or even infinite—the individual has no good understanding of what he or she might be liable for.<sup>6</sup> As a matter of policy, it is difficult to weigh the plaintiff's interest in full compensation and the public's interest in being able to determine in advance their behavior and plans.

## 2. SECONDARY VICTIMS

A secondary victim is a person who was not the primary victim, but was harmed indirectly, or secondarily. The idea of economic loss and the idea of secondary victims are closely connected. This is because secondary victims are more likely to suffer mental harm, spiritual harm, and economic loss than direct physical damage. Take, for example, the case of Zaheer, a father who dies in an accident. He was the primary worker in the family. Although the physical injury was to him only, his family—his wife and all his children—suffer from the death, too. Of course, they suffer emotional harm from the loss of a loved one, but they also suffer pure economic loss because they lose the income that the father had previously brought home. You can see that when there is pure economic loss, it is often suffered by secondary victims. The opposite is also true: the type of loss that secondary victims suffer is most often economic.

### Discussion Question

In the gas pipeline and cable cases discussed in the previous section, is the factory owner a secondary victim? What about the factory workers? What about the owner of the pipeline or the electric cable?

The Civil Code and the Egyptian civil code clearly create liability for secondary victims, but in different ways. Compare the two:

### Civil Code

#### Article 775

Person who causes murder or death of another person by injury or any other harmful act, he shall be obligated to pay compensation to people whose alimony has been the deceased's responsibility and have been deprived of it due to the murder or death.

#### Article 777

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 778

- (1) Compensation shall also include measurement of intellectual harm.
- (2) If, due to death of the person who has been assaulted, intellectual harm is inflicted on his spouse or relatives, a court may rule for compensation to the spouse and relatives up to second category.
- (3) Compensation for intellectual harm shall not be transferable to others, unless its amount is fixed by agreement of the two parties or by final verdict of court.

### Egyptian Civil Code

#### Article 163

Whoever perpetrates an error causing harm to a third party shall be liable to compensate therefor.

Comparing the codes, we see that the Civil Code creates liability for secondary victims in particular cases, while the Egyptian code creates liability for secondary victims in general.

Notice that Article 775 of the Civil Code specifically creates liability for the case we discussed above: a person who causes the death of a father who supported his family. Article 778 provides for emotional harm to the family in addition to economic loss, and Article 777 creates general liability for harm to “another” person. These articles, while outlining liability to secondary victims, still allow for a lot of interpretation. For example, what sort of “assaults” create liability in Article 777? In Article 778, what types of harm are intellectual? Is sleeping poorly because of bad dreams an intellectual harm? What other things might be interpreted to be intellectual harms? Also, in Article 778—if it applies only to relatives up to the second category—who might be excluded for receiving compensation?

It is important to note that there are specific provisions in the Civil Code only for harm to people. There are no specific provisions for compensation to secondary victims for damage to property. It is still possible that secondary victims of damaged property could argue for liability under different articles, like in the pipeline and cable cases.

### Discussion Question

Akhmad was a soldier in the Afghan National Army. He was killed in a military operation against an enemy of Afghanistan. He was a husband and father. Does Article 775 of the Civil Code apply?

#### 2.1 Policy arguments for and against the compensation of secondary victims

The idea of compensation for secondary victims is a way of acknowledging that victims are members of society.<sup>7</sup> A man who is harmed is not simply an individual tort victim. He is also a father, husband, and member of his community. People do not live in isolation. They are connected through their relationships. When one person is injured, this can have economic and psychological effects on many other people.

Of course, there is a potential floodgates concern. Some people worry that once you allow the compensation for secondary victims, liability could be unlimited because almost anyone can argue that they are affected by the injury of a person. Consider the father who is harmed. His wife and children can be awarded compensation under Article 775 and Article 778 of the Civil Code for the economic loss and psychological and intellectual harm that they suffered. But what about the brother of the injured man, who also claims that he suffered intellectual harm by seeing his closest family member hurt? What about the store owner who argues that the man was on his way to buy something from his store when he was injured. Can the store owner be compensated for his economic loss? Does Article 777 place any limit on liability?

In cases with the potential for lots of secondary victims, some countries’ courts use what is known as “causation control,” or a “causation cutoff.” Even if the law does not explicitly say so, they understand there to be an implied test for “proximate cause” limitation on damages, otherwise the compensation to secondary victims for economic loss could quickly spin out of control. Austria, Finland, and Sweden use this method, for example.<sup>8</sup> Do Articles 775, 777, and 778 of the Civil Code specify the cases in which secondary victims may claim compensation?

Judges in some other countries use more **discretionary** tests, thinking about whether there is a “sense of **disproportion**” when considering whether the compensation is too high, or whether too many secondary victims are being compensated. Discretionary means the power to decide based on one’s own judgment. Disproportion means a lack of proportion or a lack of the proper relation in size between things.

These approaches to limiting—but not totally restricting—liability are compromises between two extremes: on one extreme end is the “exclusionary rule” which exists in common law countries, totally barring compensation to secondary victims. On the other extreme is allowing unlimited compensation to any and all secondary victims.

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<sup>1</sup> Julio Alberto Diaz, Thesis, “Non Physical Damage: A comparative Perspective,” University of Canterbury.

<sup>2</sup> J.M. Barendrecht, ‘Pure economic loss in the Netherlands’ in E H Hondius (Ed) Reports to the Fifteenth International Congress of comparative Law (1998)116.

<sup>3</sup> National Reporters and Editors Commentary, “The Case Studies,” in Mauro Bussani and Vernon Palmer, *Pure Economic Loss in Europe*, Cambridge, Cambridge University Press (eds.) (2003), p. 420.

<sup>4</sup> Herbots, in Furmston, *The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss* (ed.) (1986), p. 145.

<sup>5</sup> Daniel Jutras, ‘Civil law and pure economic loss: what are we missing?’ (1986-1987) *Canadian Business Law Journal*, 308.

<sup>6</sup> Margus Kingisepp, “Scope of Claim for Consequential Damage in Delict Law,” University of Tartu

<sup>7</sup> Nathalie Des Rosiers, President, Law Commission of Canada, Families, “Communities and Peoples: Redress and Healing for Secondary Victims of Institutional Abuse,” Public Speakers Forum, International’s Justice Federation.

<sup>8</sup> See The Case Studies, in PURE ECONOMIC LOSS IN EUROPE 171, 206-07 (Mauro Bussani & Vernon Valentine Palmer eds., 2003).

## CHAPTER 5: FAULT WITH REFERENCE TO SPECIFIC COMMUNITY NORMS

### INTRODUCTION

We have already seen how important community norms can be. In previous chapters, we saw how courts in Afghanistan deal with contracts that were formed by non-discerning minors and people who are mentally ill. Because there is no one universal standard of how mentally ill someone has to be before the courts will declare the person as legally incompetent, community norms are incredibly important. The ways courts decide questions like these are often with reference to how the surrounding community or society understands those issues.

#### 1. COMMUNITY NORMS AS A METHOD OF STATUTORY INTERPRETATION

##### Civil Code

###### Article 9

- (1) A person who transgresses his rights shall be responsible.
- (2) Transgression of rights occurs in the following cases:
  - 1—Actions against custom.
  - 2—Having the intention to infringe rights of another.
  - 3—Triviality of interest of the person as compared with the harm inflicted on another.
  - 4—Impermissibility of the interest.

Article 9 shows the extent to which custom is given importance in Islamic law. Similarly, the Mejlle states:

36. Custom is an arbitrator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgment.
38. A thing which it is customary to regard as impossible is considered to be impossible in fact.
39. It is an accepted fact that the terms of law vary with the change in the times.
40. In the presence of custom no regard is paid to the literal meaning of a thing.
41. Effect is only given to custom where it is of regular occurrence or when universally prevailing.
42. Effect is given to what is of common occurrence; not to what happens infrequently.
43. A matter recognized by custom is regarded as though it were a contractual obligation.

Custom provides the context. If the community follows a norm, is it expected that people follow that norm or risk assuming fault? One of the main ways community norms are influential in civil responsibility—and all law—is by influencing the way judges interpret statutes. Many words and sentences in statutes are vague because it is impossible for the legislature to explicitly write down what they want everything to mean. So judges have to determine what some ambiguous phrases mean. Often, the way they do this is by looking to what those things mean in the surrounding communities.

Historically, for example, Islamic communities developed the standard that, in public areas, there is always a requirement of “common-sense safety without negligence.”<sup>1</sup> That means that if a person holds a dangerous material in a public area and if someone is injured by that material, the injury itself is considered a good indication of negligence. This norm is designed to encourage people to take extra safety measures when dealing with dangerous items in public areas. For example, if Farhad is walking down the street with a big bottle of propane gas and the tank catches fire and hurts someone, a court is

more likely to find that he did not exercise proper precaution and that he was negligent, compared to a situation where Farhad is walking down the street with a big bottle of apple juice that accidentally spills, causing someone to slip and be injured.

What if Farhad is in the bazaar with a goat on a rope, but the rope breaks, and the goat runs and injures someone with its horns? Is Farhad liable? If the court makes clear that it will hold people like Farhad liable for injuries caused by their dangerous goats in public places, people like Farhad, in the future, will make sure they are using stronger rope, and injuries like that would decrease. From a customary perspective, this is why it often makes sense to have rules that encourage certain types of behavior. You will see this in Article 797 later in the chapter.

### Discussion Question

What are some words, phrases, and sentences in the following articles from the Civil Code that could mean different things in different communities, districts, provinces, or countries?

#### Article 793

A criminal event that is caused by an animal shall not cause any responsibility. The owner shall be obligated to compensate because of actions of an animal when his failure to provide necessary precaution, because of preventing the event, is proven.

#### Article 796

(1) The protector of a building, even though he may not be its owner, shall be responsible for the damage caused by destruction even though the damage be minor, except when it is proved that the destruction was not due to negligence in protection, either it happened due to the oldness or defect of the building.

#### Article 807

If a person uses property of another person without permission, he is obliged to repay its profit, unless the property is movable and the user had good faith.

The understanding of “necessary precaution” in Article 793, “negligence in protection” in Article 796, and “good faith” in Article 807 will probably vary between different **jurisdictions**. A jurisdiction is an area or territory over which a particular court system has authority.

Most often, a judge looks to community norms to figure out whether something is normal and how a reasonable observer would have understood the situation. But a reasonable observer might see things differently in different communities. That is why the meaning of certain terms has to change depending on the location. “Necessary precaution” might mean one thing in one place and a different thing somewhere else. It is impossible to say that it should be the same standard everywhere. The same word changes meaning based on the context, and one of the easiest ways for a judge to think about context is by assessing the community norm.

Sometimes, the question is whether the statute creates a “floor” to liability, or a minimum standard of care to avoid negligence. In these cases, a judge can require a higher standard, but not a lower one, even in communities where the norm might be lower.

Just like the community might be the community of Afghanistan, the community might also be a province, village, or even a certain group of people within a village. In a small farming village, the community norm might be to have one night watchman who walks around alone with a flashlight for a few hours but mostly sits at the entrance to the bazaar. If products were found stolen from a shop, the

judge might look to what the community norm is for night watchmen before deciding whether that night watchman was negligent. In a larger village or a city, the norm will probably be different, and so the standard for “negligence in protection” will be different. A judge’s understanding of “negligence in protection” will usually reflect the community’s understanding. In rare cases, a judge might think that the community norm is not exactly right in its application to a particular case, or should not be followed for some reason. For example, though that is how the night watchman usually operates, night watchmen—even in that small village—should be held to a higher standard. In that case, he might find the night watchman to have been negligent.

Also, the legislature can change an interpretation by passing a law. They can say, in this case, negligence should be understood by judges to mean a particular thing, even if the community norm of how the night watchman usually operates is different. If the legislature passes a law that says that any night watchman who is sitting is acting negligently, does that mean that if something is stolen from the bazaar and the night watchman was found sitting at that time, that he is automatically liable? Think back to the various elements that must be proven for liability to exist.

## 2. COMMUNITY NORMS FOR LIABILITY IN TECHNICAL JOBS

In some cases when judges and other legal actors think about community norms, it is a very informal process and is often even done subconsciously. In other cases, it is far more formalized—such as when the community is not a community in the traditional sense of a village or city, but the community is a group of professionals all performing similar jobs. A group of doctors who all perform the same basic medical procedure might agree that there is a correct way to do it, and that if a doctor does it differently, he is acting incorrectly and negligently.

### Civil Code

#### Article 797

If person possesses technical instruments or other objects that need special attention in order not to inflict harm, in case of infliction of harm by these objects and instruments, he shall be recognized liable, unless he proves that he has taken adequate precautions for prevention of harm. Special provisions, in this respect, that will later be enacted shall be observed.

What is a “technical instrument” or an “adequate precaution” in Article 797? We know that it must differ from the understanding of “necessary precaution” in Article 793 and “negligence in protection” in Article 796. That difference has to do with the norms for the communities that those statutes apply to. We can think of doctors as being a community that has certain established norms. And if that is not specific enough for a case, then we look to a smaller community within the community of doctors. For example, all doctors might know how to check someone’s temperature to see if she has a fever, but we would not expect a doctor who specializes in the stomach to know how to perform a complicated procedure related to the heart or lungs. Likewise, a farm tractor might be considered a “technical instrument” in some societies, but not in a community centered on farming where everyone owns a tractor and everyone would be expected to know how to use it.

These ideas developed historically in Islamic communities through community experiences of injuries to patients. A person who performs circumcisions on baby boys was liable for the injury if he cut more than he was supposed to cut.<sup>2</sup> This was based on an order of ‘Umar, the Second Successor. He charged such persons for medical errors. This principle developed into the doctrine that a person who practices medicine without a proper license or qualifications is liable for any injury, regardless of whether negligence is proven. It is assumed that there was negligence. Alternatively, a doctor with a license is



liable for negligence only if the injured person can prove that there was a lack of the necessary standard of care or a clear error.<sup>3</sup>

In Islamic law, standards also developed for liability in situations where certain instruments were involved, as in Article 797 of the Civil Code. When dangerous materials were involved, for example, the standard was heightened. That dangerous material could be something like an untamed animal or a weapon. If a weapon or untamed animal was involved in any injury, that injury was considered an indication that negligence was involved on the part of the injurer—that is, on the part of the person who had the dangerous material.<sup>4</sup> In that situation, it would not be necessary for the injured person to prove negligence—it was assumed. This was an early form of the heightened standards that developed into laws like Article 797 of the Civil Code.

Community norms serve as a form of deterrence. Often, these community norms can be codified as government regulations. For example, the Hisbah was an early Islamic agency that developed safety standards for all trades and crafts starting as early as the year 637 under ‘Umar.<sup>5</sup> Those who failed to follow the standards and safety regulations for their particular trade were subject to fines, especially if their failure caused injury to another person. This sort of deterrence in the form of regulation led to standards that set the norm for whether an obligation was created.

### **3. COMPENSATION AS DETERMINED BY COMMUNITY NORMS**

Compensation is also often determined by community norms. In Islamic law, compensation for harms like the ones we have been discussing consists of daman, or financial compensation, and diya, or money for the injury, treatment expenses, and lost income allowance. Islamic law distinguishes between human injuries that result in death, major injury, and minor injury. Diya for death or major injury is set by Islamic jurisprudence, but compensation for minor injury is determined by the judge as a percentage of the diya for more major injuries.

#### **3.1 Professional associations and compensation: why insurance changes incentives**

Takaful is a form of insurance system that guarantees compensation for the injured. When a diya for loss of life or major human injuries is owed, the responsibility for payment is distributed through the members of the family or the community of the injurer, who have all agreed to take part. Instead of the injurer paying the injured the entirety of the sum that is owed, the payment is divided among many members of the community. In this insurance system, the community has voluntarily agreed to make an exception to the Islamic principle that “no one is responsible for others’ deed or creed.”<sup>6</sup> Takaful is based on the traditional tribal system of al ‘aqilah, where communities share responsibility for many of the harms that take place within the community. Takaful extends al ‘aqilah to modern professional associations and unions. For example, doctors who are all exposed to the same potential liability can participate in this communal payment system. This makes sense as a function of a community norm. If all of the heart doctors are judged based on the same standard of liability, then it makes sense that they would develop a system a joint insurance system.

Just as with al ‘aqilah, an entire village or tribe might help pay the compensation to the injured. Under the system of kaffarah, the injurer has to compensate more than just the injured.<sup>7</sup> Historically, in the case of loss of life, the injurer must give the equivalent in value to the poor and needy. Kaffarah, in this form, has to come from the killer himself. As for diyah, it is the responsibility of those who are his caretakers. The caretakers are partially responsible because they could have helped prevent the injurer from causing the death. Diyah and al ‘aqilah encourage communities to be more careful in helping to prevent any injuries that might be caused by a member of their community.

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<sup>1</sup> Khafif Ali, *Al Daman Fi Al Fiqh Al Islami* (Arabic), *Liability in Islamic Jurisprudence*, Al Mtba'ah Al Faniyah Al Hadithah, Cairo, Egypt, 1971, page 39.

<sup>2</sup> Zarqa Mustafa, *Al Fi'l Al Darr Wa Al Daman* (Arabic), *Harmful Action and Liability*, Dar al Qalam Publishers, Damascus, Syria, 1988, page 45.

<sup>3</sup> *Id.*

<sup>4</sup> Faidullah, Mohamed Fouzi, *Nazariyat Al Daman Fi Al Fiqh Al Islami* (Arabic), *Liability Theory in Islamic Jurisprudence*, Dar al Turath Publishers, Kuwait, 1983, page 186-87.

<sup>5</sup> Monzer Kahf, *Economics of Liability: An Islamic View*, unpublished, Islamic Research and Training Institute.

<sup>6</sup> 6:164, Qur'an.

<sup>7</sup> 4:92, Qur'an.

## CHAPTER 6: COMPENSATION

### INTRODUCTION

By now, you know that when a contract is breached or a delict has occurred, the responsible party usually owes the other party some remedy. When a delict has occurred, the most common remedy to make up for the damage is **compensation**, which normally means monetary damages.<sup>1</sup> While at first it might seem straightforward that a party that harms another should pay that injured party, there are many aspects to compensation. The general idea that one party pays another when it has injured another is simple. But how much should the party pay? For what kind of harm can the injured party be compensated? What happens when more than one person caused the harm? These are some of the issues that this chapter addresses.

### 1. COMPENSATION

#### 1.1 General overview

Compensation is the most common remedy for delicts, ranging from the most serious to the least, which is demonstrated by the Common Provisions (Articles 776 to 789) in the Harmful Acts section of the Civil Code. The general theory of compensation under Afghan law may be stated as follows: when someone inflicts harm on another, the perpetrator is required to pay compensation for the loss. While the exact theory is not directly stated in the Civil Code, one can infer the general principle from the Common Provisions on compensation and other articles. For example, Articles 774 and 775 require murderers or individuals who assault or cause bodily injury to another to compensate the injured party. And, in the case of murder, they must compensate those for whom the deceased is responsible. Thus, we see that the Civil Code requires monetary compensation for some of the most serious crimes that can be committed. At the other extreme is Article 776 of the Common Provisions, which is much more generally and expansively worded.

#### Civil Code

##### Article 774

Person who commits harmful act such as murder, injury, assault or other injuries to a self, he shall be obliged to compensate for the inflicted harm.

##### Article 775

Person who causes murder or death of another person by injury or any other harmful act, he shall be obligated to pay compensation to people whose alimony has been the deceased's responsibility and have been deprived of it due to the murder or death.

##### Article 776

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

Here, we can see the lowest standard for compensation in the Civil Code. There is the general term "harm," which we have learned covers an extremely wide range of harmful acts, including something as minor as property damage. Furthermore, Article 776 states that compensation is required even when harm is caused accidentally. Looking at Articles 774 and 776 together, we can see that compensation is a remedy for the entire range of delicts.

Additionally, individuals are required to compensate an injured party only up to the amount of the monetary value of the harm they caused. We will see later that the monetary value of harm is not always easy to determine, but whatever the court deems to be the monetary value of the harm is what the liable party is required to pay. Note, however, that an individual will be responsible to compensate an injured party only for the direct damage that he or she caused to the individual, not the indirect damage.

### Civil Code

#### Article 779

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

The difference between direct and indirect damage is best understood through an example.<sup>2</sup> Imagine that Basir is a construction worker who is fixing the roof of the house adjacent to the house Hamida rents. While working on the roof of the house, Basir drops some construction material onto Hamida's roof and causes damage to Hamida's house and property. While the structural damage is being fixed, Hamida has to live somewhere else. Hamida moves into a new house that costs more money. Provided that Hamida has acted in good faith and has incurred reasonable expenses, Basir would owe Hamida damages for the destruction of her property, the cost of moving to the new house, and the difference between the price of her rent at the new, higher-priced home and what she would have paid had she not had to move. These encompass the direct damages Hamida suffered due to Basir's actions.

Now imagine that the new house Hamida moved to is infested with insects. Basir would not be responsible for any damage or harm Hamida suffers due to the insects at her new home. Even though it is Basir's fault that Hamida moved to the new home, he is not responsible for the condition of the house that she moved into. The responsibility for the condition of the new house is either Hamida's or the owner of that new house. The only responsibility that Basir has for Hamida's insect infestation is *indirect*, and individuals are not required to compensate an injured party for damages arising indirectly from their actions.

### Discussion Question

Classify the following scenarios as direct or indirect harm. Justify your answer:

1. Malik and Nabil are in a car crash, which is deemed to be Malik's fault. During the crash, Nabil's leg is badly cut, but the injury should not negatively affect his life in the future. Unfortunately, the cut becomes infected, and Nabil can no longer fully use his leg.
2. Tahira lights a fire on her property. The fire quickly gets out of control and spreads onto Sadiq's property, damaging Sadiq's barn. The next day, Sadiq goes into the barn to evaluate the damage. While walking around, he trips over a beam that had fallen because of the fire. Sadiq breaks his ankle.
3. Zaid is kicking rocks as he walks across a bridge. One of the rocks falls off the bridge and hits a car below. The rock then bounces off that car, hits Omar, and injures him badly.

## 1.2 Irrelevance of intent

Another important aspect to note about compensation is that intent is not important. Article 776, discussed above, indicates that harm—even if caused by error or mistake—is still required to be compensated by the party that caused the harmed. What is essential is that harm is compensated.

However, an individual must still be found liable for the harm at issue before the individual will be required to compensate the injured party. Once the individual is found liable, that person's intent or lack of intent to cause harm is immaterial to the compensation that the person will owe or the amount of compensation they will owe.

Recall what you have learned about property damaged caused by animals. Remember that an individual who allows their animals to graze on the property of another without the owner's permission has committed a harmful act and owes the owner compensation for the damage caused by the animals. Now suppose that Jamillah's uncle, Nasir, has given her permission to let her goats graze on his land. Jamillah brings her goats to what she thinks is Nasir's land, but it turns out that the land belongs to his neighbor, Abdul. Jamillah will owe Abdul compensation for whatever damage her goats may inflict on Abdul's land, even though she did not think she was doing anything wrong. While Jamillah brought the goats onto Abdul's land by mistake and thought she was grazing them on land that she had permission to use, the Civil Code is not concerned with her intent. Even though her actions were an accident, Abdul has still been harmed and needs to be compensated for that harm. Since Jamillah caused the harm, it is her responsibility to compensate for it.

### Discussion Question

Isah has a fence around his square piece of property. He needs to replace the north wall of the fence because the wood has started to rot. Isah hires Rahim to tear out that wall. Rahim tears out the wrong part of the fence. In which of the following circumstances will Rahim be required to compensate Isah for tearing down a healthy wall of the fence?

1. Rahim tears down the south wall, not the north wall.
2. Rahim tears down the south wall, not the north wall because he mistook the south wall for the north wall.
3. Rahim tears down the north wall and the west wall.

### 1.3 Multiparty harmful acts

Sometimes, multiple people will cause harm in a single case. When this happens, the Civil Code requires every party that is involved to contribute to the compensation awarded to the injured party. However, from a practical perspective, it can be difficult to figure out how to **apportion**, or divide, liability among each party. Imagine, for example, that three men are playing with firecrackers in the street next to Mohammad's shop. One of the firecrackers causes a spark that burns down the shop, but no one knows who threw the firecracker that was responsible. In this case, it would be nearly impossible to figure out how liable each of the men is for the damage to Mohammad's property. The Civil Code gives instructions as to how the parties should divide the compensation.

### Civil Code

#### Article 789

If several persons are responsible for harmful act, they shall have equal liability for compensation, unless judge determines compensation share of every one of them.

Unless the court indicates otherwise, all parties found liable will owe an equal share of the compensation to the injured party. Thus, in the case of Mohammad's burned-down shop, all three of the men throwing firecrackers would owe an equal share of the total award.

However, the amount of compensation owed by each individual does not have to be equal in all cases. The court may order each party responsible for a harmful act to pay different amounts. Returning to the firecracker example, imagine now that the group has just obtained the firecrackers and is deciding whether or not to throw them. The men know it is dangerous to throw them where they are standing, but convince each other that nothing bad will happen. One of the men throws the first firecracker. It sparks and burns Mohammad's shop to the ground. In this scenario, the court knows who actually threw the firecracker, but it may find that the other two men are liable for the damage because they encouraged the other man to throw the firecracker. The court may order the man who threw the firecracker to pay 80% percent of the compensation and the other two men to pay 10% each.

#### **1.4 Intellectual harm**

Compensation for harm is not limited to the physical harm a party may cause.

### **Civil Code**

#### **Article 778**

(1) Compensation shall also include evaluation of intellectual harm.

The Civil Code recognizes that harm may occur to one's intellect or emotions and allows compensation for such harm. Intellectual harm may occur as a result of the physical harm inflicted on one's person or property. In such cases, the compensation for the intellectual harm would be in addition to the compensation for the physical damage that occurred. While intellectual harm usually results from a physical injury, the Civil Code leaves open the possibility of compensation for intellectual harm that has no corresponding physical injury.

The Civil Code does not discuss when a person may be compensated for intellectual harm or what, specifically, an intellectual harm is. To better understand the concept of intellectual harm, we can look to how other countries treat the issue. In the broadest of terms, intellectual harm is non-physical damage that one or more parties inflict upon another. Words commonly used by courts to describe intellectual harm are "emotional distress," "mental anguish," and "pain and suffering." Several civil law countries include emotional distress and mental anguish resulting from a harmful act as compensable injuries, and some of them refer to intellectual harm as "moral damage." In a case from the United Arab Emirates (UAE), twenty percent of the compensation given to the victim of a car accident was for his emotional distress and depression.<sup>3</sup> The victim in this case was left blind and paralyzed. You can imagine that the emotional pain caused by the accident was extreme. The UAE believes, as do many countries, that to truly compensate someone for the injury caused by such an accident, the court must take into account non-physical injuries.<sup>4</sup> Thus, when serious bodily injury occurs, courts may also take into account the emotional side of the injury when determining compensation.

However, the harm does not have to be as serious as severe bodily harm for an individual to recover for intellectual harm. In France, moral damages include emotional suffering and being deprived of the normal pleasures of life, which has been broadly interpreted.<sup>5</sup> For example, in one case, 30% of an individual's compensation for the loss of a pet racehorse was given to account for the grief that the party suffered from losing the animal.<sup>6</sup>

Additionally, intellectual harm may occur without physical damage. For example, in France, a spouse has historically been able to receive compensation for the emotional harm he or she suffered due to the other spouse's adultery.<sup>7</sup> In such a case, there is no physical damage to the injured party—there is only emotional damage resulting from the harmful act of adultery.

It is unclear what amount of grief or emotional distress will be deemed too minimal to be compensated by the courts. This analysis is likely to be case-specific. While, as in France, an individual may be able to recover for the intellectual harm caused by the death of a beloved racehorse, it is unlikely that an individual could recover for the death of one of a dozen or more sheep that he or she owns but has no special connection to. Of course, this individual would be entitled to compensation for the value of the sheep, but the individual could not recover more than its market value.

### Discussion Question

Amir has a painting of himself and his sister, Mariam, hanging on the wall of his home. One day, Youssef spilled tea on the portrait and ruined it. Amir would like to recover compensation from Youssef for the intellectual harm he suffered due to the destruction of the painting. In which scenario would you allow Amir to be compensated for intellectual harm? Explain your answer.

1. The painting was very expensive. Amir had saved his money for two years to afford it.
2. The painting was a gift from Mariam, Amir's sister, who now lives in Canada and who Amir is rarely able to see.
3. Mariam, Amir's sister, had died, and the painting was the only image Amir had of the two of them together.

The physical harm does not have to be one's person. It can also be to one's property or to a close relative. Sometimes, physical harm to one individual will cause intellectual harm to another. If the two individuals are related, the individual suffering intellectual harm can be compensated for that intellectual harm in some circumstances.

### Civil Code

#### Article 778

(2) If, due to death of person who has been assaulted, intellectual harm is inflicted on his spouse or relatives, court may rule for compensation to the spouse and relatives up to second category.

The Civil Code defines the narrow circumstance in which individuals can recover for intellectual harm that they suffer without having suffered a physical injury themselves. The standard for the kind of physical injury an individual's relative must suffer in order for the individual to recover compensation for intellectual harm is very high. An individual seeking compensation under Article 778(2) must satisfy a three-part test. First, the relative who has suffered the physical injury must have died. Second, the death must be directly caused by the harm that the compensating party is liable for. Third, the individual seeking compensation must have suffered intellectual harm as a result of the death of the relative. All three parts must be fulfilled in order to gain compensation for intellectual harm under this part of the Civil Code. For example, a wife may recover for the emotional distress that she suffers due to the death of her husband, so long as his death is directly caused by the unlawful actions of another.

Furthermore, the people who can gain compensation are limited to relatives of the second category. Thus, someone may be compensated for the death of parents and grandparents, but not great-grandparents.

### Discussion Question

In which of the following circumstances can the individuals recover for intellectual harm that they suffer due to physical injury of a relative? Why or why not?

1. Rashid is hit by a car and dies. His daughter becomes extremely depressed.
2. Rashid is hit by a car and is paralyzed. His daughter becomes extremely depressed.
3. Rashid is hit by a car and is paralyzed. He dies six months later from a heart attack. His daughter becomes extremely depressed.
4. Rashid is hit by a car and dies. His daughter becomes extremely depressed, and her son, seeing the state of her mother, also falls into a state of extreme depression.

While an individual may recover for intellectual harm caused by the physical injury of a close relative, this is not the case for intellectual harm. The person who has actually suffered the intellectual harm is the only person who can receive compensation for it. This also differs from compensation for physical harm, which may be assigned to those other than the physically injured party.

### Civil Code

#### Article 778

(3) Compensation for intellectual harm shall not be transferable to others, unless its amount is fixed by agreement of the parties or by final ruling of court.

While the default rule is that the individual suffering the intellectual harm is the only one who can be compensated for it, the Civil Code permits both parties and courts to avoid this restriction. If the parties agree that the compensation for intellectual harm will go to someone other than the injured party, they do not have to agree upon a specific sum of money. They may agree that whatever amount of compensation for intellectual harm the court orders will go to another individual who is not related. For example, imagine that Ahmad agrees to undergo a risky medical test that may have a negative impact on his brain and mind. Ahmad and the party administering the test may agree that Ahmad will undergo the test, but if Ahmad suffers emotional harms, the amount he deserves for intellectual harm should be transferred to someone who is not his family member.

#### 1.5 The amount of compensation

By now, you should recognize an overarching concern in the Civil Code of ensuring that the injured party is properly compensated for the harm that it has unjustly suffered. This is clear from the wide range of injuries for which parties can be compensated. The Civil Code allows compensation not only for physical injury to persons or property, but also allows compensation for non-physical injuries that a harmed party or a close relative may suffer. Now, we will examine the concern for accurate recompense by looking at the amount of compensation a party is able to obtain.



In some circumstances, a court will be able to determine that a party is liable for harm inflicted on another, but not the precise value of the damage. The Civil Code has a special provision for such circumstances.

### Civil Code

#### Article 780

If court cannot precisely determine the amount of compensation, it may reserve for the harmed a right to appeal on determination of the amount of compensation within a reasonable period of time.

Thus, if the court is uncertain as to the actual amount of damage caused, it can give the injured party the right to have the court reexamine the case and potentially change the compensation award. There are several reasons why a court may not be able to determine the appropriate amount of compensation at the time that it determines liability. For example, imagine that Abdul and Rashid are in a car crash and that Rashid breaks his leg. He may require surgery in order for his leg to properly heal. But when the court is deciding who is liable for the accident, the doctors cannot say for sure. If the court determines it was Abdul's fault, it may grant Rashid an initial award assuming that he does not require surgery, but with the right for Rashid to ask the court to revise the award. If it turns out that he does need surgery, Rashid could go to the court and ask it to make Abdul further compensate him to cover the cost of the surgery.

Also note that an injured party may request revision only within a reasonable time period. Asking for a revision of compensation for the destruction of something like a computer five years after the event would clearly be after the reasonable time period has elapsed. However, asking for a revision a few days after the computer was destroyed would be within the reasonable time period. Where it is difficult is when someone asks for a revision at a time that is neither extremely close to or extremely long after the event. The Civil Code does not specifically define what a reasonable time period is, so it will be up to the court hearing the case to decide, which will be guided by the norms of the people in the community, which we discussed in the previous chapter. A reasonable time period may vary depending on the circumstances of the case and the reason why the court cannot determine the precise amount of compensation owed.

For example, someone may have caused a flood on another's property, but the actual damage cannot be assessed until the property has completely dried. If it takes several months to dry, then the reasonable time period for the injured party to request a revision of the compensation will take that into account. If, however, the injury at issue is that one party damaged another's computer, the reasonable time period will be far shorter. In this scenario, the court may have difficulty determining if the liable party owes the injured party the cost of a new computer or the cost of repairing the current computer. Determining whether or not the computer can be fixed would take a far shorter amount of time than the scenario of the flooded property, so the reasonable time period that the injured computer owner could ask for revision would be shorter.

### Discussion Question

In each of these scenarios, explain whether the injured party may validly claim a revision under Article 780:

1. Abdul and Rashid are in a car crash, and the court determines that it was Abdul's fault. Rashid's mechanic has estimated the damages to his car to be 100 Afghanis. The court awards Rashid that amount in compensation from Abdul, with permission to demand revision. Two weeks later, Rashid's mechanic informs him that the actual damage to the car is 200 Afghanis. Rashid immediately asks the court to revise his compensation.

2. Two weeks after the accident, Rashid’s mechanic informs him that the actual damage to the car is 200 Afghanis. Six months later, Rashid asks the court to revise his compensation.
3. One year after the accident, the muffler of Rashid’s car falls off. His mechanic tells him that it was most likely a result of his accident with Abdul. Rashid immediately asks the court to revise his compensation.

Furthermore, only the injured party has the right to a revision of the level of the compensation. If the liable party believes the court has ordered it to pay too much, it cannot petition for the award to be lowered. Even if it can prove that the court has ordered it to pay too much, the liable party is stuck with the amount the court has ordered it to pay. There is one potential way in which a liable party that has been ordered to pay too much in compensation may get the award lowered.

### 1.6 Method of compensation

There are two different types of compensation: monetary and the return of property. Generally, “compensation” means monetary compensation, which represents the monetary value of the damage suffered by the injured party. However, a court may also order the return of property as the compensation—or in addition to monetary compensation, if appropriate. Determining how the liable party must compensate the injured party is the court’s decision.

## Civil Code

### Article 781

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.

As you can see, the court has the ultimate authority to determine whether the compensation should be monetary, in the form of property, or a combination of both. Additionally, when the compensation is monetary, the court can order the way that the compensation is to be paid. The court can select from several options, ranging from a **lump-sum** payment, where the entire amount is given in one payment, to **installment** payments, where a portion of the amount is given over time until the full amount is paid.

There are many reasons why a court may permit someone to pay in installments. For example, if an individual owes 1,000 Afghanis but does not have access to that amount of money, that person may be instructed to pay 100 Afghanis every month until he or she has paid the injured individual 1,000 Afghanis. Or, if someone is able to pay 500 Afghanis immediately after being found liable but cannot pay the remaining 500 for another three months, that person may be permitted to pay in two installments. Furthermore, the installments do not necessarily have to be for the same amount. If the court finds it appropriate, someone may be ordered to pay the 1,000 Afghanis by giving 500 Afghanis right after that person is found liable, 300 Afghanis six months later, and 200 Afghanis three months later.

Additionally, when choosing installment payments, the court may require someone to offer a **guaranty** of the money owed to ensure that the person will pay all of the installments. A guaranty is something given as security. For example, if someone owes 1,000 Afghanis but will be paying it in 100 Afghani installments over ten months, the court and the injured party may be nervous that the liable party will stop paying the installments before having paid the full 1,000 Afghanis. In such a case, the court may require a guaranty from the liable party. The liable party may offer a piece of property that is worth 1,000 Afghanis

as a guaranty that it will complete the installments. Alternatively, the liable party may find someone else who will act as a guarantor.

Finally, note that compensation cannot take the form of harm to the liable party.

#### Civil Code

##### Article 788

Inflicting harm and repelling harm with harm is not permissible, also harm cannot be removed by its similar.

When an individual suffers harm, that person does not have the right to similarly harm the liable party. If the individual chose to harm the liable party, the individual will then be liable for the harm caused. Additionally, the court cannot order that compensation take the form of similarly harming the liable party.

#### 1.7 Prescriptive period

Finally, the Civil Code limits the amount of time after harm has occurred that the injured party may bring a claim to the court.

#### Civil Code

##### Article 798

Claim of compensation for damage caused by any kind of harmful act shall not be heard after lapse of three years since the date of knowledge of the harmed and the inflictor of the occurrence of damage and, in all circumstances, after lapse of 15 years since the date of occurrence of harmful act.

There are two separate time limitations on when a claim may be brought. The first limitation is three years from the day that *both* the injured party and the party causing the harm are aware that a harm has occurred. Note that Article 798 addresses only knowledge that a harm occurred and not knowledge of who caused the harm. For example, imagine that Omar and Sadiq are in a car accident. Both are aware of the accident, but neither knows the other person's identity. If Omar finds out who Sadiq is three years and one month after the accident, he will be outside of the prescriptive period. This is because both Omar and Sadiq knew about the accident right when it occurred, so the prescriptive period ended three years from the date of the accident.

Sometimes, the fact that harm has occurred is not immediately obvious to one or both parties. For example, someone may hire another to install pipes for water in a home. If the person does a bad job, this could lead to mold growing in the house, which may not be discovered for several years. Or, one party may know about the harm but may have difficulty informing the other party that it occurred. In cases where neither party knows about the harm or only one of the parties knows about the harm, they have fifteen years from when the harm occurred to bring the claim. Once fifteen years is up, the claim can no longer be brought.

#### Discussion Question

One day in the year 2000, Ahmad's cows destroyed the fence around Mina's property. Mina waits to bring a claim against Ahmad to court. In which of the following scenarios is Mina within the prescriptive period? Explain your answer.

1. Both Ahmad and Mina see the cows knock down the fence. In 2004, Mina tries to bring Ahmad to court for the harm he caused.
2. Only Ahmad sees the cows knock down the fence, but Mina later finds out that it was Ahmad's cows. In 2004, Mina tries to bring Ahmad to court for the harm he caused.
3. Only Mina sees the cows knock down the fence. Ahmad moves away, but moves back in 2014. Right when he moves back, he finds out his cows destroyed the fence. In 2016, Mina finds out that Ahmad has moved back and tries to bring a claim against him.

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<sup>1</sup> Compensation can refer to either the category of remedies owed when a delict has occurred, or it can refer specifically to money damages. Unless specifically stated, compensation means money damages in this chapter.

<sup>2</sup> The difference between direct and indirect damage is covered more fully in the chapter on causation.

<sup>3</sup> 40 percent of the compensation was for the physical injuries he suffered, and the other 40 percent was the costs of his future medical treatments and the salary he could no longer earn due to his injuries. Abdul Luqman. "Insurance and Drinking Drivers in the UAE," *Arab Law Quarterly* 15, no. 4 (2000): 370-72.

<sup>4</sup> Note that the UAE does not have a specific article that relates to compensation.

<sup>5</sup> Claude Micallef-Grimaud. "Article 1045 of the Maltese Civil Code: Is Compensation for Moral Damage Compatible Therewith?" *Journal of Civil Law Studies* 4 (2011): 486.

<sup>6</sup> The other 70 percent of the compensation represented the market value of the horse. Pierre Catala and John Anthony Weir. "Delict and Torts: A Study in Parallel," *Tulane Law Review* 38, (1964): 681 note 86.

<sup>7</sup> *Id.*

## CHAPTER 7: DEFENSES TO LIABILITY

### INTRODUCTION

Defenses to liability enable parties that directly caused harm to another person or that person's property to avoid liability for their actions. Normally, the party liable for another's injury is the party that caused the injury. If, however, one of the following defenses can be applied to the situation, the party that directly caused the harm either will not be liable for the injury at all or will have its liability lessened. The four main categories of defenses to liability are (1) lack of capacity, (2) lack of free will, (3) self-defense, and (4) contributory negligence. Lack of capacity and lack of free will are complete defenses to liability, which means that if a court determines that someone lacked capacity or free will when that person acted, that person will not be liable for the injury. Self-defense and contributory negligence can be complete or incomplete defenses depending on the specific circumstances of the case. This means that if a court finds that someone acted in self-defense or that contributory negligence existed, the party that caused the harm will not be completely liable for the injury, but could still be partially liable.

#### 1. LACK OF CAPACITY

One potential defense to liability is that the individual that caused the harm lacked the capacity to be responsible for his or her actions. This subject was previously addressed when discussing how someone may be responsible for the actions of others. Recall that under Articles 790 and 791, children and those without full mental capabilities, such as the insane, are not liable for their actions because they lack capacity. Instead, the liability is given to parents or guardians.

However, remember that lack of capacity is not strict secondary liability, and a minor may be responsible for compensation of damage due to his or her actions if the parent or guardian can demonstrate that they provided adequate supervision. If this is the case, Article 762 makes the minor responsible for the compensation.

Regardless of who is ultimately responsible for the compensation, in all cases where a wrong has been committed, the injured party will be compensated. The question is whether the child has a defense from liability that would shift the liability to the parents or guardians.

#### 2. LACK OF FREE WILL

Sometimes, people are forced to act against their own free will. If such action causes injury to another, the actor will not be found liable. Instead, the person who instructed that person to undertake such action will be liable. The Civil Code recognizes two circumstances where individuals are not responsible for their actions because they were acting under another's authority.

#### Civil Code

##### Article 787

(1) Act shall be attributed to its doer not to its orderer, unless doer is forced to act. In acts, only complete duress shall be considered as acceptable coercion.

(2) Public officer shall not be held liable for his act that has caused harm to another if he has performed it on the basis of order of an authority that had to be obeyed or he believed so and he has also proved his belief on legitimacy of the mentioned act by referring to reasonable means and observing necessary precautions.

The only time that average people are not responsible for their own harm-causing actions is if they were coerced. Think back to the discussion of coercion with regards to contracts. Coercion is defined in the same way for harmful acts. You can think of complete coercion as occurring when someone is threatened so seriously that the person had “no choice” but to do what the commander asked. The threat must be so serious that to not act as the commander instructed would be unthinkable. This is in contrast with incomplete coercion, where it would not be unthinkable for the coerced party to have defied the coercer.

When someone harms another but did so only because of coercion, that person is not liable for the harm. This is because the threatened individual had no real choice as to his or her action and because there is another party that did choose for that act to occur. It would be unjust to make the person liable for the harm the action caused since that person did not choose to commit the action.

### **Discussion Questions**

1. Amir is eighteen years old. One day, he and his father are driving to visit friends who live on a steep hill. The car they are driving is old, and its brakes do not work that well. Amir’s father tells him to park on the hill, rather than at the bottom of the hill where the road is flat. Amir is concerned that the car will slip down the hill but does not want to disobey his father. After parking, the car does slide down the hill and hits another car, causing damage. Is Amir responsible or was he coerced?
2. Mohammed works for Wahid as a builder. Mohammed is known for being extremely careful with his work, but he works slowly. One day, Wahid became impatient with Mohammed’s pace and tells him to finish his current project in the next day or that he will be fired. Working at his normal pace, Mohammed would not have finished the project for another three days. Mohammed rushes to finish the work in time. Unfortunately, he made an error during construction, which resulted in a large amount of property damage for the client. Is Mohammed responsible or was he coerced?

### **Discussion Questions**

1. Do you think it is fair that only complete coercion removes the liability from the actor? Why is incomplete coercion not sufficient? Should it be?
2. Recall Article 776, which says that a party that harms another by error or mistake is still liable for the harm that is caused. Do you agree that someone should be liable for harm caused by error or mistake, but not for harm caused because of coercion?

The other circumstance in which people are not considered responsible for the harm they have caused is when they are public officers acting under the orders of their commanding officer. But public officers must pass a two-factor test in order to be found not liable for their actions. First, public officers must demonstrate that they were required, or believed they were required, to follow the orders of the commanding officer. Furthermore, public officers must prove they were acting legitimately. In other words, they must demonstrate that their action was a legitimate interpretation of the commanding officer’s orders.

Imagine that Faisal works in the Ministry of Rural Rehabilitation and Development, directing the construction of roads in some of the provinces. Faisal’s boss, Abdullah, gives him detailed instructions on the route the road should take. Faisal follows the instructions, but it turns out that Faisal chooses to build the road right through someone’s property and causes severe damage. Since Faisal is a public officer who was following his commanding officer’s instructions, he would not be liable for the damage the road caused.

Note, however, that the injured party will still be able to make a claim. The injured party can make a claim against the instigator, but not the actor. The actor is free from liability because of coercion or because the actor was a public officer acting under the orders of a commanding officer. Instead, the liability is with the instigator.

### Discussion Question

Now imagine the same scenario with Faisal and Abdullah, except this time Abdullah told Faisal simply to build a road connecting two towns. If Faisal builds the road on someone's property, will he still be liable? Make both the argument that he would be liable and the argument that he would not be liable.

### 3. SELF-DEFENSE

Self-defense is a defense against liability. When people cause harm because they are attempting to defend themselves, they will not be found responsible for the harm they caused.

### Civil Code

#### Article 784

(2) Person who causes harm in defense of himself or his property or of another person or his property shall not be considered liable, provided that he has not exceeded the extent of necessary defense, otherwise he shall be obligated to pay just compensation.

#### Article 785

Intense harm shall be dispelled by light damage. Person who inflicts, in protecting his self, greater damage than what he has incurred on another, shall be condemned to pay the compensation that court considers just.

Individuals are allowed to act in self-defense only to an appropriate and necessary degree. Someone harming another person or property does not give the harmed party the right to respond in an unnecessarily strong manner. One can respond only to the degree necessary to protect whatever is being harmed from further immediate danger. For example, if someone comes into your store and starts to damage your goods and you respond by cutting the tires of their car, it is likely not appropriate self-defense, and you will be liable for whatever harm you cause. While one could argue that cutting their tires was a way to prevent them from escaping, it is unlikely to work as self-defense if it is the first thing you did to try and stop them from damaging your property. There were several other actions you could have taken before cutting the tires to protect your goods. Ultimately, the court will determine whether or not someone's act of self-defense was appropriate.

Also, note the difference between self-defense and harm inflicted as revenge, which is banned by Article 788. Although individuals acting in self-defense are responding to the harm that another is inflicting on them, their property, another person, or another's property, this is different than acting to avenge harm. The two essential differences are necessity and time. When acting in self-defense, individuals will almost always be acting in immediate response to the actions of the party that harmed them. Furthermore, their actions will be necessary to prevent further immediate harm to themselves, their property, another person, or another's property. In contrast, if someone attempts to inflict harm as a method of compensation, there will be some lapse of time between the harmful event and the subsequent act of harm. While they may be acting to prevent further harm, they will also be acting to hurt the other party because they initially hurt them. For example, imagine someone is holding your computer and is about to smash it on the ground. If,



as you grab it back from that person, you cause that person to fall and break a bone, you would not be liable because you were defending your property. If, however, you saw the person smash your computer and then you walked over and shoved the person, causing that person to break a bone, you would be liable because you did not act in defense of your property.

### Discussion Question

Rasoul owns a shop that sells glass. One day, Salim comes into the shop and starts to smash the glass with a wooden cane. In which of the following scenarios was Rasoul acting in self-defense?

1. Rasoul is able to grab the cane from Salim and breaks it.
2. Rasoul is able to chase Salim from the store. Later that night, he sneaks into Salim's house, steals the cane, and breaks it.
3. Rasoul's friend, Latif, chases Salim from the store. Two weeks later, Rasoul sneaks into Salim's house, steals the cane, and breaks it.

#### 4. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

Additionally, someone that causes harm may not be liable for the damage or may be less liable for it if the actions or inactions of the injured party contributed to the damage. This is normally referred to as contributory negligence in civil law countries. The Civil Code explains comparative negligence as follows:

### Civil Code

#### Article 782

If the harmed person has caused or increased harm by his own fault, court may reduce the amount of compensation or even reject it.

Thus, if harm could have been avoided or lessened had the injured party acted more carefully or in a manner that made it more likely to be injured, the party that caused the injury will be found less liable or not liable at all. In order to better understand the concept, imagine that liability is cake that the court gives to one or both of the parties. When someone is injured, but has not acted in a way that made it more likely to be injured, the "liability cake" belongs entirely to the party causing the harm. However, if the injured individual did something that increased the likelihood of being injured, the court will divide the cake between the two parties. If the injured party's actions only slightly increased the chance of injury, that party will be given a small slice of the cake. The size of the injured party's slice of the cake will increase as the amount that the injured party's contribution to the injury increases. In certain circumstances, the court will give that party the entire liability cake. After apportioning liability, the compensation owed will depend on how much of the liability each party is given. If, for example, the harm is judged to be worth 1,000 Afghanis and the injured party is found 20% liable for the harm, the other party will owe the injured party 800 Afghanis—80% of the monetary harm.

When determining whether or not the injured party contributed to his or her own injury, the court will compare the injured party's actions and will take into consideration the factors surrounding the situation, such as reasonably expected behavior, community norms, or other relevant factors. If the injured party acted more recklessly than what would have been expected in the given circumstances, then the party will be deemed to have contributed to the injury. The assessment of contributory negligence is highly case-

specific and will take into account the customs and norms of the community. However, a general rule is that if the injured party was doing something illegal that contributed to the injury, then the injured party will be apportioned some part of the liability for that injury.

If, for example, Hakim drives the wrong way on a street and hits Nadir's car, Hakim would normally be liable for the damage he caused. But if Hakim hit Nadir's car only because Nadir drove through a red traffic light, then a court could find that Nadir is partially liable for any injury to his car and his property. How the court would split the liability between the two of them is difficult to predict.

### Discussion Question

How much of the liability in the example above would you give to Hakim? How much to Nadir? Explain your answer.

In the previous example, it is clear that both parties were at fault in some way. Hakim drove the wrong way down the street and hit Nadir's car, but Nadir also broke a law when he drove through the red traffic light. However, circumstances will frequently arise where the injured party's actions have not so clearly contributed to the injury. Imagine that Sadiq has a fence around his land with a big gate for getting in and out. Normally, he keeps the gate locked, but one day he forgets to lock it. That day, Zahir, comes across the land with his cows. Since Sadiq did not lock the gate, it has swung open. Zahir allows his cows to graze on Sadiq's property, and they cause damage. In this case, the court may or may not find that Sadiq contributed to his injury. There are many factors to consider, and more would need to be known about what is normal in the community to decide. For example, in their community, if someone leaves the gate to their property open, is that normally a signal that anyone is allowed on the property? If so, then Sadiq did contribute to his injury because he left the gate open. If, however, a fence around a property is a signal that no one is allowed on the property without the owner's permission, even if the gate is left open, then Sadiq probably did not contribute to his injury.

Additionally, if an injured party's actions made the injury worse than it would have been, the liability of the party that caused the harm will be reduced. This is also referred to as a duty to mitigate damages. Imagine that Isah rents a large house with many rooms from Ibrahim, and it is Ibrahim's responsibility to fix any problems that occur with the house. One day, the glass in one of the windows in the house breaks. Isah tells Ibrahim about the problem, but Ibrahim does not fix it immediately. A month later, during a large rainstorm, many of Isah's belongings are destroyed because water came in through the broken window. Although it was Ibrahim's responsibility to maintain the property, he will likely not be found completely liable for the harm Isah suffered. The house had many rooms, so Isah probably could have moved his belongings to another room that did not have a broken window, but chose not to. Isah did not mitigate his damages.

#### 4.1 Assumption of risk

Another way to judge whether people contributed to their own injuries is to determine whether they have "assumed the risk" that is a part of the activity. **Assumption** of risk means that people have chosen to do something with the knowledge that the activity exposes them to danger. If the injured party has assumed the risk of the activity, then the liability of the other party will be lessened or discharged completely. Assumption of risk is most straightforward when the injury occurs in sports. If Abdul steps on Latif's foot during a football game and Latif breaks his foot, Abdul will not be liable for Latif's injury. This is because Latif assumed the risk that he would get injured when he decided to play the game. It is a physical game, and people can be injured playing it. If, however, Abdul broke Latif's foot because he fouled Latif in a way that is more severe than normal for the game, Abdul will be liable.

Assumption of risk is not limited to sports. It applies in any situation where people or their property are harmed during an activity that they knew was risky. Imagine that Naila asks to use Idris's washing machine. Idris gives her permission, but he tells her not to wash any scarves because the machine normally ruins them. Naila ignores his warning and washes some scarves, which are then destroyed. Idris is not liable for the damage to Naila's scarves even though it was his washing machine that ruined them because Naila knew that the scarves would likely be destroyed if she washed them but did it anyway.

### Discussion Questions

1. Malia's owns property that includes a lake. One day, Baktash jumps out of a tall tree next to the lake. The lake was shallow, and he breaks his leg on a rock in the water. Do you consider jumping out of a tree to always be risky, so Baktash has assumed the risk of his actions? Why or why not?
2. Assuming that jumping out of a tree is not always risky, in which scenario has Baktash assumed the risk of his actions? Why or why not?
  - A. Malia tells Baktash that it is dangerous to jump out of the tree because the lake is shallow. Baktash has seen Malia's sons do it before, so he does not believe her.
  - B. The lake looks deep, so Baktash thinks he will be safe.
  - C. The lake is so shallow that the rocks are above the surface of the water near the edge of the lake. Baktash thinks he can jump far enough that he will miss them.

## 5. EXTERNAL CAUSE

Until now, the defenses to liability have acknowledged that the individual is at fault for the damages, but they allow for liability to be reduced, delayed, or eliminated because other factors contributed to their fault. For example, under Article 782, if injured parties add to their own harm, the party that caused the harm will not have to compensate them as much or at all. Like the other defenses, Article 782 does not claim that the liable party did not cause the injury, only that the liable party is not entirely responsible. In contrast, the final defense to liability does claim that the accused party did not cause the harm that occurred.

### Civil Code

#### Article 783

Person shall not be obligated to pay compensation if he proves that the inflicted damage has been due to external cause without his interference or due to unexpected event or force majeure or fault of the harmed person or that of another person, unless law or agreement of parties states the contrary.

If an individual can prove that something or someone else was actually the cause of the harm that occurred, then the individual is not responsible for compensating the injured party. For example, imagine that Alia and Amir are neighbors. Alia has a fence around her property. The fence was strong and in good condition. One day, a strong storm comes along, and the wind blows the fence over, damaging Amir's property. Because the storm would be considered an act of God, and the fence was strong and stable, Alia would be able to use Article 783 as a defense to liability.

Remember, though, that the parties have the ability to agree that one party will be liable to another for damage even if the situation would otherwise fall under Article 783. If, for example, Amir had not wanted Alia to build the fence and the two agreed that Alia could build the fence around her property if she also agreed to be liable for any damage the fence caused to Amir's property, then Alia would not be able to

use Article 783 as a defense to liability. Even though the storm would still be at fault for the damage caused by the fence, the two agreed that any damage caused by the fence would be Alia's responsibility.

## CHAPTER 8: CAUSATION

### INTRODUCTION

Ayub buys a loaf of naan from Qadria's bakery. Ayub does not usually shop at Qadria's bakery, but his normal bakery is closed that day. Ayub eats some of the naan that night and wakes up the next morning with a terrible stomach ache. He goes to the hospital, but the doctor, after a quick examination, tells Ayub to go home and rest. The pain gets worse and worse. The next day he goes back to the hospital. He sees a different doctor who immediately suspects the problem. This doctor performs surgery and removes a small piece of glass from Ayub's stomach. Ayub spends another month in the hospital recovering. During his stay, he overhears one doctor telling another that if the piece of glass had been found during Ayub's first visit, his injury would have been much less severe.

What caused Ayub's injury? A piece of glass was the immediate cause. But we are interested in knowing whether anyone is legally responsible for Ayub's injury, so we need to ask what caused Ayub to swallow the glass. Ayub thinks the glass was hidden in Qadria's naan, and so he blames Qadria for his injury. But can he prove it? Even if he could prove that the glass was in Qadria's naan, should Qadria be blamed? Maybe Ayub should have been more careful while eating. Maybe Ayub's first doctor should not have sent him home without a more thorough examination.

### Discussion Questions

What principles should we use to decide who and what caused Ayub's injuries? If you were Ayub's lawyer, what other facts would you want to know before you decided whether to file a lawsuit?

What does the Civil Code say about causation?

- A defendant is not liable unless he caused the harm.
- The defendant must cause the harm directly.
- A defendant is not liable if an external cause is responsible for the harm.

What are the pillars of causation?

- A defendant's act must be both the factual cause and legal cause of a plaintiff's injury.

What is factual causation?

- "But-for" causes are factual causes.
- In some cases, substantial factors leading to an injury are factual causes.

What is legal causation?

- It is a limitation on liability based on morality and policy.
- There are three main theories of legal cause: equivalency of causes, adequate cause, and reasonable foreseeability.
- A defendant's act is not a legal cause if an external cause breaks the chain of causation.

Defendants are liable only for harms that they cause. This chapter discusses fundamental principles of causation that you can use to analyze cases, such as Ayub's. In most real-life cases, it is clear whether or not the defendant has caused harm to the plaintiff. Some cases, however, present complicated questions

of causation. You will discover that these complicated questions are more often decided by the judge's view of morality, policy, and common sense than by applying rigid legal rules.

This chapter begins by examining three articles in the Civil Code that address causation when a harmful act occurs. Next, we address the two pillars of causation: factual cause and legal cause. Factual cause is a broad category that includes all of the events that were necessary to produce the plaintiff's injury. Legal cause is a narrower category that limits a defendant's liability to those acts that have a close connection with the plaintiff's harm.

## 1. CAUSATION IN THE CIVIL CODE

As in other civil codes around the world, the Civil Code provides general principles rather than specific guidance for lawyers, jurists, and litigants trying to determine if the law considers one person's action or inaction to be the cause of another person's harm. Three articles summarize the key aspects of the Civil Code's approach to causation.

### Civil Code

#### **Article 777**

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 779**

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

#### **Article 783**

Person shall not be obligated to pay compensation if he proves that the inflicted damage has been due to external cause without his interference or due to unexpected event or force majeure or fault of the harmed person or that of another person, unless law or agreement of parties states the contrary.

First, according to Article 777, a person is liable only for the harm that she causes.<sup>1</sup> If the person's harmful act is not the "cause" of harm, then the law will not require her to compensate the victim. Causation in the Civil Code is based on individual responsibility. This approach differs from some non-legal settings. Voters may hold an entire political party accountable for the actions of one of its leaders. One family may blame all members of another family for the misdeed of just one of its members. As we will see later, the Civil Code allows multiple individuals to be held liable for the same harm, but only if each individual participated in causing it.

In Article 779, the Civil Code indicates that, for individuals to be held liable for their harmful actions, the harm must result "directly" from the act. Indirect harms do not create liability. The Civil Code does not define "direct" harm.

Article 783 states that a person will not be liable when an "external cause" is responsible for the harm. Article 783 tells us that external causes break the causal link between a defendant's act and the plaintiff's injury, releasing the defendant from liability.

These articles establish three important principles: (1) individuals are liable only for harms that they cause, and only if (2) the harm is direct and (3) without an external cause. These articles leave important questions unanswered, though. What does it mean to cause a harm? What is the difference between direct

and indirect causation? What qualifies an event as an external cause? How do we apply these principles to the facts of particular cases? The rest of this chapter examines these questions in detail. It identifies additional principles and ideas that can help us analyze questions of causation in civil responsibility.

### Discussion Questions

1. Why do you think that the Civil Code bases its approach to causation exclusively on individual responsibility? How is this similar to and different from the approaches taken by non-state processes for dispute resolution?
2. Use Articles 777, 779, and 783 to try to identify the legally recognized cause or causes of Ayub's injury. Make a note of the questions that you have, and see if the sections below provide answers.

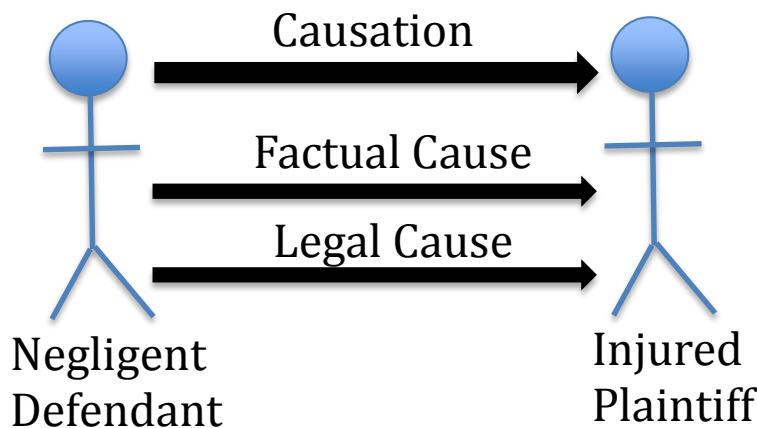
## 2. FACTUAL AND LEGAL CAUSATION: THE TWO-STEP APPROACH

We can interpret the Civil Code as dividing the causation inquiry into two steps. First, under Article 777, courts determine if the defendant's action or inaction was a cause of the plaintiff's injury. If not, then the defendant is not liable. If it was a cause, then, under Article 779, courts decide if the defendant's action or inaction was a direct cause. According to Article 783, the defendant does not directly cause an injury if an external cause is responsible for the harm.

Other civil law and common law courts take a similar two-step approach to causation, although they use different terms to describe the inquiry. In the first step, courts determine if the defendant's behavior was the factual cause of the plaintiff's injury. An action or inaction is the **factual cause** of an injury if it is either a necessary condition of or a substantial factor in the injury's occurrence. If the defendant's behavior is not the factual cause of an injury, then the defendant is not liable. If the defendant is the factual cause, then the court proceeds to the second step: legal causation. An action or inaction is the **legal cause** of an injury if it has a sufficiently strong connection to the injury's occurrence. Factual and legal causation are both necessary to trigger liability.

Below, we look to the Civil Code, examples from other countries, and Islamic law to explore this two-step inquiry.

### Diagramming Causation



## 2.1 Factual causation

Article 777 requires courts to hold individuals liable only for injuries that those individuals cause, but the Civil Code does not define “cause.” The dictionary definition is not of much help either: a cause is “a person, thing, fact, or condition that brings about an effect.”<sup>2</sup> One thing cannot cause another unless it precedes the other in time. If one thing happens after another, then it cannot be a cause. But not everything that precedes something else is a cause. The two events must be related. Factual causation is a concept that enables courts to decide if an earlier event is a cause of a later event.

As stated above, a defendant’s behavior is a factual cause of a plaintiff’s injury if it is a necessary condition of or substantial factor in that injury’s occurrence. A factual cause is also called a cause-in-fact or, in Latin, *conditio sine qua non* (“condition without which not” or necessary condition). As we will see below, the same injury always has many factual causes. In most cases, courts use the “but-for” test to determine factual causation. On rare occasions, they may also use the substantial factor test.

### 2.1.1 The “but-for” test

If the victim would not have suffered harm *but for* the defendant’s unlawful act or omission, then the defendant is a factual cause. This “but-for” test requires lawyers and judges to ask a hypothetical, or “what if,” question: What would have happened to the plaintiff if the defendant had acted reasonably instead of unreasonably? If the plaintiff would not have been injured, then the defendant is a factual cause.<sup>3</sup>

What are the but-for causes of Ayub’s injury? Obviously, he would not have been injured but for swallowing a piece of glass. Every injury has more than one cause-in-fact, though. If we assume that the piece of glass was in Qadria’s naan, then Ayub’s purchase of the naan was also a but-for cause. Ayub would not have purchased the naan from Qadria if his normal bakery had not been closed that day. Perhaps that bakery would not have been closed if the baker had not travelled to a wedding. All of these events are causes-in-fact, or but-for causes, of Ayub’s injury. They form a **causal chain**, or a series of interconnected events that stretches backwards to the beginning of time and forward to its end.

Factual causation is a broad concept, but it does not include every event or even every act of negligence that precedes a victim’s injury. The negligent act must also be a necessary condition of the injury. Imagine that the owner of a copper mine is required by law to provide his employees with safety glasses when they work in his underground mine. One day, the mine shaft, or tunnel, unexpectedly collapses and kills several workers, who had not been given safety glasses. Although the mine owner was at fault in not providing his employees with glasses, his error was not the cause-in-fact of the miners’ deaths. Even if they had been wearing safety glasses, the mine still would have collapsed, and they still would have died. On the other hand, if a worker hammering in the mine without safety glasses is blinded by a shard of rock, then the owner’s fault is the cause-in-fact of the worker’s injury because safety glasses would have prevented the injury.

Consider the following case from South Africa.<sup>4</sup> When police arrested a suspect, his young children fled into the streets. The police did not look for them. The next day, two of the children were found dead from exposure to the cold and rain. The court concluded that even if the police had conducted a proper search, they would not have found the children. Therefore, the police’s failure to search was not the cause-in-fact of the children’s death.

Applying the but-for test always involves making an educated guess about what would have happened if the defendant had acted differently. In most cases, it is clear whether something is or is not a but-for



cause. Sometimes, however, it is unclear what would have happened if the defendant acted differently. In Ayub's case, for instance, we have no conclusive evidence to prove that Qadria's naan contained the piece of glass that Ayub swallowed. In cases such as these, attorneys on both sides make arguments based on evidence, logic, and common experience to persuade judges that their proposed application of the but-for test is correct.

### Discussion Questions

1. Was the first doctor who sent Ayub home a but-for cause of Ayub's injury? If you cannot answer based on the facts provided, what other facts would you need to know to apply the but-for test?
2. If you were the lawyer for the police department in the example from South Africa, what evidence would you have collected to show that the police were not the but-for cause of the children's death?

### Discussion Questions—Suggested Answers

1. To decide whether the first doctor was a but-for cause, we would need to know whether Ayub's injuries would have been less severe if he had been treated immediately.
2. As a lawyer for the police department, your goal would be to show that, even if the police had conducted a search, they would not have found the children. You could determine if the police had standard procedures for conducting searches for lost children. Then, you could try to show that even if the police had followed these procedures, they still would not have found the children. For instance, perhaps the department's procedures required the police to search for the children within three kilometers of where they were last seen. If the children died five kilometers from where the police last saw them, then a properly conducted search probably would not have found them.

### 2.1.2 Substantial factor test

Determining if a defendant is the factual cause of a plaintiff's injury is usually straightforward: substitute reasonable behavior in place of the defendant's unreasonable behavior and determine if the plaintiff still would have been injured. In some cases, however, the defendant's unreasonable behavior plays an important role in bringing about the plaintiff's injury, but that behavior is not a but-for cause. Some courts in civil law countries will find that a defendant's behavior, though not a but-for cause, is still a factual cause if that behavior is a **substantial factor** in the plaintiff's injury.<sup>5</sup> We will discuss two types of cases in which courts might rely on the substantial factor test: multiple sufficient causation and alternative causation. In each of these cases, we must ask whether the substantial factor test complies with Article 777's requirement that defendants be held liable only for harms that they cause.

Multiple sufficient causation and alternative causation both involve situations in which more than one person contributes to a plaintiff's injury. Article 789 of the Civil Code acknowledges that several individuals can cause the same injury. Article 789 gives judges considerable discretion to decide the amount of compensation that each responsible defendant is required to pay the plaintiff.

### Civil Code

#### Article 789

If several persons are responsible for harmful act, they shall have equal liability for compensation, unless judge determines compensation share of every one of them.

A plaintiff's injury has **multiple sufficient causes** when more than one defendant was negligent and more than one of those negligent acts would have caused the plaintiff's injuries even if the other negligent acts had not occurred. If two motorcycles speed past a horse at exactly the same time, causing the horse to throw its rider, neither motorcyclist is the but-for cause of the rider's injury. Eliminate the negligence of one motorcyclist, and the negligence of the other motorcyclist remains—the horse would still have thrown its rider. Both motorcyclists have acted carelessly, so it seems unfair to allow them both to avoid compensating the plaintiff simply because neither is a but-for cause. In cases of multiple sufficient causation, courts may apply the substantial factor test and determine that the defendants' negligent acts are factual causes.<sup>6</sup> Arguably, an Afghan judge could use the same reasoning to find that both defendants caused the injury under Article 777 and were responsible for the injury under Article 789. The judge would then have the discretion under Article 789 to decide whether each defendant should pay the same amount of compensation or whether one defendant should pay more than another.

A plaintiff's injury has **alternative causes** when only one of several negligent defendants caused the plaintiff's injury, and the plaintiff cannot prove which one. Imagine three men are hunting. At the same moment, two hunters both shoot in the direction of the third hunter. The third hunter is wounded by a single bullet. Only one of the hunters actually shot the victim. Only one is the but-for cause, but it is impossible to determine which one. Since both were negligent, courts may look to the substantial factor test and find that both acts were factual causes.<sup>7</sup>

It is unclear whether Articles 777 and 789 would allow an Afghan judge to find defendants liable under a theory of alternative causation. In the example above, only one of the hunters actually caused the plaintiff's injury. The other hunter acted carelessly but inflicted no harm. Perhaps a court would interpret "cause" in Article 777 and "responsible" in Article 789 broadly enough to allow it to hold both defendants liable, rather than allowing both to avoid liability. This result would serve the goals of civil responsibility: it would compensate the plaintiff, punish careless behavior, and deter future hunting accidents.

### Counterfeit Medicine and Alternative Causation

The term "counterfeit medicine" encompasses a wide array of defective and mislabeled medications, including drugs without active ingredients, with incorrect amounts of active ingredients, with incorrect ingredients, with fake packaging, or with high levels of contaminants.<sup>8</sup> Counterfeit drugs are a problem worldwide, but they are especially prevalent in developing countries.<sup>9</sup> For instance, in 2012 more than 100 patients at a clinic in Pakistan died when they received contaminated heart medication.<sup>10</sup>

One day, after you become a lawyer, a person who has been injured by a counterfeit medicine asks you for help. She can tell you the name of the drug, but not the name of the company that made it. You do some research and find that there are multiple manufacturers selling chemically identical, equally harmful forms of the drug in Afghanistan. You realize that you have an alternative causation problem: you know *what* caused your client's injuries, but not exactly *who*. Each manufacturer will argue that even if its pills were defective, you cannot prove that your client was harmed by its pills, and not those of another factory. How would you solve this problem?

An American case addressing similar facts suggests one approach.<sup>11</sup> In that case, the court allowed plaintiffs to sue every manufacturer that marketed drugs in the plaintiffs' geographic region. The court determined each manufacturer's "market share," or the percentage of the total amount of the harmful drug that it had sold in the region. Each manufacturer was required to pay the same percentage of the plaintiff's compensation as its market share. If a company sold 10% of the harmful medication in the region, then it was required to pay 10% of the plaintiff's damages.

What are the advantages and disadvantages of this approach?

### Discussion Question

Do you think that Articles 777 and 789 authorize judges to hold defendants liable in cases of multiple sufficient causation and alternative causation? Why or why not?

If courts applied only the but-for test, then cases involving multiple sufficient causation and alternative causation would not trigger liability. The substantial factor test is broader than the but-for test and ensures that deserving plaintiffs do not go uncompensated in these special cases. In most cases, however, the but-for test includes the acts of responsible defendants, and we have no need to look beyond it.

In fact, the but-for test usually includes too many potential causes. One might argue that if an individual's negligence was a necessary condition for another person's injury, then that should be enough to create liability. To illustrate the problem with this approach, let's return to Ayub's case, but let's adjust the facts slightly. After Ayub seeks help at the hospital, the first doctor still negligently fails to diagnose his condition and sends him home. While walking back from the hospital late at night, Ayub is robbed. The doctor's negligence is a but-for cause of the robbery. If the doctor had not released him from the hospital, Ayub would have spent the night at the hospital.

But the relationship between the doctor's negligence and Ayub's injury seems too distant to require the doctor to compensate Ayub. Imposing liability in this case would be unfair. It would also do little to encourage doctors to be more careful in treating patients since doctors cannot predict the harms that might befall patients upon leaving hospitals. The law needs to separate factual causes that give rise to liability and factual causes that do not. The next section on legal causation describes how courts make those determinations.

### Factual Causation Summary

1. Apply the but-for test:
  - A. Mentally eliminate the defendant's wrongful conduct.
  - B. Determine if the plaintiff would still have been injured.
  - C. If the injury would not have occurred, the defendant is a factual cause.
  - D. If the injury still would have occurred, proceed to step 2.
2. Apply the substantial factor test:
  - A. Was the defendant's action or inaction a substantial factor in the plaintiff's injury?

## 2.2 Legal causation

### 2.2.1 Interpreting Article 779 of the Civil Code

Negligent behavior can "cause" harm within the meaning of Article 777 without creating liability for defendants. This is because, under Article 779, defendants are liable only if the plaintiff's injury was "directly cause by the [defendant's] harmful act." The Civil Code provides no definition of direct causation. How should courts interpret this requirement?

The Civil Code was influenced by the French and Egyptian civil codes. But neither of these codes mentions direct or indirect causation. They refer simply to causation.<sup>12</sup>

Islamic law, however, does distinguish between direct and indirect causation.

### Mejelle

#### Article 92

A person who performs an act, even though not intentionally, is liable to make good any loss caused thereby.

#### Article 93

A person who is the cause of an act being performed is not liable to make good any loss caused by such act unless he has acted intentionally.

#### Article 887

Direct destruction consists of the destruction of a thing by a person himself. The person destroying the thing is called the actual doer of the act.

#### Article 888

Indirect destruction consists of being the cause of the destruction of a thing. That is to say, to do an act which causes the destruction of another thing in the normal course of events. The person performing such act is called the person causing the destruction.

Articles 92 and 887 describe direct causation. In Arabic, direct causation is known as *mubasharah*, and a person who causes a harm directly is a *mubashir*.<sup>13</sup> Direct harm occurs when the injury results from physical contact between the *mubashir* and the injured person or property. In such cases, the *mubashir* is liable regardless of whether he intended to cause the harm. A person who slips and falls on another person's property, destroying it, is liable for the damage because the harm is direct.<sup>14</sup>

Articles 93 and 888 describe indirect causation. In Arabic, indirect causation is known as *tasabbub*, and the person who indirectly causes harm is a *mutasabbib*.<sup>15</sup> According to Article 888, indirect harm occurs when the *mutasabbib* creates conditions that, "in the normal course of events," result in the plaintiff's injury. Transgression, or *ta'addi* in Arabic, must be present if liability is to result from *tasabbub*. Transgression is present when the defendant intends to cause harm (Article 93), but transgression also occurs when the defendant exceeds his own legal rights and violates the rights of another.<sup>16</sup> A person who cuts a cord holding a lamp, causing the lamp to fall, has committed a direct harm to the cord and an indirect harm to the lamp. Liability for damage to the lamp depends on whether the person was justified in cutting the cord.<sup>17</sup>

If Abdu digs a hole and Ramadan's horse falls into that hole, the harm to Ramadan is indirect. If Abdu dug that hole on his own property, then he has not transgressed any of Ramadan's legal rights and so is not liable. If Abdu dug the hole in a public road, however, then he is not acting within his legal rights as a property owner, and he has infringed on Ramadan's right to safe passage on the road. Abdu is liable.<sup>18</sup>

Is it possible that when Article 789 of the Civil Code refers to injuries that "directly originate" from defendants' actions, it is referring to *mubasharah*? This interpretation would create a very restrictive approach to causation. Only physical contact between the defendant and the injured person or thing could result in liability. This approach would not hold individuals liable when their negligence is even slightly removed from their victim's injury. If this were the case, the Civil Code's approach to causation would differ from the *Mejelle* and other sources of Islamic law. This is because Article 789 of the Civil Code would allow compensation only for direct (*mubasharah*) harms, not indirect (*tasabbub*) harms. Classical

Islamic law, however, allows compensation for indirect harms as long as the defendant has also infringed on another's legal rights. This interpretation of Article 789 would also differ from the approach to causation contained in the French and Egyptian civil codes. As mentioned above, these codes do not distinguish between direct and indirect causation.

Other articles in the Civil Code suggest that legislators did not intend to codify such a restrictive approach to causation. Article 779 is located in the Civil Code's section on Harmful Events. Three other articles in that same section—Articles 758, 759, and 775—discuss situations in which liability results from an injury caused by a defendant. These articles discuss causation without mentioning direct causation.

Consider also Article 760, which states, in part, that “creation of cause of destruction [of another's property] shall bring about liability to compensate.” Like Article 888 of the *Mejelle*, this article seems to allow liability to arise from indirect harm to property.

Interpreting Article 779 to limit liability to *mubasharah* would create unjust and inefficient results. Many injuries are caused without physical contact between the negligent party and the person or property harmed. This approach would leave many victims uncompensated and many forms of immoral and economically inefficient behavior undeterred.

An alternative approach would be to interpret Article 779's reference to direct harm as limiting the types of factual causes that can create legal liability. This approach would give judges discretion to decide when the relationship between a cause and an injury is too remote to require the defendant to pay compensation. This approach would be consistent with the text of the Civil Code, the doctrine of Islamic law, and the practice of other civil law countries. But the question remains: what exactly does “direct” harm mean? How should courts apply Article 779 to the facts of a specific case?

### Discussion Questions

1. What meaning should Afghan courts give Article 779's direct causation requirement?
2. When interpreting Article 779, should courts look to other articles in the Civil Code, Islamic law, and/or other countries' civil codes?

### 2.2.2 Theories of legal cause

In civilian systems, **legal causation**, also called **proximate cause**, is the second step in determining causation. Whereas the factual causation inquiry aims to find any causal connection between an act and an injury, the legal causation inquiry asks if that causal connection is strong enough to justify imposing liability. Recall the concept of a causal chain, or series of interconnected events stretching from the injury infinitely forwards and backwards in time. Proximate cause is about deciding when an event is too far back in the causal chain, or too remote from the injury, to merit assigning legal responsibility. To return to an earlier example, we need the concept of legal causation to explain why Qadria's negligence in baking glass into his naan (if that is what happened) triggers liability, but the first doctor's negligence resulting in Ayub's being robbed does not.

There is no formula or rule that judges can apply mechanically to decide what is and what is not a legal cause. Instead, judges must rely on public policy, morality, and common sense. Attorneys are more likely to win causation arguments when they can convince judges (1) that the outcome the attorney seeks is fair for the parties before the court, (2) that the outcome is beneficial to society as a whole, and (3) that similar cases in the future could be decided on the same principles used to resolve this case.<sup>19</sup>

The ambiguity in the legal causation inquiry may frustrate you as a student, but it also gives judges the flexibility to reach the fairest outcome. As one American judge put it: “What we . . . mean by the word ‘proximate’ [cause] is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”<sup>20</sup>

Although courts do not rely on strict rules to reach their legal causation decisions, they do use various theories to organize their thinking. Since the legal causation inquiry is mostly concerned with policy and morality, judges will choose the theory of causation that allows them to reach the decision that they feel is correct. This means that the same court may rely on different theories in different cases.<sup>21</sup> We discuss three of these theories: equivalency, adequacy, and reasonable foreseeability. We rely primarily on European and North American cases to explore these theories, but Egyptian scholar Chafik Chehata reports that several countries in the Arab world, including Egypt, make use of these same theories in their decision-making.<sup>22</sup> Although the Civil Code makes no reference to these theories, neither do the civil codes of other jurisdictions that use them. For each theory, we will consider potential conflicts with the Civil Code’s direct causation requirement.

### 2.2.2.1 Equivalency

The **equivalency theory** states that all causes are legally equal. In other words, the equivalency theory treats all factual causes as legal causes. Of the three legal causation theories discussed in this chapter, equivalency theory is the most expansive. For this reason, it is also the most likely to conflict with the requirement in Article 779 of the Civil Code that causation be direct. Judges might rely on this theory when they believe that the causal relationship between the negligent act and the injury is obvious and direct and so requires no further analysis. No jurisdiction, however, could rely solely on equivalency theory. We have already highlighted the problems that would result from allowing the over-inclusive concept of factual causation to be the only factor in determining whether a negligent act creates liability.

### 2.2.2.2 Adequacy

The **adequate cause theory** holds a defendant liable only if his action is an adequate cause of the plaintiff’s harm. An action is an adequate cause if, under normal circumstances, it “changes or increases the risk of the type of harm which actually occurs.”<sup>23</sup> The shift in risk must be predictable based on common experience, rather than expert knowledge.<sup>24</sup> That is to say, “an event or circumstance is said to be causal in relation to those consequences which it normally produces according to the natural course of things.”<sup>25</sup> Note the similarity between adequacy theory and Article 888 of the *Mejelle*, which defines indirect destruction of property as “an act which causes the destruction of another thing in the normal course of events.” Many civil law countries use this theory.<sup>26</sup> Two German cases illustrate this approach.

A defendant police officer fired at a fleeing suspect but struck a pedestrian instead. The wounded man was taken to the hospital where several patients were being treated for a deadly strain of the flu. The man fell sick and died. The police officer claimed that his gun shot did not kill the man—the flu did. The German court determined that the officer’s gun shot was an adequate cause. The gun shot increased the victim’s risk of death from the flu by (1) weakening him physically and (2) putting him into close contact with infected persons.<sup>27</sup>

In another case, the defendant negligently hit a man with his car, resulting in the amputation of the victim’s leg. Eight years later, during World War II, the victim was walking with his family to a bomb shelter when artillery shelling started. His family ran to safety, but the man could not keep up and was killed. The court found that the defendant’s negligent driving was not an adequate cause of the man’s

death. Randomly falling shells are just as likely to kill people who are running as people who are standing still, and so his injury did not appreciably increase his risk of death.<sup>28</sup>

As noted above, adequate cause theory shares some similarities with the Mejele's description of the indirect destruction of property. An Afghan court might determine that if a negligent act causes harm in the normal course of events, then that harm is direct within the meaning of Article 779 of the Civil Code.

#### **Application Exercise: Negligence that Increases Pre-Existing Risk**

What if the defendant's negligence does not create the risk that ultimately results in the victim's injury, but instead increases a pre-existing risk?

A doctor forgets to run a routine test, delaying the diagnosis and treatment of a patient's disease. If treatment had started immediately, the plaintiff would have had a 50% chance of survival. Now she has a 30% chance. The patient might still survive. Even if the doctor had not acted negligently, the plaintiff still faced a risk of death.

1. Has the doctor's negligence caused harm to the patient? Why or why not?
2. If so, how should the court calculate damages? Should the court award damages before knowing whether or not the patient will die from her disease?

#### **Application Exercise: Negligence that Increases Pre-Existing Risk—Suggested Answers**

1. The patient would argue that the doctor has harmed her by increasing her risk of dying. The doctor might argue that merely increasing the risk that a harm will occur is not an actual harm. According to the doctor, the relevant harm is death. If the patient dies, then disease, not the doctor's negligence, would be to blame. If you agree with the patient that an increase in risk of death is a harm recognized by the law, then there is no question that the doctor's negligence is the direct cause of that harm.
2. The patient might argue that she should be awarded at least 20% of the damages that she would have been entitled to if the doctor's negligence were the sole cause of her death. This is because the doctor has decreased her likelihood of survival by 20%. The doctor might argue that, at most, the patient should only receive damages if she actually dies. Otherwise, she would not have suffered any actual harm from the doctor's negligence.

### **2.2.2.3 Reasonably foreseeability**

The **reasonable foreseeability theory** designates a defendant's act as the legal cause of a plaintiff's injury when the defendant could have reasonably foreseen, or predicted, that his act would cause the harm.<sup>29</sup> Common law courts in the United States and England often use this approach. In practice, it is similar to the adequate cause theory. It is likely that the reasonable foreseeability approach would yield the same results as the adequate cause theory if it had been used to decide the flu and shelling cases discussed above.

The adequate cause and reasonable foreseeability theories both rely on social norms, or values, and attempt to advance sound public policy. They follow the principle that a person should be held liable only for harms that she could have avoided. People cannot take precautions to avoid harms that they cannot predict. Holding people liable for unforeseeable harms might be unfair, and it might discourage people



from engaging in activities that generate economic value. Regardless of the theory that courts apply, their inquiries into legal causation are likely to be flexible, fact-specific, and guided by morality and policy.<sup>30</sup>

### 2.2.3 Complex issues in legal causation

Although rare, some cases do present difficult legal causation questions. This section addresses questions related to the type, manner, and extent of harm, as well as the issue of external causes.

#### 2.2.3.1 The foreseeability of the type, manner, and extent of harm

Article 888 of the Mejlle defined indirect causation, which could trigger liability, as an event that causes harm “in the normal course of events.” Similarly, Article 760 of the Civil Code allows for liability when a person creates the conditions that result in another’s injury. Assuming that these rules might inform a court’s approach to legal causation, how should judges apply these rules when a person’s actions have unexpected consequences?

One situation in which unexpected consequences can complicate the legal causation inquiry occurs when we would normally expect one type of harm to result from a person’s negligent behavior, but another type of harm results instead. A 1921 English case, *In re Polemis*, held that liability would result from any harm that resulted directly from the negligence.<sup>31</sup> That case involved a seaman who accidentally dropped a wooden board into a ship’s cargo storage area. The board did not hit anyone, but it did create a spark that ignited oil fumes. The subsequent explosion destroyed the ship. Even though no one could have predicted that a dropped board would cause that type of harm, the worker’s employer was still liable for the damage because the dropped board caused the explosion directly.

Courts applying the adequate cause and reasonable foreseeability theories have largely abandoned *In re Polemis*’s approach.<sup>32</sup> In another English case known as *Wagon Mound*, the crew of a ship docked at port allowed oil to spill from the ship, coating the surrounding water and docks. No one believed that the oil presented a fire hazard, but it unexpectedly ignited, causing significant damage. The court found that the fire damage, though a direct result of the crew’s negligence was not a foreseeable type of damage, and so the ship’s owners were not liable for it.<sup>33</sup>

What if a foreseeable kind of harm happens in an unforeseeable way? In an American case, *United Novelty Company v. Daniels*, an employer instructed an employee to use gasoline to clean a washing machine in a room heated by an open flame. We would expect an explosion to follow. And it did, but only after a rat soaked in gas ran from under the washing machine to the flame, caught fire, then ran back to the machine. The court decided that the harm was reasonably foreseeable, despite the unforeseeable manner in which it occurred.<sup>34</sup>

Another issue arises when a victim suffers a foreseeable harm, but the extent of the harm is greater than expected because the victim is particularly susceptible to injury. These plaintiffs are sometimes referred to as “eggshell plaintiffs” because they are physically or psychologically fragile—fragile like the shell of an egg. In European and North American courts, the commonly accepted rule is that the defendant is liable for the full extent of the harm to eggshell plaintiffs, even if the severity of the harm was not foreseeable. For example, Muhammed is a bus driver who falls asleep at the wheel, causing an accident. Most passengers suffer only minor injuries, but Abdul, who has a rare heart condition, has a heart attack and dies. Under the eggshell plaintiff doctrine, Muhammed would be responsible to pay damages to Abdul’s family for his death.<sup>35</sup>



### Discussion Questions

1. Do you think that the decisions in *Polemis*, *Wagon Mound*, and *United Novelty Company* are consistent with Mejele Article 888 and/or Article 760 of the Civil Code? Are these cases consistent with Article 779 of the Civil Code?
2. Should courts expect people who are unusually vulnerable to injury to exercise more care to avoid injury than people who are not as vulnerable?
3. Do you think that people who are unusually vulnerable to injury act differently in countries that apply the eggshell plaintiff rule as opposed to countries that do not? What about people or businesses that engage in activities that might injure eggshell plaintiffs?

#### 2.2.3.2 External causes

A defendant's action is only one event in the causal chain leading to a plaintiff's injury. The plaintiff must prove that the defendant's role in her injury is not too remote to be considered a legal cause. The defendant may argue that other events were more important in causing the plaintiff's injury. In making this argument, he might rely on Articles 782 and 783 of the Civil Code.

#### Civil Code

##### Article 782

If the harmed person has caused or increased the incurred harm by his own fault, court may reduce the amount of compensation or even reject it.

##### Article 783

Person shall not be obligated to pay compensation if he proves that the inflicted damage has been due to external cause without his interference or due to unexpected event or force majeure or fault of the harmed person or that of another person, unless law or agreement of parties states the contrary.

Article 782 allows judges to adjust compensation in cases where a victim of another's negligence fails to take steps to minimize the resulting harm. The article thus imposes a duty to mitigate, or limit, damages. For example, an employee temporarily disabled by her employer's negligence might be entitled to lost wages, or the money that she would have earned had she been able to work. Once that employee is able to work, however, she has a duty to mitigate her damages. If she refuses to work when she is able to do so, Article 782 allows the judge to decrease her damages.

Article 783 identifies four **external causes**, or events that occur after the defendant's error and alter the course of events so drastically that the defendant can no longer be regarded as having caused the victim's injury. These four external causes are acts of God, forced circumstances, the plaintiff's fault, and a third party's fault. Unlike Article 782, Article 783 implies that external causes completely eliminate, rather than reduce, the defendant's liability. External causes may also be referred to as **intervening** or **superseding causes**. These events "break the chain of causation" between the defendant's error and the plaintiff's injury and completely erase the defendant's liability.

Below, we discuss three types of events that may affect whether a defendant's error is a legal cause: acts of God, the plaintiff's own fault, and acts of third persons. As you read about each of these types of external causes, think about how the Civil Code's direct causation doctrine might influence a court's approach to external causes.

An **act of God** is an unpredictable and unavoidable event that contributes to a plaintiff's injury. An act of God may also be called a **force majeure**. Natural catastrophes such as earthquakes and floods are typical examples of acts of God. The event need not be absolutely unpredictable and unavoidable. Otherwise, almost no event would qualify as an act of God. Instead, the event must be so abnormal that it was not reasonably predictable or avoidable.<sup>36</sup> The concept of act of God plays a similar role in contracts, so it will be helpful to review Chapter 10 of the contracts material.

Noorzai hires Jan to build a warehouse, but Jan, without permission, uses substandard construction materials. When the winter snows come, the roof of the warehouse collapses. Jan cannot claim that the snow is an act of God, since it was predictable. Now imagine that instead of a normal snowfall, the snows are so deep that year that no one in the community can remember a winter as severe. The roof of Noorzai's warehouse collapses, but many other buildings in the area are also damaged. In this case, Jan has a much better argument that Noorzai's injuries are attributable to an act of God. Do you think his argument is convincing? Has Jan directly caused Noorzai's injuries?

Article 783 also lists a plaintiff's error as a potential external cause. The victim's fault might contribute to the occurrence of his initial injury. One legal scholar relates an example drawn from classical Islamic legal texts: a person who spills water onto a public road is not liable for injuries to a person who slips on that road when the injured person makes no effort to avoid the slippery section.<sup>37</sup>

Consider this example. Mustafa is talking on his phone while crossing a busy street. Suddenly, he sees a car speeding towards him. He has time to move out of the way, but he is scared and just stands still instead. The car hits him. Should his error eliminate or reduce the driver's liability under Article 783? Mustafa might argue that negligent drivers should anticipate that people will act irrationally when frightened. He would argue that his standing still was caused by the driver. The driver might counter that if Mustafa had been paying attention instead of talking on his phone while crossing the street, he would have seen the car earlier.

After Mustafa is struck, he has a bad headache, but, instead of going to see a doctor, he goes to a business meeting. At the meeting, he loses consciousness and dies. When Mustafa's family sues, the driver argues that Mustafa's failure to seek immediate treatment was unreasonable and that it is an external cause of his death. The success of the driver's argument will likely depend on whether the court thinks that Mustafa had good reason to seek medical treatment and whether prompt treatment would have saved his life. Instead of finding that Mustafa's decision not to seek medical care was an external cause, the court instead might view it as a failure to mitigate damages under Article 782. In this case, the driver might still be liable for the injuries that Mustafa would have sustained had he sought treatment promptly.

The act of a third person can also eliminate a defendant's liability for a plaintiff's injuries. Intentional acts by third parties are more likely to break the chain of causation than negligent or lawful acts. Courts are more likely to view a third party's act as an intervening cause if the defendant could not have foreseen the risk of the third party's action.<sup>38</sup>

Recall the earlier example, drawn from the Mejelle, in which Abdu digs a hole in a public road and Ramadan's horse falls in. Arguably, under Article 783 of the Civil Code, Abdu's negligence would not create liability if a third person intentionally drove Ramadan's horse into the hole. This third person would be an external cause.

Imagine that a police officer observes a car driving erratically. He pulls the car over to the side of a busy street, walks to the passenger-side window, and begins questioning the driver, Meena. Then, another car runs into the parked car and injures Meena. Meena sues the police officer, arguing that he should not have

forced her to stop her car in an unsafe place. The police officer responds that he could not have predicted or prevented the other driver's careless driving. What other facts would you want to know in order to decide this case? The exact location of Meena's car and the traffic conditions might be important factors to consider. Would it make a difference if the driver who injured Meena rammed her car on purpose?

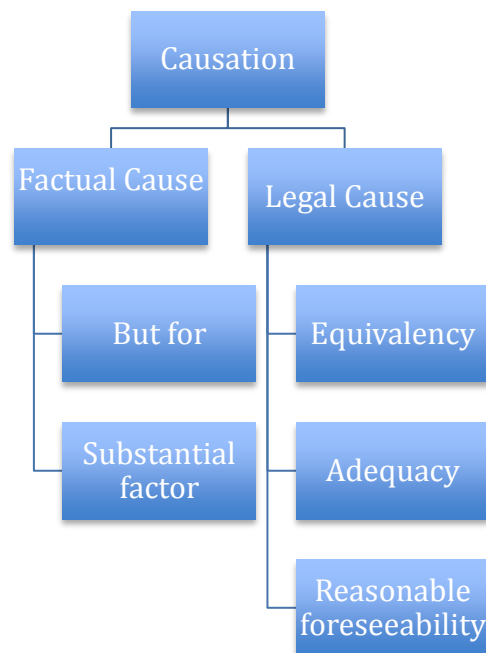
### Discussion Questions

Does Article 783 require a judge to eliminate a defendant's liability if he determines that a natural event, third person's fault, or the plaintiff's error is a contributing cause, but not the sole cause, of the plaintiff's injury? Could the judge decide instead to hold the defendant liable but reduce the compensation that the defendant must pay? Which would be the better rule?

### CONCLUSION

The Civil Code requires that defendants compensate plaintiffs when their harmful acts have directly caused the plaintiffs' injuries. Multiple defendants can share liability for an injury that they both cause. Causes beyond the defendant's control, including acts of God, the plaintiff's error, and third party acts, may reduce or eliminate the defendant's liability.

In most cases, implementing the Civil Code's causation requirements is simple. A person's negligent behavior is the but-for cause of another's injury, and the relationship between the behavior and the injury is sufficiently direct. This chapter has explored a variety of circumstances in which applying the Civil Code's causation rules presents challenges. The theories of factual and legal cause do not provide rigid formulas for solving causation problems. Instead, they offer conceptual frameworks that lawyers and judges can use to think (and argue) about these issues. In the most difficult cases, the decision will often turn on which outcome the judge believes best promotes justice and sound public policy.



- <sup>1</sup> Articles 758 and 775 include similar phrasing relating to liability for the destruction of property and murder, respectively.
- <sup>2</sup> *Webster's 3<sup>rd</sup> New International Dictionary* (Merriam-Webster, 1993).
- <sup>3</sup> Max Loubser and Rob Midgley, editors, *The Law of Delict in South Africa* (Capetown: Oxford University Press, 2009), 68.
- <sup>4</sup> *S v. Van As*, 4 SA 591 (1967) in Loubser and Midgley, *Law of Delict*, 69.
- <sup>5</sup> F.H. Lawson and B.S. Markensinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law, Vol. I* (Cambridge: Cambridge University Press, 1982), 110-11.
- <sup>6</sup> Lawson and Markensinis, *Tortious Liability*, 110.
- <sup>7</sup> These facts are adapted from an American case: *Summers v. Tice*, 33 Cal.2d 80 (1948), available at <http://scocal.stanford.edu/opinion/summers-v-tice-26161>.
- <sup>8</sup> World Health Organization, "General information on counterfeit medicines," accessed July 30, 2013, <http://www.who.int/medicines/services/counterfeit/overview/en/>.
- <sup>9</sup> World Health Organization, "Growing threat from counterfeit medicines," *WHO Bulletin* 88. 4 (April 2010), accessed July 30, 2013, <http://www.who.int/bulletin/volumes/88/4/10-020410/en/>.
- <sup>10</sup> Agence France Press, "Pakistan shuts drugs factory after deaths," Feb. 2, 2012, accessed July 30, 2013, <http://www.google.com/hostednews/afp/article/ALeqM5gLrCXZnv60cU-C20KeG6FZKDu2bQ?docId=CNG.c3ec565502bf571e4d37efad1f9dcf96.21>. For more on counterfeit medications in Pakistan, see Farhan Sharif and Khurram Anis, "Stopping Fake Drugs From Pakistan is Too Late for Victims," *Bloomberg Business Week*, May 17, 2012, accessed July 30, 2013, <http://www.businessweek.com/news/2012-05-17/stopping-fake-drugs-from-pakistan-is-too-late-for-victims>.
- <sup>11</sup> *Sindell v. Abbott Laboratories*, 607 P.2d 924 (1980), available at <http://scocal.stanford.edu/opinion/sindell-v-abbott-laboratories-28157>.
- <sup>12</sup> See, e.g., French Civil Code Article 1382: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."; Civil Code of Egypt Article 163: "Whoever perpetrates an error causing harm to a third party shall be liable to compensate therefor."; see also Civil Code of Iraq Article 186(1): "A person who willfully or by trespassing has directly or indirectly caused damaged to or decreased the value of the property of another person shall be liable." French Civil Code Article 1151, however, does limit contract damages to injuries which are the "immediate and direct consequence" of breach. French courts have applied this article to delicts. Raymond Young, editor, *English, French & German Comparative Law* (New York: Routledge-Cavendish, 2007), 454.
- <sup>13</sup> Abdul Basir bin Mohamed; *Strict Liability in the Islamic Law of Tort*, 39 *Islamic Studies* 445, 455-56 (2000).
- <sup>14</sup> Mejele Article 913.
- <sup>15</sup> bin Mohamad, *Strict Liability*, 455-56.
- <sup>16</sup> *Id.* at 457.
- <sup>17</sup> Mejele Article 888(1). Other examples of indirect causation include a farmer who sets fire to his field while the wind is blowing, resulting in the destruction of his neighbor's crop (bin Mohamad, *Strict Liability*, 458) and a person who opens the door to his neighbor's barn, allowing his neighbor's animals to escape (Mejele Article 922).
- <sup>18</sup> Mejele Article 924.
- <sup>19</sup> Loubser and Midgley, *Law of Delict*, 86-88.
- <sup>20</sup> *Palsgraf v. Long Island Rail Road Company*, 248 NY 339 (1928) (Justice Andrews dissenting), available at [http://www.courts.state.ny.us/reporter/archives/palsgraf\\_lirr.htm](http://www.courts.state.ny.us/reporter/archives/palsgraf_lirr.htm).
- <sup>21</sup> Pierre Catala and John Antony Weir, *Delicts and Tort: A Study in Parallel (Part IV)*, 39 *Tulane Law Review* 701, 741 (1964-65).
- <sup>22</sup> Chafik Chehata, *La théorie de la responsabilité civile dans les systèmes juridiques des pays du Proche-Orient*, 19 *Revue internationale de droit compare*, 883, 903 (1967).
- <sup>23</sup> Lawson and Markensinis, *Tortious Liability*, 121.
- <sup>24</sup> Young, *Comparative Law*, 452.
- <sup>25</sup> Catala and Weir, *Delicts and Torts*, 718.
- <sup>26</sup> Lawson and Markensinis, *Tortious Liability*, 121-123.
- <sup>27</sup> BGH NJW, 1991 (VI ZR 2/91), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=764](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=764).
- <sup>28</sup> BGH NJW, 1952 (III ZR 100/51), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=773](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=773).
- <sup>29</sup> Lawson and Markensinis, *Tortious Liability*, 120-121.
- <sup>30</sup> As the court in the shelling case put it, "The question whether and in what measure a causal connection induces liability can never be exhaustively answered by abstract rules but can be decided in doubtful cases only by the judge according to his unfettered discretion having regard to all the circumstances; and only when it is borne in mind that the doctrine of adequate causation as a way of limiting liability . . . will the danger of schematizing the formula be avoided and correct results obtained." BGH NJW, 1952 (III ZR 100/51), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=773](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=773)
- <sup>31</sup> *In Re Polemis and Furness, Wiley & Company*, 3 K.B. 560 (1921).
- <sup>32</sup> Lawson and Markensinis, *Tortious Liability*, 119-120.

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<sup>33</sup> *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Company Limited* ("Wagon Mound (No. 1)") (1961) UKPC 1, available at <http://www.bailii.org/uk/cases/UKPC/1961/1.html>.

<sup>34</sup> *United Novelty Company v. Daniels*, 42 So.2d 395 (Miss. 1949), available at <http://www2.newpaltz.edu/~zuckerpr/cases/united.htm>.

<sup>35</sup> Lawson and Markensinis, *Tortious Liability*, 112-15.

<sup>36</sup> Pierre Catalla and John Anthony Weir, *Delict and Torts: A Study in Parallel*, 39 *Tulane Law Review* 701 (1964-1965), 776-778.

<sup>37</sup> Chehata, *La théorie de la responsabilité civile*, 892.

<sup>38</sup> Catalla and Weir, *Delict and Torts*, 737-738.

## GLOSSARY

**Acceptance:** agreement to the specific terms stated in the offer

**Act of God:** also called force majeure; an unpredictable and unavoidable event that contributes to a plaintiff's injury

**Adequate cause theory:** an approach to legal cause that holds a defendant liable only if the defendant's action under normal circumstances changes or increases the risk of the type of harm which actually occurs

**Adhesion contract:** a standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms.

**Agent:** a person who acts in the interest of another individual with their consent

**Alimony:** a court-ordered allowance intended for maintenance and support of the recipient

**Alternative causation:** a form of causation that occurs when only one of several negligent defendants caused the plaintiff's injury and the plaintiff cannot prove which one

**Apparent contract:** a contract that exists in writing that does not represent the actual agreement of the contracting parties, who may be trying to deceive others

**Apportion:** to divide and share out according to a plan; especially to make a proportionate division or distribution of

**Assumption:** taking to or upon oneself; to undertake

**Autonomy of the will:** the quality of having individual control over one's own moral and mental inclinations and behavior

**Bad faith:** dishonesty of belief or purpose when negotiating or performing a contract

**Barter:** an exchange of goods

**Bilateral contracts:** contracts that have reciprocal and interdependent obligations, such as contracts of sale, partnership, hire, and lease

**Bodily harm:** physically harming another person

**Burden of proof:** a party's duty to prove or disprove a disputed fact

**Capacity:** the ability to create or enter into an enforceable agreement

**Causal chain:** an infinitely long series of interconnected events

**Cause-in-fact:** see factual cause

**Cause of contract:** the purpose that parties seek to achieve by entering into a contract

**Coercion:** a kind of defect that, if judged to be integral to the formation of the contract, will invalidate the contract

**Collectivism:** collectivist theories view contracting parties as owing special duties to deal with each other in good faith and to act with a view towards the other party's well being

**Compensation:** a form of payment, monetary or otherwise

**Conditio sine qua non:** a Latin phrase meaning "condition without which not"; see factual cause

**Consideration:** a doctrine in common law regimes that requires something of value to be offered by both parties to a contract

**Contingent:** occurring or existing only if certain other circumstances are present

**Contract:** a legally enforceable promise or agreement

**Contractual fault:** the failure of an obligor to perform his contractual obligation

**Contractual obligations:** legal duties accepted voluntarily between parties

**Creditor:** one who is owed a debt by the debtor

**Creditor:** the party with a right to claim a sum of money or another object, service, or action

**Culpable:** legally to blame for a bad act

**Custom:** a practice that by its common adoption and long, unvarying habit has come to have the force of law

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury

**Debtor:** the party with the duty to perform

**Default rule:** a legal principle that fills a gap in a contract in the absence of an applicable express provision but remains subject to a contrary agreement

**Defendant:** the party accused of wrongdoing in a lawsuit

**Deterrence:** penalties designed to prevent harmful acts

**Direct causation theory:** an approach to legal cause that holds defendants liable only for the harms that result directly from their actions

**Direct destruction:** when the person destroying property actually does the act

**Directness:** the causal link between the debtor's fault for the non-performance and the loss

**Disaffirm:** to declare a voidable contract to be void

**Discerning individual:** a minor between the ages of seven and eighteen

**Discretionary:** the power to decide based on one's own judgment

**Disposition:** change of ownership

**Disproportion:** a lack of proportion or a lack of the proper relation in size between things

**Duress:** refers to a situation whereby a person performs an act as a result of violence, threat or other pressure against the person

**Effects of contract:** the legal obligations and rights that result from concluding a valid contract

**Equivalency theory:** an approach to legal causation that regards all factual causes as legal causes

**Exchange contract:** when two parties agree to transfer property for property other than money

**Executor:** a court appointed legal representative for an individual with incomplete capacity or lacking capacity

**Expectation damages:** compensation awarded for the loss of what a person reasonably anticipated from a transaction that was not completed

**Expectation interest:** what the party expects to get out of the transaction

**Expire:** cease to be valid; come to an end.

**External cause:** also called intervening cause and superseding cause; an event that occurs after the defendant's action and alters the course of events to such an extent that the defendant's act can longer be regarded a legal cause of the plaintiff's injury

**Factual cause:** also called cause-in-fact and *conditio sine qua non*; the first pillar of causation; an event that is either a necessary condition of or a substantial factor in the occurrence of an injury

**Failure to warn:** in some circumstances, an individual may have a responsibility to warn others about a danger over which they have some control or responsibility

**Fault:** the intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person

**Floodgate:** a barrier that controls and regulates the flow of a body of water

**Formality:** a procedure which must be followed to achieve a particular legal result

**Fraud:** a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment

**Freedom of contract:** contracts can be formed without government restrictions and interference



**Frustration of purpose:** an unforeseen event undermines a party's principle reason for entering into the contract, and both parties knew of this principle purpose at the time the contract was made

**Future subject:** a subject of contract that does not exist at the time the contract is formed

**General successor:** someone who receives the entirety of an estate or obligation, including the rights and duties, by succession

**Gharar:** generally defined as uncertainty; it relates to a forbidden form of contract where details about the sale item are not known

**Ghasb:** Islamic law term for the idea of usurpation

**Good faith:** a legal dictionary defines the term as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage"; as discussed in the chapter, good faith is a difficult concept to define

**Guaranty:** something given as security

**Implied contract:** a contract between two parties that may not be written, but represents their actual agreement

**Incarceration:** synonym for imprisonment

**Incomplete capacity:** a legal status that limits the circumstances under which an individual can create legal obligations for him or herself

**Increased pre-existing risk causation:** a form of causation that occurs when a defendant's act or omission heightens the probability that a plaintiff will suffer an injury for which she was already at risk

**Indirect destruction:** when a person is the cause of the destruction of a thing

**Indirect liability:** obligations to which one had to answer for damage not caused by one's own acts, but by other people or things for which one was responsible

**Induction:** the act or process of reasoning from specific instances to general propositions

**Industry custom:** the practices associated with a particular industry

**In rem:** relating property

**Installment:** one of the parts into which a debt is divided when payment is made at intervals

**Intellectual harm:** Harm that occurs to one's mind (i.e. emotional distress) or reputation

**Intent:** the state of mind accompanying an act, especially a forbidden act

**Intention:** a person's determination to act in a certain way

**Intentional acts:** defined categories of deliberate conduct, including: theft, robbery (with force, or violence), attack on a person, and attack by a person on property

**Intervening cause:** see external cause

**Invalid contract:** a contract that has been created but that is not legally binding or enforceable

**Itlaf:** Islamic Law concept for destruction of property

**Jahallat:** ignorance

**Joint liability:** the liable defendants are responsible for compensating the plaintiff for his or her losses

**Jurisconsult:** in Roman law, these were long explanations of a legal principle, which we now call commentaries, or treatises

**Jurisdiction:** an area or territory over which a particular court system has authority

**Lack of capacity:** a legal status that prevents an individual from creating any legal obligations for him or herself

**Legal cause:** also called proximate cause; the second pillar of causation; an event that, based on morality and public policy, has a sufficiently strong connection to the occurrence of an injury

**Legal recourse:** the ability to pursue a claim in court in response to harm

**Lessee:** The person to whom a lease is granted

**Lessor:** a person who grants a lease to another

**Liability:** being legally obligated or accountable

**Local custom:** the practices associated with a particular community

**Lump-sum:** a single sum of money that serves as complete payment

**Misfeasance:** active misconduct working positive injury to others

**Mitigate:** to lessen

**Modification:** a change to something; an alteration

**Positive modification:** adding to the value of a piece of property

**Irreversible modification:** changing property so significantly that it does not reasonably resemble its original form

**Moratorium:** a legally sanctioned period of delay in the performance of an obligation. Whether to grant the moratorium is a question of fact left entirely to the court to evaluate in light of each case's particular circumstances

**Multiple sufficient causation:** a form of causation that occurs when more than one defendant was negligent and more than one of those negligent acts would have caused the plaintiff's injuries even if the other negligent acts had not occurred

**Negligence:** the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation

**Nonfeasance:** passive inaction or a failure to take steps to protect others from harm

**Non-physical harm:** harm to one's mind or reputation

**Objective:** of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions

**Objective cause:** the general reason for which two parties would enter into a given contract. It indicates the basic reciprocal relationship between the parties. For example, in a sale one party seeks to acquire an object, and the other party seeks to give it away in exchange for something of equivalent value

**Objective intention:** what any reasonable person would understand from the statement

**Obligation:** a legal duty or liability

**Obligations of result:** obligations of result impose a duty to achieve a promised result

**Obligations requiring adoption of a particular standard of care:** these obligations impose a duty to perform an act while following a certain standard of care but do not guarantee a certain result

**Obligation of warranty:** an obligation of warranty is the only truly strict liability code provision; in all cases, the debtor is held strictly liable, regardless of fault or the presence of an external cause

**Obligee:** one who is owed a debt or duty by the obligor

**Obligor:** one who owes a debt or duty to someone else

**Offer:** the expression of someone's willingness to enter into an agreement

**Offeree:** a person or persons to whom a contractual offer is made

**Offeror:** the individual offering to enter into a contract

**Offer of reward:** a type of unilateral will in which the offeror makes a public declaration that he or she will award a prize in exchange for some specific act

**Option:** a promise that allows one party to a contract to unilaterally rescind a contract under certain circumstances

**Particular successor:** someone who receives a particular estate property or item by succession, as opposed to an entire estate

**Perform:** to take the action required by the contract

**Performance:** the successful completion of a contractual duty

**Plaintiff:** the party who initiates a lawsuit

**Power of assent:** ability to complete an enforceable contract

**Presumption of fault:** fault is presumed on the alleged debtor, but that party may rebut, or disclaim, liability by showing that he took the proper steps to limit any harm

**Principal:** the primary person in charge of a relationship or executing an agreement

**Pro bono representation:** to give legal representation without the expectation of compensation

**Products liability:** When a manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product

**Promissory estoppel:** the doctrine that provides that if a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present

**Proposal:** a suggestion for an arrangement; an act of putting forward or stating something for consideration

**Proximate cause:** see legal cause

**Proximity:** closeness between things

**Qazf:** false accusation of unlawful sexual intercourse

**Ratify:** to adopt an act already completed but either not done in a way that originally produced a legal obligation or done by a third party having at the time no authority to act as the person's agent

**Real property:** Tangible property, such as a land

**Reasonable person standard:** the diligence with which an ordinary reasonable person would use in the circumstances

**Reception theory:** in effect when received by the opposite party

**Reliance damages:** Damages awarded for losses incurred by the plaintiff in reliance on the contract. Reliance damages restore the plaintiff to the economic condition the plaintiff enjoyed before the contract was formed

**Reliance interest:** what the party has put into the transaction

**Remedy:** a solution; a legal means to recover a right or to prevent a wrong

**Renew:** start something again as new

**Repeal:** to revoke by legislative enactment

**Repugnant to public order:** an action, motivation, or object that exists in violation of the government's rules and laws

**Repugnant to manners:** an action, motivation, or object that exists in violation of societies moral standards

**Rescind:** to revoke or invalidate

**Reputational harm:** an attack that undermines the esteem which a person is held by others

**Rescind:** to cancel

**Revenue:** income collected by an entity, such as a city, for the purpose of public functions

**Revoke:** withdraw; cancel

**Riba:** associated with usury, but can also stand for the much broader idea of unjust enrichment

**Secondary liability:** liability for the actions of another party

**Slander:** the act of publicizing disgraceful but false information

**Specific performance:** specific performance is when a court orders the parties to comply with the precise terms of a contract, such as transferring a particular piece of land to another party; specific performance is generally appropriate when monetary damages are inadequate

**Standard of care:** the diligence with which the obligor must perform the obligation

**Status quo ante:** to return the parties to the position they were in before performance of obligations

**Strict liability:** liability that exists even in the absence of fault

**Solicitation:** an expression of interest in forming a contract

**Subjective:** based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena

**Subjective cause:** the particular reason for which one party or another enters into a given contract. It does not require reciprocal goals between the parties

**Subjective intention:** what a particular person is thinking at the moment the statement is made

**Subject of contract:** the physical object or promise for which a contract is made

**Substantial factor test:** an expansive form of factual causation that includes all events that are substantial factors in producing the plaintiff's injury

**Succession:** acquisition of rights or property by inheritance

**Supersede:** to displace in favor of something newer

**Superseding cause:** see external cause

**Surrogate performance:** the debtor does not personally perform the obligation, but is held responsible for the cost of another person performing the obligation

**Suspended contract:** contract which is not presently valid but which one party can ratify or reject at some point in the future

**Termination:** a party's right to end the contract and void unperformed, future obligations

**Testament:** see will

**Testator:** person who creates a will

**Third party:** an individual who does not have a direct connection to a legal transaction but might be affected by it

**Undiscerning individual:** a minor younger than seven years old

**Unilateral contracts:** contracts involving obligations that bind only one party, such as obligations for gifts

**Unilateral will:** a non-contractual legal obligation created by an offer that does not require acceptance

**Unintentional acts:** responsibilities that people have for damages caused indirectly

**Unjust enrichment:** when one person intentionally or by chance profits directly from harm or losses suffered by another

**Usurpation:** the taking of another's property without consent

**Third party usurpation:** when a piece of property is taken by two separate individuals

**Usury:** the lending of money at high interest rates

**Valid contract:** a legally binding and enforceable contract

**Vicarious liability:** liability that is assumed or automatically assigned to a second party (such as an employer) for the actions of another (such as an employee)

**Voidable:** not automatically void, but must be voided through an action by one of the contracting parties

**Void contract:** a legally unenforceable contract

**Will:** a property of the mind, where one expresses volition and is favorably disposed or inclined towards something

**Zina:** unlawful sexual intercourse

**Zone of control:** area over which one has clear access