

Are the Limitations on Remedies Fair? A Comparative Study Between the US Law and Islamic Law

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ABSTRACT

This paper addresses similarities and differences between the US law and Islamic law, and considers how each system might benefit from the other. Within the scope of limitations on remedies, the paper explores foreseeability, causation, mitigation, and certainty. How the two systems understand the concepts is described, and the concepts are examined through the lens of fairness. A comparative analysis follows, investigating similarities, divergences, and possible enhancements to the law. The foundation of morality, set in the context of the two systems, establishes grounds for the potential merger of morality and the limitations on remedies. The perspective of justice is a central and crucial point of divergence between the two systems, and the conundrum of flexibility versus faithfulness to the principles of law informs the major findings of the study. Although, there is a noticeable tendency of the two systems to hold a similar legal stance despite their different legal structures.

Keywords: contracts law, comparative law, Islamic law, remedies, damages

INTRODUCTION

The idea that a legal system needs no improvement is fundamentally inaccurate. History tells us that a legal system must evolve, whether from internal or external sources, in order to survive and to avoid a gradual decay. This study uses a comparative approach for the better understanding of two legal systems: Islamic law and the law of the United States. Moreover, by comparing what may appear to be incompatible laws, the study attempts to serve the purpose of advancing the systems as well as bridging the gaps created by misconceptions or misunderstandings about these legal systems.

The study will attempt first to answer questions about morality, particularly with respect to limitations on remedies of contract. Then, addressing the law of the US as well as the law of Islam, the study will cover each limitation: foreseeability, causation, mitigation, and certainty. Finally, comparative analyses of the two systems will focus on how each system understands fairness and the implications of this understanding for the law.

ISLAMIC LAW & US LAW ON THE QUESTION OF MORALITY

The pervasive question of morality cannot be avoided when we consider the limitations of remedies in contracts. We can view the role of morality under the larger issue of fairness and consider how each system would explain the availability of remedies in terms of morality. To answer this question in a broad sense clearly seems

part and parcel of a comparison between the two systems and thus relevant to the topic of the study.

When we consider the question of the impact of fairness and morality from the perspective of the major western philosophical legal schools--naturalism, realism, and positivism--it is extremely hard to subsume Islamic law under these schools of thought. Perhaps natural law can be seen as compatible with Islamic law, but with a caveat. Not the mainstream understanding of natural law but rather the modified version espoused by Thomas Aquinas might apply. However, the views are not identical as they diverge on a major element of natural law (Makdisi 1997).

George Makdisi asserts that "in Islam there is no concept of natural law," and he describes a basic difference between Aquinas's account of natural law and Islamic law:

Obligation is a matter determined by God; this is the doctrine of Ibn 'Aqil [classical Islamic law scholar], and it is also that of St Thomas Aquinas. The difference between them is in the route that obligation takes to travel from God to man. With St Thomas, the route is from God and, by way of the nature of things, to man; with Ibn 'Aqil, the route is direct, from God to man, for in Islam there is no concept of natural law. If there is an intermediary between God and man, it is God's Messenger, the Prophet; but his function is to deliver God's message, which he receives through the agency of the Archangel Gabriel, and to the terms of which he himself is obligated (Makdisi 1997)

With that being said, the obligation from God would necessarily be moral. Yet Islamic law never

claims that the entirety of the law was revealed from God, however; it posits an element of the law which was human-made (so to speak). The Islamic jurists had, and still have, an important role in forming the law (Alashqar 1982). A distinction must be made here, namely that the direct obligation from God must be moral and that such obligation has its significant existence within Islamic law. The area in Islamic law where legal scholars have some leeway or flexibility in their endeavor to understand and to interpret the law of God cannot be seen as moral in the same absolute manner. But according to Islamic law theorists, the normative maxims of Islamic law as derived from the divine teaching should already include moral standards (Barawi 2018).

When we look to US legal scholars, we find no consensus on where the law or the constitution was derived from or how the law should be read. Various schools claim to be the authority of the law and each school tackles the morality question with a different approach. From the perspective of naturalism, “natural law and morality were, like mathematics, supposed to be derived through human reason” (Lambright 2015). Seemingly, reason is the tool used to infer morality, and this reason can vary from one understanding to another. Therefore, the question of morality must be sufficiently answered in order to validate the law.

In contrast, legal positivism intentionally overlooks the question of morality in its understanding of the law, sets aside the motive of a policy, and is based on empirical rule (Cullison 1985). Therefore, according to this account, law does not need a moral justification in order to be imposed or enacted. Last but not least, legal realism places the emphasis of the law on court decisions. Harry Jones discusses how legal realism should approach the question of morality, not from first principles but from the decision-making process: “The ethical theory to be drawn from legal realism is, I suggest, that the moral dimension of law is to be sought not in rules and principles, or the higher law appraisal of rules and principles, but in the process of responsible decision, which pervades the whole of law in life” (Jones 1961).

The idea of this section is to discuss briefly the merger or possible merger of morality and law according to the two legal systems. With the scope of the study confined to limitations on remedies of breach of contract, Islamic law generally does not offer a direct divine obligation on the area of limitations. Therefore, moral explanation needs to be sought in order to have a sound and justifiable law. The US law would be in the same boat with Islamic law, facing the very same question, if the law were to be understood according to natural law or legal realism. However, if the law were to be understood exclusively according to positivism, theoretically speaking, the question of morality might be escaped. Lastly, it is vitally important to note that each system has its own way to assess morality or fairness, all in

accordance with each system’s legal maxims and rules. And so we have different laws and different moral explanations.

LIMITATIONS ON REMEDIES FORESEEABILITY

The US Law

This limitation tends to protect a defendant from unusual injury which occurred because of a breach of contract. The non-breaching party would not be awarded atypical damages for such a breach unless it has been brought to his attention at the time of making the contract. As the Restatement of Contract states, “Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach.” (Restatement § 351, 1981). Similarly and arguably, the plaintiff is able to recover consequential damages if the parties made the contract in a formality of tacit agreement (Bix 2012). The default rule is that the remedy would be awarded for normal damage and other types of damages if the party had reason to know by any means. The other part of the default rule is that in case of ordinary surrounding circumstances the remedy should be given as well. Also, the standard of “had reason to know” would apply in the special circumstances just as in normal circumstances (Restatement § 351 comment (b), 1981).

Foreseeability is a doctrine established in the common law system after the leading English case of *Hadley*. The facts in brief: *Hadley* was in the business of milling flour, and somehow one of the main components of the mill was broken. As a consequence, the entire operation had to shut down. *Hadley* hired *Baxendale* to have the part delivered on a certain date. The defendant recklessly delayed the delivery, causing the plaintiff to bear a greater loss as the mill remained inoperable. The court held that this type of loss was not recoverable because the parties did not contemplate it when they made the contract. In other words, this particular damage was not reasonably foreseeable at time of the formation of the contract. Therefore, the defendant was not liable to compensate the plaintiff for such a damage (*Hadley v. Baxendale* 1854).

Fairness Assessment

On one hand, the advantage of the foreseeability, or *Hadley*, rule is that it gives an incentive for the contracting parties to reveal the hidden high valuation of the contract substantives. That should enhance the chances of an outstanding performance and encourage the contracting parties to strive with great precaution to avoid high price damages (Posner 2011). In other words, this limitation establishes a fair mechanism which should allow the limitation to play in favor of both parties. If that is the case, then foreseeability satisfies the fairness standard by

setting a requirement which advocates equally for the betterment for both parties.

On the other hand, a question of fairness may go to the core of foreseeability. The test of foreseeability sets for the court a convenient standard in determining a legitimate compensable breach, i.e., a reasonable person standard. But the losing party might experience the result as a type of punishment for failing to foresee the breach (Brown 1975). This perspective of foreseeability says that if you do not foresee the possible loss at the time of forming the contract then you may justifiably be punished. This is the essence of foreseeability stated plainly and without euphemism.

Moreover, the foreseeability rule would seem to favor one party over the other. If the damage from the breach has already occurred, then the rule would protect the breaching party who had not contemplated such damage. The non-breaching party, however, might suffer severely from the breach but the rule would still side with the defendant, and no consideration of the severity of the loss would matter, for the simple fact that the damage was not foreseeable (Gilmore 1974).

In an ideal world, a breach is a breach, and the one who commits the act should be held accountable regardless (Anderson 2014-2015). Yet due to the nature of the claim, the court needs a practical measure to assess the damage where a loss could not have reasonably been foreseen. In other words, a loss that never occurs to the mind of the defendant is out of the scope of the contract. Therefore, the defendant should not be liable for something he had never intended to commit or sign for. So, this account interprets fairness differently than it was interpreted previously. On the other hand, the test would equally back the plaintiff when the defendant had reason to know about the damage even if he did not have actual knowledge. All in all, the test attempts to set an objective standard to protect the contract at large and ideally strikes an even balance between both parties. Of course this all depends on a fictional reasonable person who is put in the shoes of the defendant with no actual knowledge required (Anderson 2014-2015).

The test rests as well on the assumption that the parties are somewhat able to anticipate a breach. In reality, however, such is not the case, as their anticipations are likely to be very limited. The human imagination is restricted by various factors. The contract may appear familiar and evoke no prediction whatsoever of any serious contingency. Who can imagine all possible outcomes? Thus it has been suggested that this limitation be replaced by another legal doctrine, that of impossibility, where a completely unforeseen, supervening event takes place (Brown 1975). The reason behind the doctrine of impossibility is the desire to avoid a situation where a party is deprived of remedy due to the unrealistic nature of the test of foreseeability. This argument may look genuinely fair, with more

appreciation and consideration given to the impossibility doctrine over the foreseeability test, but it has a very limited application in the real world of contracts, where a contingency such as death is rare.

Danzig and Watson raise legitimate questions concerning the fairness of the foreseeability test, especially given the fact that modern technology enables ever-faster communication between parties, an important difference from the historical basis of the test. When the case was decided more than 150 hundred years ago, for the most part the only communication between parties took place at the time of forming the contract and not much after that. So, “now [that] the telephone makes it possible to mandate discussion at the time of breach, would it be desirable to move the focus of the rule to this point?” (Danzig & Watson 2004) The scale of any possible damages also impinges on the question of fairness: “Why should the court look exclusively to whether a defendant could foresee a type of damage, but not attend to whether he could foresee their magnitude? Does the recovery of tens thousands of dollars, where most parties would have anticipated hundreds of dollars, comport with our sense of fairness?” (Danzig & Watson 2004)

Reasonableness plays a crucial role in the standard stipulated by the foreseeability test. A reasonable person is assumed to have the character to act where the act is required. Also, theoretically, a reasonable person has the ability to differentiate between right and wrong even in a future event. Last and not least, he or she is able to predict or see somehow a loss coming out of a breach. It is a virtue attributed to the person. But there is a grey area among people given this status, and the possibility that they will differ in answering the question of foreseeability is great. Yet various answers might all be called reasonable and persuasive. Therefore, what judgment should we rely on?

Also, the claim of reasonableness is considered a virtue, and all will claim it. But, critically, jurors may differ on what is reasonable and what not, and on who is reasonable and who not! Therefore the verdict would depend on whose subjective view of reasonableness wins out (MacCormick 1999). Moreover, a practical and objective definition of reasonableness cannot be described precisely, which adds more complexity to the matter. Thus, the degree of reasonableness resists objective measurement (MacCormick 1999). The critique concerning the fairness of foreseeability notes that assessment of the status or virtue of reasonable person is a relative and contingent matter. So, what is called reasonable today might be called unreasonable tomorrow.

On the other hand, in making a case for the fairness of foreseeability, one can acknowledge that the parameters of reasonableness may not be perfectly formed. Nevertheless, a societal understanding of the term can be normative in that it reflects what the bulk of the community would agree on (DiMatteo 1997). Moreover, the concept of the totality of

circumstances can be brought up to fill the gap of vagueness and help to better determine reasonableness with a higher degree of consensus. But this has its own problems when left to the discretion of the court and the judge, who cannot be fully detached from personal standards of understanding reasonableness (DiMatteo 1997).

In conclusion, after critiquing the standard of reasonableness as subjective, impractical, or even irrational, we see that it cannot be defined without personal interference from the parties and even the judge. The jurors, in my opinion, are in the same boat as they strive to the best of their ability to distance their personal views and stick with the principle of the reasonable person. Therefore, the reasoning is circular as the principle of the reasonable person prevails. The question then is, what could be an alternative? It is important to have a person outside the circle of the parties to come up with a reliable judgment. And in order for this person's assessment to be accepted, he or she must have the characteristics of a reasonable person. Thus we can ask whether is it fairer to stick with the concept of reasonable person or should we get rid of the foreseeability limitation and its supplements entirely?

ISLAMIC LAW

After doing intensive and thorough research trying to find a parallel concept in Islamic law literature within the scope of the breach of contract, I can confidently conclude that there is none. The reason for this absence is mainly due to the pervasive theory of *darar* (Loss) (Alkhafif 2000). Islamic law does not base the breach on anything other than *darar* or loss. Once that *darar* has been established, there is no need to investigate further whether that *darar* was contemplated at the time of forming the contract or not. The consistent tendency of Islamic law is that *darar* must be responded to with a legal reaction (Alzuhayli 2012).

However, some sort of compatibility (for lack for a better term) with foreseeability exists in places where Islamic law talks about an intervening event or, in other words, an act of God which makes the performance impossible (Ministry of Islamic Affairs 1992). In a very deep and extremely narrow look, this concept may fall into the criteria of foreseeability where the intervening event might be seen as a limitation, and once it occurs the party is not liable to compensate the other party. Nonetheless, this should be more suitable to the concept of frustration or impracticality which are located in a totally different realm in the US contract law (Bix 2012). Moreover, Islamic law does not regard the period of forming a contract as an important period until the terms in the contract have been set. Therefore, although the two systems may reach the same conclusion in a particular example, the bases are foreseeability as well as frustration in the US law but only frustration according to Islamic law. Also,

in case of an intervening event, a breach has not occurred yet the performance gets blocked from an outside source and the very definition of breach may not be satisfied.

COMPARATIVE ANALYSES

Here we confront a difficult discussion because we need to make a judgment about the two systems in light of recognizing or denying foreseeability. In my opinion -especially here- this may become very problematic because it is an attempt to objectify fairness in the absence of a unanimous source or reference to evaluate both systems. If a matter is discussed within a system, the rules defining that system apply. But judging a practice in terms of two systems operating under different sets of rules is highly questionable. I do not think a researcher can distance himself to avoid bias one way or another; subconsciously, the maxims or rules of one system may influence judgment of the other.

By mandating foreseeability, US law understands fairness in a way that questions how a person can be liable for something not imagined at the time of entering the contract duties. If the party is liable for an unforeseeable loss, it is almost as if they become liable for a whole other contract, one that is beyond the one they initially entered into. Moreover, foreseeability is a systemic and practical tool to limit the impulse for greed prevalent in society. In other words, a party is only liable for what a contract normally obligates, and the damage is something specific. A plaintiff cannot come up with a fantasy to gain the remedy at the expense of the defendant.

Islamic law looks at fairness differently in that damage is a reaction to wrongdoing caused by a breach, and this wrongdoing causes a loss regardless of whether the loss was foreseen or not. To elaborate, once a person commits an act of injustice, the consequence of this act is liability. A breaching party commits a breach, and an injured party incurs a loss. Thus, how is it rational or plausible to ask whether this loss was foreseen or not when the breaching party was entirely the cause of the loss? Also, according to *darar* theory, the act of breach is seen in Islamic law as transgression. Therefore, a transgressor has to rectify the situation by compensating the transgressed party for whatever loss was incurred. Furthermore, Islamic law normatively focuses on another limitation: the causation where the emphasis falls on proving the connection or the correlation between breach and loss (Alzuhayli 2012). Once a correlation between breach and loss has been determined, then no further investigation (such as foreseeability) is needed.

CAUSATION

The US Law

This restraint, where the logical order of common sense is at work, appears to be more rational and natural in comparison with the others. Basically, the plaintiff has to establish proof of a causal link between the breach and the loss in order to be entitled to a remedy. Simplistically, in normal cases, a direct breach has no hard requirement to prove a causal link due to the level of clarity it has (Restatement § 347, 1981). Nevertheless, the critical part of causation would be in a case of consequential damage, where the damage is not directly caused by the breach but rather by subsequent consequences. For the latter, the party must exhaust every means to demonstrate a clear causal link; otherwise, the rule is not satisfied (Blum 2013).

Contributing Factors

The practice of the federal court tends to appreciate or value the test of substantial factor. Therefore, a factor has to be proven to be a substantial factor in order to be liable for the damages (*Energy Capital Corp. v. United States*, 2000). No matter how large a role other factors played in facilitating the breach, no liability can be established as long as the level of substantiality is not satisfied (McDowell 1988). The terms remote cause and proximate cause help distinguish between the factors. Thus, the more the factor is remote and tangential, the less likely the breaching party is to be liable, whereas the more the factor is proximate, the more likely the breaching party is to be liable. "But no particular degree of remoteness in time or space, and no maximum number of intervening events, has ever been established as a deadline beyond which damages are not recoverable ." (Corbin on Contracts § 55.7, 2018).

Here the court elucidates its stance on adopting substantial factor and rejecting apportionment of responsibility by invoking fairness as the base of this firm position. It states:

To permit apportionment of liability . . . arising solely from breach of contract would ... do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed Nothing prevented [the defendant] from negotiating for protection from liability in its contract with the [plaintiff]. Having neglected to do so, it may not now be heard to complain that it is exposed to a claim for damages. Nor are we persuaded that we should create a common-law right of contribution in contract actions.... [T]he need to liberalize the inequitable and harsh rules that once governed contribution among joint tortfeasors ... are not pertinent to contract matters. Parties to a contract have the power to specifically delineate the scope of their liability at the time the contract is formed. Thus, there is nothing unfair in defining a contracting party's liability by the scope of its promise

as reflected by the agreement of the parties. Indeed, this is required by the very nature of contract law, where potential liability is determined in advance by the parties. (*Bd. of Educ. v. Sargent, Webster, Crenshaw & Folley, 1987*)

Fairness Assessment

With the court's assertion on denying the concept of apportionment of responsibility, the supposed fair virtue of the latter is missed. Where the total loss would be divided based on the degree of fault and no party carries the burden of the others, everybody is held accountable for the action committed. It may be fair, and fitting the general rules of the law, for no person to be punished or accountable for the actions of others (O'Gorman 2017). On the other hand, this approach may seem problematic when a non-breaching party cannot provide any evidence for one of the factors as substantial. Therefore, the law offers only one tough option whether utterly losing the case or completely winning the case. To reiterate, the apportionment of responsibility may leave each party happy (as the law should maximize happiness for the society at large), where the plaintiff would not be deprived of an award as the defendants would share responsibility divided by the level of fault, and without having the compensation falling completely upon one of defendants.

In contrast, the court's understanding of fairness comes from a broad stretch of the term. A possible implication of ignoring the substantial factor is that a window will open for anyone involved in the deal to be sued. The courts might then be inundated with suits that have no real relation to the loss. Therefore, the court is convinced that a stricter limitation has to be stipulated (*North v. Johnson, 1894*).

Islamic Law

It is commonly and widely understood that damages will not be granted unless liability is established. Liability must meet three requirements: violation of the contract terms, infliction of harm, and causation connecting the first two. In other words, the violation must produce harm with an evident causal link (Alhaidary 2012). Causation in Islamic law is governed and assessed by Urf. The word refers to the common understanding of the public within the area of the contract specialty. Thus, the court needs to ask people in the field or conduct a survey to understand the Urf in order to come up with a final ruling as to whether causation is established or not (Siraj 1990).

CONTRIBUTING FACTORS

Let us move on to a complex area with the hope we can get the bottom of it in a clear way. The complexity arises from having multiple factors facilitating and leading to the infliction of harm on the side of non-breaching party and how causation plays its role. Islamic law differentiates between two

things: reason (Sabab) and cause (Mubashir) (Almarzoqi 2009). For the sake of simplicity, a reason would be the act that brings about the breach or the motivation that evokes the breach. A cause would be the thing that hits and results in the breach. Or there might be multiple factors, one starts and the other one intervenes. The question here is, which of these factors should be held accountable for the breach and consequently the remedy?

The answer can be divided into two categories. First, can all the factors without exception be exclusively called reasons or causes? In this scenario, Islamic law generally tends to hold accountable the factor which has a stronger effect or influence in leading to and resulting in the breach. It may seem simple but, in some cases, it is extremely difficult to determine and measure the final and the stronger influence (Almarzoqi 2009). Moreover, no tools or tests have been provided to measure the factors; this is left to the court's discretion. Moreover, in a scenario where the factors are deemed to be equal and no factor supersedes another, Islamic law generally embraces the concept of apportionment of responsibility, with the loss divided equally among all factors (Almarzoqi 2009).

A second category includes instances when the combination of reason and cause are involved in precipitating the breach. Islamic law has a tendency to hold the cause accountable and overlook the reason. That is not to say that the reason could not receive some of type of Tazir punishment (discretionary punishment) if the action is deemed legally immoral and should not have been done in the first place. Yet that does not lift the reason to the point of responsibility for the breach; therefore it is not held responsible for the damage. The reasoning and logic behind this notion is that the cause is the substantial factor and if it had not been committed, or if had been erased from the scenario, no breach would have occurred (Almarzoqi 2009). Also, that the reason cannot by itself reach the point of breaching the contract is accurate and true. Thus, according to this narrative, to hold the reason liable is unfair.

Fairness Assessment

To distinguish between the reason and the cause can prove difficult because to do so depends greatly on Urf, the public understanding, (Siraj 1990) and it is hard to fix this understanding with certainty. While it is possible to have unanimity in some cases, in others the line between reason and cause is undistinguishable and leads to a divergence of views. Efforts to make distinctions between symmetric things from the perspective of the public can cause confusion. Clearly, the Islamic law endeavors by this distinction to avoid a situation in which a factor cannot breach the contract but yet can be held responsible. To direct responsibility to the one who made the difference--the one who factually commits the breach--may seem clever and fair. However, what

is really missing here is a realistic and practical exam or test to reach a reliable distinction. To me, the Islamic law needs to develop and advance its rules and maxims to come up with or invent tools able to help the court to decide with comfort and confidence what act is responsible for the breach.

DEFINITION, TWO PERSPECTIVES

The US law and Islamic law are in perfect harmony where they share the very same concept of causation. The only difference might be in the wording of the concept and its details, but the essence is the same. The main process to get to causation is nearly the same, and Islamic law bases the process on the concepts of Daman (liability) and Darar. Consequently, the end products for both systems are parallel. So far as the abstract meaning of causation is concerned, one finds no noticeable difference between the systems.

It is worth mentioning here that Islamic law provides a specific tool to measure the authenticity or validity of causation, namely, Urf. Urf generally enjoys a wide acceptance and is the most admissible and recognized tool in this area. Admittedly, the court in some cases enjoys a larger discretion due to the nature of these cases (Siraj 1990). On the other hand, the US law clearly leaves this matter to the court without specifying the tools. The general rules of evidence should be applied and whatever passes the scrutiny of the evidence test should be allowed to be presented before the court -without specifying any rule or tool for causation. All in all, at this point, the only difference between the two systems is the notion of Islamic law to let Urf govern the test of authenticity whereas the US law gives no priority to one category of rules – rules of evidence - over the other.

CONTRIBUTING FACTORS ACCORDING TO THE TWO SYSTEMS

It can be assertively said that the two systems have regarded the concept of substantial factor to be the governing and superseding concept over the others. This is more pertinent to US law where the concept of substantial factor dominates the area with no competitors. Although Islamic law as stated has given the priority in normal or less complicated cases to the concept of substantial factor, it has consciously abandoned the concept of substantial factor in other cases. In the event of factors indistinguishable in terms of strength, Islamic law tends to adopt the concept of apportionment of responsibility due to uncertainty in attributing the breach solely to one factor. Islamic law thus offers a hybrid practice where the concepts of substantial factor and apportionment of responsibility have their places. Moreover, in the case of implementing substantial factor, the Tazir uniquely intervenes to punish the

one who shares some sort of responsibility for the breach even though the breach does not fall wholly on his liability.

Two points should be raised. First, Islamic law evens the scales in saying that no one can escape justice and all shortcomings and mishandlings deserve some sort of legal reaction and attention. (This is a well-founded notion in Islamic law, especially in the area of criminal law, where Tazir is applied in instances where there is no fixed punishment for a wrongdoing. Here, contract law overlaps with criminal law due to the similarity in nature) (Ministry of Islamic Affairs 1992). This is with respect to implementing all of these mentioned concepts: substantial factor, apportionment of responsibility and Tazir. Therefore, Islamic law should be seen as advantageous over the US law. The second point addresses the implementation of apportionment of responsibility, which is more of a philosophical question. Is it possible to have equivalent factors in every circumstance without one being stronger than the others, as the condition of apportionment of responsibility goes in Islamic law? I find this somewhat mind-boggling, as it is hard to find real cases carrying this particular characteristic. However, I do not deny the existence of such cases; indeed, they may well occur. I do, however, question the practicality of adopting the concept when cases fitting such strict conditions may be rare.

In discussing the two systems, the lack of a practical and realistic measuring tool to distinguish between factors came up. The need for such a tool is clear, and both systems would benefit from the development of a tool able to enhance the laws. The tool needs to be less discretionary and more accurate. Each system may derive a practical tool from the larger legal maxims and principles to fit the purpose. Care must be taken to not mix tools from one system with the other in order to avoid potential conflict.

THE QUESTION OF OBJECTIVITY CONCERNING CAUSATION AND FORESEEABILITY

The question of objectivity is a vital in the process of determining the fairness of a system. The more objective a system becomes, the fairer it will be, as emotion and discretion recede in influence. In this regard, foreseeability at its core “depend(s) on the purpose and intention of one party as known to the other” (Treitel 1988). If intention and purpose were fully known, a high degree of would be possible. Yet the essence of foreseeability is “the defendant’s capacity for foresight,” (Treitel 1988) which can be profoundly subjective. Causation, in contrast, can be tested by a set of measurements, dependent on the system, to achieve a clear outcome. Also, the test can be applied uniformly in any case where the injured party strives to connect the loss to the breach with tangible proof. This is contrary to the first mentioned

limitation, where tangibility is not a crucial element of proof as it greatly depends on intention.

Islamic law seems to have no problem in solving this riddle, as foreseeability is largely neglected. Moreover, Islamic law weighs the scale of limitations heavily towards causation, and I have no doubt that causation is more objective than foreseeability. In that regard, Islamic law can be seen as advantageous in establishing an objective limitation and disregarding the subjective limitation. Again, this is not a holistic comparison but rather one focused on objectivity. Also, it is not an attempt to claim that causation is a panacea, since of course causation can be flawed.

At this juncture, for the sake of practicality, it is pertinent to bring up the facts of *Hadley v. Baxendale*--a seminal case--to see how Islamic law deals with it, and its treatment differs from or resembles that of US law. The fundamental question here is to see how the liability requirements can be satisfied, and once all are satisfied, then the damage will be granted! (Alhaidary 2012).

The late delivery of the mill component was certainly a violation of contract terms, and the plaintiff suffered a loss. The critical part is to prove the causal link that shows the violation was in fact the sole cause of the loss. I think Islamic law may split into two stances. First, causation is established such that with no violation there is no loss. With this stance, damages will be awarded if three requirements are met. Second, causation cannot be proven. The case concerning the loss is too speculative unless the plaintiff is able to clearly demonstrate that the loss was the actual and direct loss from the breach.

Hadley v. Baxendale is exemplary of how Islamic law sets the test objectively and how Islamic law is faithful to the concept of causation. It is evident here that the question of foreseeability not considered and has no effect whatsoever. To reiterate, objectivity is a merit for the law, and I think Islamic law is more objective in this instance in favoring causation over foreseeability.

MITIGATION

The US Law

This particular limitation appears straightforward in theory and practice. Yet with a deep look, it may turn out to be more complex than the other limitations. Mitigation simply says that “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.” (Restatement § 350, 1981). So, the restatement clearly mandates a plaintiff to act affirmatively in mitigating the loss.

The restatement plainly states that “the injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”

(Restatement § 350, 1981). This includes as well a case in which a non-breaching party has endeavored to the best of his ability at the time to avoid a loss. But in retrospect, the efforts might be assessed as not the best reasonable choice when an alternative available choice would appear to have been preferable. Thus in this case the restatement sets the ground for having made a reasonable effort to some extent, albeit unsuccessfully, and that this attempt would be sufficient for the purpose of mitigation (Farnsworth 1999).

Islamic Law

Mitigation as perceived and understood under the US law is debated in Islamic law. Before getting into the debate, we should note that the concept of mitigation is not as well described and researched in Islamic law as it is in US law. What I have found is a different issue that can be conceived of or represented as parallel to the concept of mitigation. What I mean is that the concept of mitigation has not been celebrated as much as the other concepts, as indicated by the fact that so little discussion has been dedicated to mitigation (Almarzoqi 2009).

However, that is not to say that the concept is entirely absent from Islamic law. It does exist, but with scant coverage in comparison with other legal concepts in the same circle. Moreover, the whole mitigation discussion is a thin and small issue within the larger concept of causation. In other words, the only ostensible reason for Islamic law jurists to discuss mitigation is to answer the question of whether causation has been satisfied when the injured party fails to reduce the harm while able to do so.

In answering this question, the jurists split into two camps. One group asserts that a party bears no duty to mitigate, and the failure to mitigate does not break the causal link. The reasoning for this opinion is direct and simple: why should the injured party be mandated to bear a duty when he did not evoke the violation? In contrast, the second group displays their opinion in a fashion precisely opposite that of the first camp. (Almarzoqi 2009). Their reasoning is quite simple as well, holding that the injured party can be seen as complicit in escalating the harm or, in other words, admission of harm inflicted can be read as an acceptance of the harm.

It should be said here that both groups agree unequivocally that if mitigation is beyond the party's ability then there is no mitigation requirement. I am slightly inclined to support the second opinion for the two following reasons. First, an injured party with a passive attitude could be seen as a part of the process of enlarging the harm. In other words, if set a scale to measure the harm, clearly the first one or two degrees is caused solely by the breaching party. Yet the subsequent harm cannot be attributed only to the breaching party but rather to the causative interactions of both parties. One party initiated the

harm while the other let it escalate despite having the ability to block it.

The second reason for adopting mitigation is a reliance on one of the most celebrated teachings and principles in Sharia, which is to endorse what is good and to stop or obstruct what is bad or evil. The Quran explicitly and strictly commands people to "help one another in furthering virtue and God consciousness, and do not help one another in furthering evil and enmity" (Asad 2003).

Comparative Analyses

We can assert that the two legal systems are in complete agreement on the concept and nature of mitigation. This assertion must be understood in light of the opinion that Islamic law principally accepts the concept of mitigation. If the Islamic law were to be exclusively understood as denying the concept of mitigation from its root, then the entire assertion would fall apart.

To further the agreement between the two systems to another degree (all of that according to the opinion that Islamic law requires mitigation), the Restatement can be the best means to solidify the agreement. In defining the conditions of valid mitigation, the Restatement holds that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation" (Restatement § 350, 1981). All of these conditions shall be accepted in Islamic law, even though they are not mentioned in this area, because all can be embraced through reliance on the major legal maxims: for instance, the maxim of "injury may not be met by injury" (Majala Article 19) or harm cannot be reciprocated with harm. In other words, all these conditions are outside the contract duty and therefore conceivably deemed to be a harm on the side of the injured party, and so they cannot be accepted according to the maxim.

The other testimony for this agreement is the Restatement that "the injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss." (Restatement § 350, 1981). This can be categorized under the Quranic maxim or axiom "God does not burden any human being with more than he is well able to bear" (Asad 2003). In other words, generally, anything considered religiously beyond somebody's ability will be forgiven and here, specifically, when the injured party tries his utmost to mitigate the harm but fails to do so, then that effort should be sufficient to meet the mitigation requirements.

With aforementioned caveats, the limitation attempts to achieve fairness. It is true that the defendant bears an extra burden, but this burden is not required if it exceeds his ability to meet it. The US court's move to require both parties to mitigate can be perfectly understood with the notion of not siding with either party. It states, as "both plaintiff

and defendant have had an equal opportunity to reduce breach of contract damages by same act and it is equally reasonable to expect defendant to minimize damages, defendant is in no position to contend that plaintiff failed to mitigate, nor will award be reduced on account of damages defendant could have avoided as easily as plaintiff” (*S. J. Groves & Sons Co. v. Warner Co.*, 1978).

THE MORALITY CONUNDRUM

Concerns about morality and fairness can be raised to a higher level regarding the basis of mitigation. The argument against the moral justification of mitigation says, in essence, that mitigation places an extra burden on the innocent party to do whatever possible to minimize the damage, even though the breach comes from the other party. So, the promisee in this case pays a distasteful and heavy price for the action he never committed. This is a straightforward violation of a moral standard, i.e., that whoever commits a wrongful act should be responsible for rectifying the situation. It is neither rational nor comprehensible to impose a duty upon someone who has had nothing to do with the wrongful act. Similarly, in a contract the non-breaching party is obligated by law to take a plausible action to reduce the loss for a breach which he did not instigate or participate in. It appears that after the breach the breaching party transfers his obligation to the other party, so, basically, his duty becomes watching the innocent party making a genuine effort to avoid a cumulative loss. Even in general law principles, the duty to rectify a mistake should be limited to the one who commits it, but mitigation is exception in this regard (Seana 2007).

The opinion in Islamic law which denies the legitimacy of mitigation would avoid the tough moral question. Yet the question remains unanswered under the other opinion of mandating mitigation. Therefore, the two systems are in the same boat. Here, we will try to tackle the issue by speaking on behalf of both systems. We admit that the question and its reasoning have very powerful arguments. However, it can be argued that, in a religious language, a breach is not the worst sin, nor the worst civil wrongful act; therefore, if the contract should be rescued by any possible means. Also, it is a healthy reaction to protect a member or rather members of the society by way of containing the loss. This is from the angle of looking at it as a societal issue. If the parties have the ability to minimize the loss, then positive intervention is rationally appropriate to shield society from needless harm.

As for the requirement of both parties (plaintiff and defendant) to act in accordance with mitigation, making the burden for mitigation fall upon both parties should balance the scale. This should remove the argument for an extra burden on the side of the non-breaching party. Last but not least, reliance on a notion in Islamic law of “Love for people what you

love for yourself (Ibn Hanbal no.16653, 2001) would guard against greed, i.e., the desire to maximize the loss and therefore maximize the compensation. If a wrongful act has been committed, it is a sign of love and compassion to help the one who committed the act to get out of it, and the imposition of an extra burden must be avoided. So, in this regard, the non-breaching party should not lose anything, as the thing lost should be remedied and the scales made even. We then have, if not exactly a win-win situation, at least a no loss-no loss situation.

The preceding paragraph is my personal approach to tackling the question. Peter Benson grapples with the question differently. “(T)he way to a better answer,” he says, “lies in keeping in mind that mitigation is an aspect of compensatory redress for contractual breach, not promissory morality” (Benson 2019) Benson further elucidates his claim: The analysis of compensation for breach of contract is categorically different. Damages or specific performance belong to the remedial stage of contract law and reflect the requirements of compensatory justice. Taken from the defendant and transferred to the plaintiff, damages are not the defendant’s execution of his obligation, but the law’s coercive response to its breach. Putting the plaintiff in the position of performance in law’s act, not the promisor’s. Juridically, it does not represent the promisor’s fulfillment of his contractual obligation to perform. The requirement of mitigation must be assessed as part of this coercive response and the idea of compensatory justice, including the principle that damages can be adequate where the promised performance is readily available on the market (Benson 2019).

He continues, If the court could act instantly in response to breach and provide the plaintiff with damages in the spot, the plaintiff would be able to use the money taken from the defendant to obtain performance without loss But the practical institutional reality is that courts cannot respond to a breach until sometime later, both when awarding damages and in ordering specific performance. In this situation, the mitigation requirement notionally deems the plaintiff to have acted as soon as reasonably possible to obtain her promised performance on the market. But it also seeks to ensure that the plaintiff is not prejudiced by the fact that she may in effect first have to use her own funds for this purpose (Benson 2019).

Although sensibly well-articulated, this account, in my opinion, fails to answer the essence of the question as it constructs the entirety of the argument on a fragile basis. It all depends on imagining the separation of inseparable things, as a promise is different than compensation, which is contrary to the nature of the contract, i.e., that all of the mentioned concepts are firmly connected and the reason for the compensation exists in the preceding promise. Accordingly, neither can be seen as independent units, but rather they are correlated with each other in

their very existence. Moreover, the notion that the court should receive a different treatment in light of morality is not only irrational but also impractical. Everything involved in the matter, whether the contracting parties or the court, should act in accordance with the moral standard. There is no sound reason to believe that the court is exempt from the question of morality.

Another philosophical account that tries to give a moral basis for mitigation invokes altruism as a ground for mitigation. The act of entering a contract in itself brings about altruistic duty to the other party (Letsas & Saprai 2014). "There is a necessary connection between the existence of a promissory obligation and the existence of a degree of trust between the promisor and the promisee" (Letsas & Saprai 2014). This non-contingent connection evokes an altruistic duty of assistance along with the duty to perform. In response to this claim George Letsas and Prince Saprai logically write that normally, altruistic duties to assist others hold between people who are in a special relationship like friendship, love, family or membership of the same moral community. The idea that promises, as a matter of fact, trigger such relationships is questionable. The making of a promise may, but need not, bring the promisor closer to the promisee in terms of ethical values such as intimacy, friendship, or trust. Whether it does so is a contingent matter. Promising a stranger that I will watch his bag while he makes a phone call will not necessarily bring us closer together. I may not trust that he will return, and he may not trust that I will watch his bag (Letsas & Saprai 2014).

In sum, I cannot see how the altruism argument survives with the mentioned challenges, and in my view it manifests the exhausted attempt to find any reason to ground mitigation on a robust moral basis. Also, I see it as an attempt to connect parts of different puzzles with each other, which serves to distort the matter at hand.

George Letsas and Prince Saprai do, however, firmly believe that mitigation can be grounded in the normative fairness standard. Mitigation is a matter of choice rather than a matter of suffering loss. They consider this example: A promises B to drive him to the airport and A does not show up on time. The action of A may cause B to miss the flight; therefore B may ask for compensation for his missed flight. But B "could easily have avoided" (Letsas & Saprai 2014) the problem by taking a cab. "The promisee has no right to claim these losses and, correlatively, the promisor is not responsible for them. This is so even though the promisee was under no duty to minimize or not to exacerbate losses" (Letsas & Saprai 2014). They back their belief with a famous tort example of a person who gets injured and lets the injury worsen through his inaction. This person cannot claim full compensation from the breaching party while he is the one who exacerbated the injury by neglecting it. Letsas and Saprai argue that mitigation in contract law should be treated as

torts law, without any difference (Letsas & Saprai 2014).

In conclusion, the last account, treating mitigation as a choice, can be overall the most sensible basis for the morality of mitigation. However, it does not seem compatible with the common commanding language: the "duty" to mitigate. The literal meaning of duty does not denote any sense of choice. Hence, the question of morality may remain unanswered!!

CERTAINTY

The US Law

This particular limitation has a significant impact on awarding a plaintiff the damages claimed out of a breach of contract. For the sake of simplicity, the Restatement of Contract holds that "damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." (Restatement § 352, 1981). The intention is to set a fair boundary for both contracting parties. On one hand, a plaintiff would receive a remedy to compensate the loss, and that loss would not be undervalued. On the other hand, a defendant would be protected from speculation on the side of plaintiff if there is no proof of reasonable certainty. So, if that is the case, the only damages offered to the injured party would be nominal damages, as the evidence has not been substantiated (Bix 2012).

The doctrine of certainty was introduced first to the Common Law system by the court decision in *Griffin v. Colver*. In this pioneering decision, the court stated that the "fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained," and that "the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture." (*Griffin v. Colver* 1858). This development of the law has been regarded as "probably the most distinctive contribution of the American courts to the common law of damages" (McCormick & Fritz 1952). The law had evolved to the point of requiring certainty but with a very important restriction of reasonableness. The courts may have had difficulty in the past fulfilling the rule, so the restatement is an evident development of the law, mandating a plausible and measurable rule, that is, reasonable certainty (Farnsworth 1999).

Islamic law

Islamic law recognizes this limitation not as an independent concept but as a part of a larger concept of Darar (harm or loss). Islamic law elaborates that not every darar deserves attention but rather that there are certain characteristics of compensable darar. One is that the darar must be certain, whether

at the moment or in the future. This rule aims to dismiss the kind of *darar* that fits the description of being speculative or delusional. The basis of this restraint is the Islamic law maxim: no regard or consideration for delusion or supposition (*La ibrat li twahim*) (Majala Article 74). Consequently, the speculative *darar* never reaches the point of certainty and thus it cannot be accommodated (Moufi 1997).

COMPARATIVE ANALYSES

Here again both legal systems are similar in their essence of understanding certainty where loss cannot be compensated without passing the certainty test. Also, as mentioned earlier, the *darar* concept has a powerful impact on shaping Islamic contract law. So, this limitation is taken almost completely from the *darar* theory, where the *darar* is not legally recognized unless it is marked to be certain (Moufi 1997).

The problematic application of reasonableness can arise in both systems, as the reasonableness test is applicable to this limitation. Adding complexity to the problem is the fact that reasonableness is at the core of certainty; in fact, the two terms, reasonable and certain, make this limitation problematic. A completely satisfactory definition is almost impossible because human judgment is involved, and thus differences due to mental capacity, experience, and education come into play. (Corbin on Contracts § 56.16, 2018). Moreover, the problem concerning certainty is more a philosophical one, and perhaps the idea of a definite and fixed conclusion is an illusion. Everything in this life is arguable, except where religious or theological beliefs are involved since they rely on a different source of authority. In other words, once a person submits himself to a religious authority, he has moved the question to the application of the belief not the belief itself. Obviously, certainty, outside the context of a religious belief, cannot be absolute.

We should mention here that Islamic law interprets reasonableness under the larger banner of *Urf*. So, *Urf* really is the concept that rules the matter and can move the case in any direction. However, maybe (only maybe) with *Urf* the problem can be less significant, but the problem is still present.

CONCLUSION

Interestingly, we find that US law and Islamic law have much in common in the area of limitations to remedies, most notably in the legal systems' perceptions about certainty. Foreseeability is a divergent point between the systems; in fact, the two systems occupy opposite sides of the spectrum. Causation and mitigation are more of a middle ground. The two systems agree on a large portion of these two limitations. Both US law and Islamic law would benefit from an improved practical tool for

assessing the causal link between the loss and the breach.

Both systems face the question of justifying the law, but each system takes a distinct approach in tackling the question, depending on the philosophy and maxims of the law. How each system understands and explains fairness figures strongly in how the law comes into being.

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