IMPOSSIBILITY OF PERFORMANCE OF CONTRACTS IN ISLAMIC LAW
A COMPARATIVE ANALYSIS
WITH PARTICULAR REFERENCE TO IRANIAN AND ENGLISH LAW

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for the degree of Doctor in Philosophy

BY:

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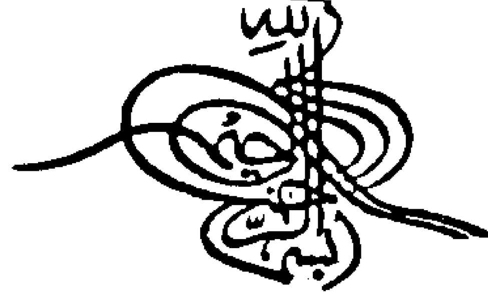

لقد ارسلنا رسلنا بالبينات
و انزلنا معهم الكتاب و الميزان
ليقوم الناس بالقسط

***

Indeed, We sent Our Messengers with clear signs, and We sent down with them the Book and the Balance, so that men may uphold justice

(The Quran : Verse 25/LVII)

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ABSTRACT

The idea of writing a thesis on the subject of "**Impossibility of Performance**" first sprang to my mind when I was acting as the director of the "Bureau For International Legal Services" in London ,which has been entrusted with the duty of supervising international cases involving Iranian governmental and non-governmental entities.I have also been involved , as arbitrator or legal adviser , in various international cases involving the Islamic Republic of Iran and certain Iranian organizations.During the course of these activities ,I frequently came across cases in which the "**change of circumstances**" in Iran,following the Islamic Revolution in 1978-1979,was relied upon by one or the other party as grounds to justify its non-performance of contractual obligations. A considerable number of such contracts were governed by Iranian law which is , of course , based on Islamic law.

Bearing in mind the fact that,to date, there has been no attempt to provide a datailed and systematic analysis of the subject even in the Arabic and Persian languages , or at least none that I am aware of , I subsequently decided to expand my area of researh to include all cases in which the performance of a contract is or becomes "impossible" or "impracticable" in one way or another , whether or not this results in the discharge of the promisor. So,in this thesis, after giving a general introduction in **Chapter I** , in which the notion of sanctity of contract and the limitations imposed on it are discussed , I poceed to discuss , in **Chapter II** , the cases where impossibility relates to the subject-matter of contracts and , in **Chapter III** , those cases in which impossibility relates to the conditions of the promisor or promisee , while **Chapter IV** discusses the issue of impossibility due to external factors(covering cases of legal impossibility , impracticability and frustration of purpose). This leads to **Chapter V** which deals with legal consequences of impossibility. In this chapter I have discussed , first , the effect of impossibility on the contract and then its effect on the rights and liabilities of

the parties . In the first section , I have shown that in Islamic law ,unlike English law , impossibility does not necessarily operate to discharge a contract automatically . Automatic termination is only one alternative in addition to other alternatives , namely , nullity , creation of a right of termination for the beneficiary , suspension and extention of the contract . In the section dealing with the effect of impossibility on the rights and liabilities of the parties I have explained that , for impossibility to discharge future obligations of a promisor , it must be due to external , unforeseeable and irresistible events. In such a case the other party's promise will also be discharged due to the " failure of consideration " in English law and to the " lack of cause " in Islamic law . The **last chapter** seeks to give a general overview and a critical analysis of the subject and to provide certain suggestions for the development of this part of law in the future . In this chapter I have explained how the doctrine of **ijtihad** or personal legal reasoning , as recognised in Shī'i law , may be used to give more certainty , and even a greater degree of adaptability to this part of Islamic law .

It is worth mentioning that this work is primarily based on the rules of **Shī'i** School of jurisprudence . By way of comparison , however , reference is made to the laws of other schools of Islamic law as well as to Iranian and English law . Occasionally , references are also made to other legal systems and to various jurisdictions throughout the contemporary Islamic world .

I hope that this study will benefit the common law reader , not only by providing him with a practical guide when dealing with Muslim countries but , more importantly , by making him understand his own legal system better, through the study of solutions offered by a foreign system with a totally different culture and historical background to a legal problem that it also faces. A problem that has gained increased importance in the rapidly changing world of today .

GUIDE TO TRANSLITERATION

ARABIC	TRANSCRIPTION
ا = الف	a
أ=همزه	ʼa
ث	th
خ	kh
ذ	dh
ز	z
ش	sh
ض	ḍ
ع	ʻa
غ	gh
ق	q
و	w

NOTE:

1) For transliteration purposes , legal terms of Arabic origin have been treated as Arabic , regardless of the way they are actually pronounced in the Perasian language . Thus , in such words , the letter ض has been shown by d , despite the fact that in Persian it is pronounced z = ز . Similarly , the letter ق has been shown by q though in Persian it is always pronounced gh = غ .

2) An opening quotation mark represents the Arabic 'ain, which is a hard glottal stop. The closing quotation mark represents the Arabic hamza, which is a soft glottal stop. The point under the letter ḍ indicates that it is a hard consonant, and the line over the letter ā indicates a long vowel.

SOME IMPORTANT DATES OF THE ISLAMIC CALENDAR IN CHRONOLOGICAL ORDER

	ALL DATES : A.D.
570	Birthday of Prophet Muhammad
610	Beginning of the Prophet's mission
622	The Prophet's Migration from Mecca to Medina: Beginning of the Islamic era
632	Demise of the Prophet
634	Beginning of the caliphate of 'Umar ibn Khattab: The second caliph
644	Beginning of the caliphate of 'Uthman ibn 'Afan : The third caliph
656	Beginning of the caliphate of Ali ibn Abi Talib,the first Shi'i Imam
661	Passing away of Imam Ali ibn Abitalib
670	Passing away of Imam Hassan , the second Shi'i Imam
680	Passing away of Imam Hussain , the third Shi'i Imam
710	Passing away of Imam 'Ali ibn al-Hussain,the fourth Shi'i Imam
732	Passing away of Imam Muhammad al-Baqir,the fifth Shi'i Imam
765	Passing away of Imam J'afar al-Sadiq,the sixth Shi'i Imam
767	Passing away of Abu Hanifa,theleader of the Hanafi school
795	Passing away of Malik ibn Anas,the leader of the Maliki school
799	Passing away of Imam Musa al-Kazim,the seventh Shi'i Imam
817	Passing away of Imam Riza,the eighth Shi'i Imam
820	Passing away of Shafi'i , the leader of the Shafi'i school
835	Passing away of Imam Muhammad al-Taqi,the ninth Shi'i Imam
855	Passing away of Ahmad ibn Hanbal,the leader of the Hanbali school
868	Passing away of Imam 'Ali al-Naqi,the tenth Shi'i Imam
873	Passing away of Imam Hassan al-Askari,the eleventh Shi'i Imam
873-940	Minor occultation of Imam Mahdi,the twelfth Shi'i Imam.Throughout this period he is believed to have had contacts with his followers through certain deputies
940	Major occultation of Imam Mahdi begins

NOTE:

When reference is made to Islamic dates,the letters **A.H.** stand

for the Latin term **Anno Hegirae** (= in the year of the **Hegira**) or for the words "after **Hijra**", meaning "after the Migration" (of Prophet Muhammad from Mecca to Medina , where he established an Islamic government).This took place in A.D. 622 and marks the beginning of the Islamic era. The **Hijri** calendar is a lunar calendar and is mainly used in Arab countries. The letters **sh.** , on the other hand , stand for the word **shamsi** (lit. solar). The solar calendar is also based on the Migration of the Prophet and is mainly used in Iran. To convert a date in the Islamic solar calendar to its corresponding date in the Gregorian calendar the figure has to be added by 621 or 622 depending on the month in which the event took place. Thus if the event took place between 1st January and 20th March , the **shamsi** date has to be added by 621. If it,however,happened between 21st March (which is the beginning of the Iranian year) and 31st December (which is the last day of the year in the Gregorian calendar) then the **shamsi** date has to be added by 621 to find its corresponding date in the Gregorian calendar.

چراغـی باش کافروزد جهـان را
نه آن شعله که سوزد خانمان را

Be a lamp that illuminates all the world around ;
Not a flame that burns a house down to the ground

(Amir Khosrow Dehlavi, Iranian poet : A.D. 1235 - 1324)

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I dedicate this work to all those who acted as "lamps" in the history of mankind, by trying to illuminate the world around with the light of "justice"

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CHAPTER I

SANCTITY OF CONTRACT : FOUNDATION AND LIMITATIONS

The Arabic word ʿaqd literally means to fasten, to strengthen and to gather something by connection(1). Thus ʿaqd or inʿiqād is an act of "putting a tie to a bargain". In the legal sense, it refers to a contract, i.e., a legally recognised agreement. Such agreements are important sources of obligation in Islamic law.

Before discussing any general principles of the Islamic law of contract, one important question must be answered: Does a theory of contract, consisting of general rules and principles, exist in Islamic law? The answer to this question is vital for the purpose

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1) A. Fayyum:, Misbah al-Munir (Qum: Dar al-Hijra, n.d.); Moin, Farhang-e-Lughat (Tehran: Amir Kabir, 1363 sh.) Vol. II, P. 1363 Amid, Farhang-e-Lughat (Tehran: Amir Kabir, 1364 sh.), Vol. II, P. 1444; al-Munjid (Beirut: Dar al-Mashriq, n.d.) PP. 518-519

of this study, because it is only if there do exist rules and principles governing every type of contract that a general study of the subject of impossibility of performance of contracts under Islamic law can be possible and meaningful.

A number of contemporary writers over the past few decades have discussed this issue in their books on Islamic law and have come to different conclusions. Most of them, by referring to the simple fact that discussions in the authoritative texts of traditional shari'a (2) law are confined to a discussion of rules governing specific or nominate contracts ('uqūd-al-moayyana), have concluded that, like classical Roman law (3) and the early common law (4), Islamic law lacks a general theory of contract,

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2) Shari'a is an Arabic word meaning the path to be followed. Lierally, it means " the way to a watering place". As an expression it refers to Islam or Islamic law.
3) It is noteworthy that the French Civil Code still embodies the Roman inheritance of a list of named contracts (contrats nommés), but it also recognises right of the parties to make other contracts (contrats innomés)
4) The early common law had no general theory of contract. All that it had was a system of "writs", which were designed to protect rights deriving from a few transactions. See: D.H. Parry, The Sanctity of Contract in English law (London: Sweet & Maxwell, 1986) P. 3. Professor Grant Gilmore in his book "*The Death of Contract*", argues that, in American law, general contract theory was an invention of the Harvard Law School. See: M.P. Furmston; G.C. Cheshire and C.H.S. Fifoot, Law of Contract (London: Butterworths, 12th ed., 1991), P.24

and only possesses law of specific contracts (5). This view cannot be accepted, because, it ignores the fact that although Muslim jurists have, almost exclusively, confined themselves to a discussion of specific contracts-such as sale (ba'i), rent (ijāra), deposit (wadi'a), donation (hiba), agency (wikāla), partnership (shirka), marriage (nikāh), agricultural partnership (mozāra'a & mosāqāt), borrowing (qarḍ), Profit-sharing (muḍāraba) etc.- they, nevertheless, in the context of the various nominate contracts, have had discussions of general nature. These generalities outweigh the exceptions between nominate contracts, and it is not difficult to infer from them certain fundamental rules which govern every type of contract. These rules cover such areas as the methods of expression of agreement, impediments to consent, cases of illegality, the various " options " available to the parties for terminating a contract, etc. and form part of a general Islamic law of contract. Moreover, many contemporary Muslim jurists, having realized the shortcomings of the old-fashioned discussions, started to write books on general principles of Islamic law, including Islamic contract law. These books later came to be known as books on the " Rules of

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5) For example J.Schacht, N. Anderson and N.J. Coulson; cited in S.H. Amin, Islamic Law in the Contemporary World (Glasgow: Royston Ltd., 1985) P.40. See also: N.j.Coulson, Commercial Law in the Gulf States: The Islamic Legal Tradition (London: Graham and Trotman, 1984), P.83

Jurisprudence " (Qawā'id-al-Fiqh) and formed an important part of the legal literature both in Shi'i and Sunni (6) laws.(7)

Even in the early mediaeval legal manuals, it soon became the practice for jurists, in discussing the contract of sale, which forms the core of the Islamic law of obligations, to carry out a general analysis of the law of contract, including a discussion of the conditions for formation and dissolution of contracts. This practice is particularly followed by Shaikh Mortaza Ansāri, in his book al-Makāsib (Trades), which is by far the most famous

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6) The Muslims are divided into two main sects: The orthodox Sunnis, who form the majority, and the Shi'is, who are in the minority throughout the Muslim world, except in Iran in which they form the majority of the population. The main difference between the two sects lies in the issue of the leadership of the Muslim community after the demise of the Prophet of Islam. This difference has, however, led into other differences both in beliefs and in laws. The four most famous schools of Sunni law are Hanafi, Hanbali, Shāfi'i and Māliki Schools, and the most famous Shi'i School is the Ithna 'Ashari or Twelver School, whose followers are to be found in Iran, Iraq, Lebanon and, in smaller numbers, in India, Pakistan and other Muslim Countries. This School has been adopted in Iran as the official religion of the sate. The name comes from the fact that they believe in the leadership of twelve Imams after the Prophet's death in A.D. 632.

7) Some of the most famous books written on Rules of Jurisprudence are the following: S.M. Bahrululum, Bulaghat al-Faqih (Najaf: Matbaat al Ādāb, 3rd ed.A.D. 1968); Sh.Ibn Nujaim, al-Ashbah wal-Naza'er (Cairo: Matbaat al-Islamiyya, A.D. 1968); A.Ibn Rajab, al-Qawaid fil-Figh al-Islami (Cairo: n.p., A.H. 1391); M.H. Naraghi, Awa'id al-Ayyam (Qum: Maktabe Basirati, 3rd ed., A.H. 1408); M.H. Bojnurdi, al Qawaid al-Fighiyya (Qum: n.p.,n.d.); F. Miqdad, Naddul-Qawaid al-fiqhiyya (Qum: Khayyam, n.d.); M. Shahabi, Qawaid-e-Figh (Tehran: University press, 1357).

book of its kind in Shi'i law. The numerous commentaries written on this book by subsequent jurists played a great role in development of the Shi'i law of contract. In all these books, while discussing the typical contract of sale, as the corner-stone of the law of contract in Islamic law, many general principles of contract law and fundamental rules of civil liability were also discussed.

Another point which clearly indicates the existence of a general theory of contract in Islamic/Shi'i law is that, according to the prevailing view amongst the jurists of the Shi'i school of Islamic jurisprudence, contracts are not limited to specific or nominate contracts ('uqūd-al-mo'ayyana) but also include other types of contract not specifically referred to in sharī'a. This necessitates the existence of general principles to govern new types of contracts.

The jurists of the Zāheri school - a school famous for its narrow interpretation of the Quranic verses and other sources of Islamic law - are the most well known adherents of the view that contracts are limited to nominate contracts and, thus, hold that no new contract can be added to the pre-existing ones. They argue that if an agreement is not regarded as binding, it cannot be called a contract; on the other hand, if such an agreement - with no precedent in Sharī'a - is made binding, this amounts to nothing less than the mortal sin

of heresy (bid'a), i.e., adding something to religion which is in fact not part of it. To prove this view, Ibn Hazm (d.A.H.456), the leader of the Zāheri School, in his famous book al-Ihkām fi Usūl al-Ahkām (8), refers to such Quranic Verses as Verse 3/V in which God declares : "... This day I have perfected your religion for you, and I have completed my blessing upon you...", and Verse 229/II in which those who transgress the bounds of God have been described as evildoers. He then concludes that, as religion has been perfected by God, there is no need to add anything to it. To do so, he says, shall be an evil thing to do.

A minority of the jurists of other schools hold similar views. For example, Shahid al-Thāni, the famous Shi'i jurist, in his book Masālik al-Afhām, while commenting on the contract of moghārasa, whereby land is provided by one party and trees by the other for the profits to be shared between them, suggests that such a contract is void. He argues that as Islamic law is God-given and not man-made, the existence of a contract depends upon the permission of God, who is the Lawgiver (Shār'e), and such a permission is lacking here.(9) Similarly, another Shi'i jurist, in the authoritative book of Miftāh al-Karāmah, while referring to the Quranic

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8) A.Ibn Hazm, al-Ihkam fi Usul al-Ahkam (Cairo: Matbaat al-Asima, 2nd ed.n.d.) Vol. II, P. 321
9) Zain al-Din Ali (called Shahid al-Thani), Masalik al-Afham (Tehran: n.p.,A.H. 1273), Vol. I, P. 174

verse " awfū bil-'uqūd " (honour your contracts), (10) suggests that the word al-'uqūd here refers exclusively to the specific contracts existing at the time of revelation of the Quran (like sale, rent etc.) and cannot be extended to other types of contract.(11)

The restrictive theory, while resulting in the development of specific contracts, was not consistent with the social and economic development of Muslim countries. As a result of this theory, people could not make new types of contracts unless they were made part of one of the already known specific contracts. The device used in such situations was to stipulate the new contract as one of the conditions of a nominate contract and, thereby, to make it binding, as a result of the rule that all the conditions stipulated in a binding contract also become binding upon the parties.

The practical problems caused by the application of this theory resulted in the more contemporary jurists departing from the old view and holding that people could make every type of contract, not expressly forbidden in the law, even though it did not fall into any single category of nominate contracts. Apart from the fact that this latter view is more compatible with the present condition of Muslim communities and must, therefore, be preferred, the following juristic reasonings can also be

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10) Verse 1/V
11) See: S.M.J. Ameli, Miftāh al-Karāmah (Cairo: n.p., A.H. 1326)

advanced in support of this view:

1) The Quran which, although not a code of law (12), is regarded by Muslims to be the very word of God revealed phrase by phrase to his Prophet, constitutes the primary source of Islamic law according to all the different schools of law. It has, on several occasions, placed a general obligation upon the people to observe their covenants. Even though these verses may appear to refer to religious obligations only, it must be remembered that, in Islam, unlike many other systems, religious and legal obligations are not quite dinstinct conceptions, and are almost indistinguishable. So it is a religious as well as a legal duty to keep one's promises.

Some of the Quranic verses which place an obligation upon the people to observe their pledges are the following:

Verse 34/XVII provides: " Observe the covenant. Verily of the covenant enquiry shall be made." Commenting on this verse, the famous Tabari (Muhammad ibn Jarir) gives a general meaning to the word covenant (ʿahd) and, consequently, interprets the verse as applying to all human contracts as well as to the spiritual covenants made between man and God.(13)

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12) There are only 80 verses in the Quran containing legal injunctions.

13) See also: M.M. Zabidi, Tāj al-ʿArūs min Jawāhir al-Qāmūs (Beirut: Dar Maktabat al-Hayat, A.H. 1306), Ibn Manzur (Muhammad ibn Mukarram) Lisanal Arab (Beirut: Dar Beirut A.D. 1955) under the word ʿahd

According to Verses 1-8/XXIII : " Successful indeed are the believers... who are shepherds of their pledges and their covenant" (14). Here, yet again, Tabari states that the meaning of acting as shepherds is that they " keep their pledges and do not lose them, but fulfil them in their entirety", and Qurtubi says that " pledges and covenants include all that is incumbent on a man in regard to his religious and secular life, both in word and deed. It comprises his dealings with his fellow men, his undertakings, and much besides, and the injunction is that he should keep them and perform them." (15)

Verse 29/IV says:" O believers! Squander not your wealth among yourselves in vanity, except it be a trade (tijāra) by mutual consent...". As the verse indicates, people are free to engage into every kind of tijāra (a word which is of wider significance than the word ʿaqd-contract-as it is an umbrella term covering all legal acts which give rise to rights or obligations, be it a contract, like sale or rent, or acts like acquisition of unclaimed property hiyāzat at-mubāhāt)(16), provided that

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14) See also Verse 177/II

15) Tabari, Jami al-Bayan fi Tafsir al-Quran (Beirut; Dar al-Marifa, A.D. 1983) Vol. XVIII P.5; Qurtubi: al Jami li Ahkam al-Quran (Cairo, n.p., A.D. 1935) Vol. XII P. 107 cited in. j.N.D. Anderson and N.J. Coulson " The Moslem Ruler and Contractual Obligations ", 33 (1958) New York University Law Review, PP. 917-933 at P. 925

16) See: R.M. Khomeini, Kitab al-Baʿi (Qum: Ismailiyan, n.d.), Vol. I, P.63

it is based on mutual consent.

Moreover, there is no reason to suggest that the Quranic verse ʿawfū bil-ʿuqūd (honour your contracts) refers only to nominate contracts. The jurist Meer Abdul Fattah Maraghee, after referring to the fact that people, in their everyday lives, need to make various types of contracts, some of which concern subjects which were not even known at the outset of Islam, accuses those who limit the Quranic verse to the specific contracts of departing from common sense (17). In fact, all the leading commentators agree that the above-mentioned verse applies to all contracts concluded between man and man, as well as all the spiritual covenants between man and God. Tabari, for example, states: " This is a command from God that every lawful contract must be observed, and it is not permissible to limit its application without proof of such limitation." (18)

2) The second most important source of Islamic law is found in the practice of the Prophet, as enshrined in those traditions of what he said or did (sunna). To this, the Shiʿis add the contents of the words and actions of the Prophet's successors, i.e., the twelve Imams. In one of his most well-known statements, the Prophet declares: " Muslims are bound by their stipulations (al-Muslimūn

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17) M.A.F. Maraghee, Anavin (n.p., A.H. 1297) Chapter on the " Principles of Contracts ".

18) Tabari, op. cit vol. 33, cited in J.N.D. Anderson and N.J. Coulson, op. cit. P. 923

inda shurūtihim)(19). As one of the meanings of the Arabic word shart (stipulation) is obligation or undertaking, it is understood from the Tradition (hadith) that Muslims are bound to fulfil their engagements, " except a stipulation which makes lawful what is unlawful or makes unlawful what is lawful."(20) Referring to this Tradition of the Prophet and also to Verse 19/VI which provides : " He hath explained unto you that which is forbidden unto you," Ibn Taimiya, the famous Hanbali jurist, concludes:

> The rule is that all contracts and conditions are valid and lawful. They cannot be regarded as forbidden or void unless they are declared as such by Shari'a either in express terms or by applying analogical reasoning. (21)

On another occasion he points out:

> Both the Quran and the Sunna have commanded that covenants and stipulations and pacts and contracts must be kept, that the pledge must be fulfilled, and that all this must be observed; and they have forbidden breach of faith and the rescission of contracts and treachery, and have commanded a severe punishment for those who behave in this way. (22)

The same statement of the Prophet has been referred to by Kāsāni in Badā'i al Sanā'i who, similarly, concludes

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19) Bukhari, Sahih (n.p.: Bulaq, 1879) Vol. III, P. 187; Tirmidhi, Sahih (Cairo: n.p., 1931)Vol. VI, P. 104
20) This qualification is added in the longer version of the same tradition. See: Tirmidhi, Sahih, op. cit., Vol. VI, P. 104
21) Ibn Taimiya, cited in S.M. Zarir, al-Gharar wa Atharuhu fil-Uqud fil-Fiqh al-Islami (n.p.,1967)P.10
22) Ibn Taimiya, Majmu'a Fatawa (Cairo, n.p., 1908-1911) vol. III, P. 329 cited in Anderson and Coulson, op. cit., P. 927.

that, according to this Tradition, every contract is valid and enforceable unless otherwise expressed by Sharīʿa. (23)

Conclusion

The foregoing reasons make it clear that agreements made between two or more parties may be enforceable and binding without necessarily constituting part of the body of contracts specified in Islamic law, provided that they do not offend against any principles of Sharīʿa. This view, which is held by the majority of the contemporary Shiʿi jurists and is also in line with the requirements of the principle of tolerance or Permissiveness (asālat al-ibāha)(24), has been reflected in Article 10 of the Civil Code of Iran, which provides: " Private contracts are binding on those who have made them, provided they do not contradict the express provisions of law" (25). The contents of such contracts are not laid down by law but derive in principle directly from the intention of the

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23) A. Kasani, Badāʾi al-Sanāʾi fi Tartib al-Sharāʾi (Cairo: Matba'at al-Arabiya, A.D. 1931) Vol. V, P. 259. See also: M. Shāfiʿi, Kitāb al-Umm (Cairo: Matba'at al-Kobra, A.H. 1324), Vol. II, P.3 for a similar conclusion.

24) For the definition of this principle, see Chapter VI below

25) Similar provisions may be found in the laws of other Muslim countries. See, for example, Article 126 of the United Arab Emirates Federal Civil Code, 1985 and Article 2 of the Commercial Code of Bahrain, 1987

parties.

This important principle that all contracts are valid provided they do not contravene Islamic prohibitions has also been recognised in the International field. In 1961, the Congress of the Week of Islamic Law in Damascus accepted this thesis and went for the <u>Autonomie de la volonté</u> against a system of various nominate contracts. Also, in the international arbitration between Saudi Arabia and the Arabian American Oil Company (ARAMCO) the Tribunal, in its Geneva Award of August 23, 1958, held that a mining concession contract made between the parties on 20 January 1954 (the Onassis Agreement) was binding under Islamic law, despite the fact that it was outside the scope of nominate contracts, since it was in conformity with two fundamental Principles of Islamic law, i.e., " the Principle of liberty to contract within the limits of the divine law and the Principle of respect for contract " (26). It is on the basis of the premise that there are general rules and Principles in Islamic law governing every type of contract that a discussion of the subject of impossibility of Performance of contracts in Islamic law can take place.

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26) See, pages 55-56 of the printed version of the award which has been deposited in the Archives of the Republic and Canton of Geneva. See also S.E. Rayner, <u>The Theory of Contracts in Islamic Law</u> (London: Graham & Trotman, 1991) PP.95 & 99 and S. Habachy, " The System of Nullities in Muslim law " , <u>The American Journal of Comparative Law</u>, Vol. 13 (1964) PP. 61 - 72 at P. 64

For an agreement to be binding and enforceable not only does it not need to be made in the form of one of the nominate contracts, but it also does not need to follow a specific form. Although the Quran in Verse 282/II recommends the people when conclude contracts to reduce them to writing, this was not, however, intended as a condition of form , but rather as a sure mode of proof. So, for a contract to come into existence, any words or actions indicative of consent suffice. Thus it is intention and consent, as opposed to specific verbal formulas and technicalities, that leads to contractual obligations. This fact has been emphasized in Articles 191-193 of the Civil Code of Iran (27). Article 3 of Majella - the Ottoman Civil Code which was completed in 1876 - also provides: " In contracts effect is given to intention and meaning and not to words and phrases."

However, jurists differ as to how this intention must be discovered. Some apply a subjective test and hold that the wills of the parties have to be in reality at one

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27) Article 193 of the Civil Code of Iran, for example, provides: " A contract may be created by an act signifying intention and consent, such as taking delivery or handing over, unless otherwise provided by the law". See also Article 89 of the Egyptian Civil Code.

(a view similar to the one adopted in French law)(28); others that it is sufficient that the parties could be taken objectively to have expressed their agreement without having been really _ad idem_ (A view similar to the one adopted by English law). According to this latter view, "the parties are to be judged not by what is in their minds, but by what they have said or written or done" (29). As Oliver Wendell Holmes puts it: " The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere,it must go by externals, and judge parties by their conduct " (30). And according

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28) For example, Article 1156 of the Civil Code of France, on the interpretation of contacts, directs the courts to " find out what has been the common intention of the contracting parties, rather than stopping at the literal sense of the terms. " This is contrasted with Section 133 of the German Civil Code (BGB=*Burgerliches Gesetzbuch*) which provides that in interpreting a declaration of intention emphasis shall be put on the declaration's "literal" meaning.

29) Cheshire and Fiffoot, _Law of contract_, 4th ed., P. 22, cited in H. Parry, _The Sanctity of Contracts_ (London: Sweet & Maxwell, 1986), P. 17

30) O.W. Holmes, _Common Law_ (London:Mac Millan, 1911 ed.) P. 309. Also Denning, L.J. Says: " Once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground." _Solle_ V. _Butcher_ [1950] 1 K.B. 671 at 691. Also Blackburn J. in _Smith_ V. _Hughes_ (1871) L.R. 6 Q.B. 597 at P. 607 says: " If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. "

to a 15th century dictum, even " the devil himself knows not the intention of a man." (31)

It is asserted that a great majority of Muslim jurists support the subjective approach, in the sense that for them the real intention of the parties, rather than the technical terms employed, represents the governing consideration. Thus, as we saw earlier, Article 3 of Majella (the Ottoman Civil Code) provides: " In contracts effect is given to the intention and meaning and not to the words and phrases. " Similarly Article 258 (1) of the Civil Code of the United Arab Emirates says: "that which is of consequence in contracts is intention and meaning, not expression or form. " To justify these provisions, reference has been made to certain Traditions of the Prophet. He is, for example, related as saying: "deeds depend upon intents " (innamal a'amalo binniyyat), and, " contracts are subject to intentions (al-'uqūd tābi'atun lil-qusūd)(32). Thus if, for instance, one person uses certain technical terms in jest, this shall not constitute either an offer or an acceptance and may not, therefore, form the basis of a contract. Similarly, if it becomes known that the contract has been concluded with the intention of avoiding a debt, it will not be

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31) Anon (1477) Y.B. 17 Edw.4, Pasch.f.1, pl.2, per Brian C.J.,cited in, A. Mason and C.J. Gageler, " The Contract " in Essays on Contract (Sydney: The Law Book Co. Ltd.) PP. 1-34 at P.4

32) Ibn Qayyaim al-Jawziya, Ilam al-Muwaqiin (Cairo: n.p., A.H. 1325), Vol. III, PP. 234-239

binding and may be annulled at the instance of the creditor (33). There is no doubt that it is the " intention " of the debtor-contractor that entitles or disentitles his creditor to seek the nullity of the contract.

However, the point must be emphasized that although Islamic law attaches great significance to the intention of the contracting parties, it has, nevertheless, tried to use certain channels to modify the subjective approach to some extent. It is in this direction that Article 224 of the Civil Code of Iran, on the interpretation of contracts, provides: " The words used in contracts shall be given their ordinary meanings "(34). Such meanings should be ascertained by making references to custom and usage. This, of course, is the right approach: We do not have " intention meters " to plug into one's mind to read it. So the conclusion that can be made is that Islamic law has adopted a combination of the subjective and objective theories, in the sense that the intention of the parties, as opposed to words and phrases used by them, forms the basis of the contract, but attempts have been made to control an unbridled subjectivism by

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33) Article 218 of the Civil Code of Iran

34) The same view has been expressed by Lord Wensleydale in Grey V. Pearson [1857] 6 H.L. Cas. 61 at P. 106. " In Construing statutes ", he said, " the grammatical and ordinary sense of the words is to be adhered to." He went on to say that this approach may be avoided if it leads to some absurdity or inconsistency with the rest of the statute. This is the so-called " Golden Rule " of interpretation.

accepting the *prima facie* presumption that the meanings of the words should be discovered by applying an objective test. This has given a particular position to Islamic law which does not easily admit of classification, and may be termed as a " modified subjective " approach. (35)

The importance of intention in creation of contracts and, in other words, the fact that contracts (unlike unilateral legal acts, such as acquittance of a debtor) result from the operation of two free wills - manifested by offer (ijāb) and acceptance (qabūl)-gives rise to a very sacred legal principle: The sanctity of contracts, which in fact make the law of the parties. As the Islamic law maxim puts it: " contracts take the place of law for

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35) Although the general strategy of English law has been to adopt the objective approach, modified subjectivism appears in some cases. In Smith V. Hughes [1871] LR 6 QB 597, for example, it was said: " If... the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain". (Per Hannen J., at P. 610). See: J. Adams and R. Brownsword, Understanding Contract Law (London: Fontana Press, 1987), P. 62. It is interesting to note that in some of the mistake cases, a pure subjective approach has been adopted by the English courts. For example, in Raffles V. Wichelhaus [1864] 2 H&C 906, the court allowed the defendants to present evidence of intention when they had vaguely referred to a ship called *Peerless* and there were two such ships.

Muslims " al-ʿaqd shariʿat al-Muslimin (36). Thus contracts " entered into freely and voluntarily shall be held sacred by Courts of Justice ". (37)

However, the concept of sanctity of contract, which is a concomitant of the doctrine of freedom of contract, is not an absolute principle: Not all contracts are sacred. So, although Islamic law recognises the concept of freedom of contract, it does so within certain limits. It occasionally declares the contract void (38) or at an end, and discharges the parties from their unperformed obligations. It is to a study of the limitations placed by Islamic law on the principle of sanctity of contract that we now turn.

Limitations on the Principle of Sanctity of Contract

All Muslim jurists agree that not every agreement made between two parties is sacred and capable of enforcement. They differ, however, as to how much freedom of contract is recognised under Islamic law. For example, among the

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36) This is similar to the provisions of Article 1134 of the French Civil Code which provides that an agreement, "takes the place of loi for the parties." See also Article 147 of the Egyptian Civil Code and Article 148 of the Syrian Civil Code.
37) Per Sir George Jessel in Printing and Numerical Registering Co. V. Sampson [1875] L.R. 19 Eq. 462 at 465.
38) It must be emphasized here that the phraze " void contract " is a contradiction in terms, because if a contract is void it is not in fact a contract!

Sunni schools, the Hanbalis and Mālikis give more freedom of contract, as opposed to the Hanafis and Shāfiʿis.
For the sake of good order, the limitations placed upon the principle of sanctity of contract will be discussed under three headings:

1) Absence of free will;
2) Encroachments of the legislature;
3) Impossibility of performance.

1- Absence of Free Will

The source of the notion of sanctity of contract lay in the fact that contracts result from the operation of two free wills. So if this is proved not to be the case, the contract cannot be regarded as sacred, and will thus not be worthy of respect. In fact in some cases of this kind no contract comes into existence at all.

According to Article 199 of the Civil Code of Iran, " duress " and " mistake " are the two factors which deflect free will. These factors will be considered in two separate sections.

1-1- DURESS (ikrāh)

The legal rules relating to duress rest on the absence of consent. A party who has been subject to duress in

making a contract cannot be truly said to have consented. Thus duress or ikrāh has been defined by Muslim jurists as : " an action directed against a person which suppresses his true consent. " (39)

Muslim jurists, by referring to such verses as Verse 29/IV which in effect declares consent as the basis of every transaction (40), and also to certain statements of the Prophet, in which he makes it clear that, among other things, duress eliminates liability, conclude that a contract made under duress is invalid(41). However, there are certain conditions which must be satisfied if a threat is to amount to legal duress. According to Article 199 of the Iranian Civil Code, the threat must have been the "main" or "decisive" reason for the threatened party's making of the contract. This is cotrasted with English law in which, at least in cases involving duress to the person, it is sufficient to show that the threat was "*one*" of the reasons why the threatened party entered into the contract (42). It follows that if it can be proved that the threatened party would have entered into the contract in question even if there had been no threat, the contract so concluded must be regarded as

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39) Zailai, Tabyin al-Haqaiq (Cairo: Bulaq, A.H. 1313), Vol. V, P. 181
40) The Verse provides: " And eat not up your property among yourselves in vanity except it be a trade by mutual consent... ".
41) M. Ansari, Kitab al-Makasib (n.p., Maktaba Allame, 3rd, ed., 1368 sh.), P. 188
42) See: Barton V. Armstrong [1976] AC 104

valid. In other words, for a threat to constitute duress under Islamic law, it must not only be shown that it would have affected any reasonable man (objective test)(43), but also that it did actually intimidate the threatened party (subjective test)(44). Hilli, in the authoritative book of Sharā'i al-Islam, expressly declares that the effect of a threat differs on different people. Similarly, Shahid al-Thāni, in the famous book of Sharh-e-Lum'a, says that the effect of a threat to disgrace, or to inflict injury, or to put into prison differs on different people. He then points out that this must be referred to the judgment of the ordinary man (45). Also Article 202 of the Civil Code of Iran provides that, when considering a threat, consideration must be given to the age, personality and sex of the duressed person.

The threat must also be serious, irresistible and illegitimate. Under Iranian law, it may be directed against the person, the property, or the honour of the party whose consent is exacted or of his close relatives like husband, wife, ascendants or descendants (46); but

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43) See: Article 202 of the Civil Code of Iran
44) See Article 205 of the Civil Code of Iran
45) Zain al-Din Ali (Known as Shahid al-Thani), Kitab al-Raudat al-Bahiya fi Sharh al-Lumat al-Dimashqiya (n.p., n.d.), Vol. II, P. 206. See also M.H. Najafi, Jawahir al-Kalam fi Sharhi Sharai al-Islam (Tehran: Dar al-Kutub al-Islamiyya, 6th ed, A.H. 1399), Vol. XXXII, PP. 11-12, and M. Ansari, Makasib, op. cit., P. 119
46) See Articles 202 and 204 of the Civil Code of Iran, the contents of which are similar to the provisions of Article 1113 of French Civil Code.

as the question should be simply whether the threat in fact did constrain the contracting party, there is no reason to suggest that threats to other persons do not invalidate the contract under Islamic law.

Clearly not all pressures and threats are illegitimate, for " in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act (47)." In fact, as far as Islamic law is concerned, it distinguishes between duress (ikrāh) and necessity (iḍtirar or ḍarūra). A constraint placed on the will of a person inducing him to consent will not affect the validity of a contract if it does not result from another person's threat, but is due to extra-ordinary circumstances in which the contractor finds himself. Thus a disadvantageous contract of sale under a pressing need of money, although unconscionable, is regarded as a perfectly valid contract under Islamic law. This is contrasted with French law in which a disadvantageous contract of employment entered into by the employee under a pressing need of money caused by the illness of his child has been declared null.(48)

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47) [1976] A.C. 104 at 121, Per Lord Wilberforce and Lord Simon

48) See: Article 206 of the Civil Code of Iran. Regarding French law, See: Cass Soc 5.7.1965 cited in Barry Nicholas, French Law of Contract (London: Butterworths, 1981) P.104

Similarly, threatening to carry out something within one's rights will not normally amount to duress. In this respect there is no reason to suppose that Islamic law endorses the approach adopted by French law that there must be a direct connection between the right which gives rise to the threat and the contract which is exacted. Thus the purchase of a car from an offender under the threat of reporting his offence to the police is as good a contract as an agreement by a debtor to create a mortgage under the threat of an action to enforce a debt. Also a person who is ordered by the competent authorities to sell hoarded foodstuffs in year of famine cannot plead that his consent was not freely given (49). on the other hand, under Islamic law, unlike the old common law, apart from the cases of actual or threatened physical harm, duress of goods, i.e., a threat of harm to property, can also provide a defence, provided that the requirement of proportionality is observed, i.e., it is proved that the duressed person has chosen the lesser of

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49) Article 207 of the Civil Code of Iran provides:" A transaction made under the orders of competent authorities is not considered as a transaction made under duress ". Article 91 of Majella (The Ottoman Civil Code) also provides :" The exercise of a right permitted by <u>Sharīʿa</u> cannot invoke liability for compensation ".

the two evils. (50)

Duress invalidates a contract because it affects consent. therefore, as Article 203 of the Iranian Civil Code makes it clear, there is no difference between cases where the threat is made by one of the parties to the contract, and those in which it is issued from a third party (51). Moreover, a threat by someone to the effect that he shall injure himself if the other party does not make the proposed contract, may amount to duress if the contract is entered into under its influence. An example is shown by a man threatening to kill himself if his father does not sell his car to him. The contract of

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50) The original common law view has been rejected in some of the recent cases in which the courts have recognised the concept of " duress of goods ". For example, in the Siboen and the Sibotre [1976] 1 LLoyd's Rep. 293, Kerr J. said [at P. 335] that the defence would be available to a person who had entered into a contract under a threat of having his house burnt down or a valuable picture slashed.

51) The codes of some other Muslim countries recognise duress issuing from a third party as affecting the validity of a contract only if it is proved that the other contracting party knew or could have been presumed to have known of the duress. See: Article 157(1) of the Kuwaiti Civil Code and Article 184 of the U.A.E. Civil Code. This is similar to the position held by English law. See: Kesarmal S/O Letchman Das V. Valliapa Chettiar (N.K.V.) S/O Nagappa Chettiar [1954] 1 W.L.R. 380, but is unlike the position held by the French Civil Code, which expressly provides that the violence may emanate from a third party, in which case the question should be whether consent was vitiated regardless of whether the other party was to blame. See: B. Nicholas, French Law of Contract (London: Butterworths, 1981) PP. 102-103

sale made under such threat is invalid. It must be mentioned that not all these cases amount to duress. A famous Shi'i jurist in the authoritative book of Masālik al-Afhām provides: " No duress exists in cases where someone says to the other: Divorce your wife or else I shall kill myself, or shall become an infidel or abstain from praying, etc" (52). The reason for this seems to be the fact that no real pressure is thought to exist here. Otherwise, so long as the doctrine of duress is based on an absence or defect of consent, it would seem immaterial what has caused the absence of consent.

As for the effect of duress in Shi'i law, it will make the contract inoperative (ghayr e nafidh) but not void, so that the threatened party may ratify it once the duress has ceased (53). This position is contrasted with the position of English law in which a contract made under duress is valid until the right of avoidance is exercised. Thus, while in English law, a durssed person who takes no steps to avoid the contract after he is

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52) Shahid al-Thani, Masālik al-Afhām, op. cit., Vol. II, P.3. See also M. Hakim, Nahj al-Fiqaha (n.P., n.d.) P. 201

53) The same view has been accepted by Māliki and Hanafi Schools of Sunni law. The Shāfi'is and Hanbalis, on the other hand, regard the act under duress as non-existent ab initio. A corollary of the first view is that if the duressed person dies before ratification (imda) or rejection (radd), the right of ratification, being a proprietary right, will be inherited by his heirs. See Article 253 of the Iranian Civil Code; See also: S. H. Emami, Huquq e Madani (Tehran: Islamiyye, 1353 sh.) Vol. I, P. 195

freed from the threat, may be bound by it, under Islamic/Shiʿi law, such a person may only be bound either by an express ratification of the contract or by voluntarily and knowingly acting under it. The distinction has practical consequences. Under Islamic law, an innocent third party who "buys" goods "sold" under the contract will not acquire a good title if the contract is not ratified by the duressed person.

The question which raises itself here is this : If the threatened party ratifies the contract, will the contract become valid ab initio, or as from the date of ratification? The answer to this question is vital for identifying the person to whom the benefits of property for the period between the initial conclusion of contract and its subsequent ratification belong. According to one view, consent lies at the root of a contract. So a contract can only come into existence when the threatened party's consent is given, and not before. The opposite view holds that the ratification of contract by the threatened party signifies his consent to the terms of a contract previously made by way of offer and acceptance and, thereby, removes the only obstacle existing for its effectiveness. Thus, according to this view, the title, risk and all the benefits pass to the other party as from the date of the contract, i.e., when the offer can be said to have been accepted. The Civil Code of Iran does

not expressly accept either of the two views discussed above. However, Article 258, in dealing with unauthorized (fodūli) transactions, i.e., transactions concluded by an unauthorized agent (fodūl), provides that if an unauthorized transaction is subsequently ratified, the benefits shall pass to the other party as from the date the contract was originally made. It can be said that the same rule should, even more strongly, apply to contracts made under duress, for the simple reason that, in this type of contract, the threatened party, having made the contract himself, is aware of its terms, whereas, in unauthorized transactions, the true owner has not even been involved in the process of contract-making. So when in this latter type the consent of the true owner can make the contract valid ab initio, it must, a fortiori, have the same effect in contracts made under duress. Also, the fact that this view is held by the majority of Shi'i jurists (54) is another factor indicating that it is more in line with the spirit of the Iranian Civil Code which is primarily based on Shi'i law. The same view is accepted in English law, which holds that contracts entered into as the result of duress are voidable and, consequently, regards any delay by the

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54) See, for example, M. Hakim, Nahj al-Fiqaha, op. cit., PP.203-4; Shahid al-Thani, Sharh Lumah, op.cit., Vol. III, P. 226, S.A. Khoei, Mabani Takmilat al - Minhaj (n.p., n.d.) Vol. III PP. 337 et. seq.

victim to seek relief within a reasonable time after the removal of the threat as an evidence of acquiescence.

One last point must be mentioned here. In the extreme cases where the threat is of a degree to destroy intention completely, it shall have the effect of making the contract void, and not merely inoperative. It must be realized that the main feature of duress is that it does not deprive the person of all choice. It leaves him with a choice between evils. If someone threatens to kill another unless he sells his property to him, the contract of sale so concluded shall be regarded as inoperative and not void under Islamic law. The reason for this being the fact that the seller has created in his mind an intention to create a contract (qasd e insha e 'aqd), by intending to pronounce the words, in order to avoid a further evil. The only problem with such an intention is that it is created reluctantly and, therefore, once the threat is removed and consent given, the contract can be regarded as valid. on the other hand, if someone is made to sign a document at gun-point, not realizing what he is signing, no contract will come into existence. The reason being the fact that, having not been aware of the contents of the paper, he cannot be said to have had any intention (not even an ill-formed one) to create a contract.

The above - mentioned distinction has been recognized

by the majority of shi'i jurists who have discussed the first type of cases under the title of duress (ikrāh), while the second type has been discussed under the title of compulsion or coercion (ijbār). The same view is reflected in various Articles of the Civil Code of Iran (55), but has been rejected by the majority of Sunni jurists (56), and a minority of the jurists of the Shi'i school of jurisprudence (57), who regard both "intention" and "consent" as interdependent " essential " elements of contract rather than " operative " elements.

Although by no means an established rule of English law, the distinction between intention and consent has been recognised by some English judges when discussing the effect of duress. In the criminal case of Lynch V. Director of Public Prosecutions of Northern Ireland (58), all five members of the House of Lords rejected the idea that duress makes a person's acts non-voluntary. In this case, it was said that a person acting under duress intends to do what he does, but does so reluctantly (59). Lord Wilberforce specifically stated that " duress does not destroy the will, for example to enter into a

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55) See, for example, Articles 190, 195,1070 and 1136
56) See: A. Khafif, Ahkām al-Mu'āmilāt al-Shar'iyah (Cairo: Matbaa Lajanat al-Talif, 2nd ed. A.D. 1944) PP. 321-322
57) See, for example, Najafi, Jawahir al-Kalam, (Tehran: Islamiya, 6th ed., A.H. 1399) Volume on Matajer P.56, Shahid al-Thani, Masalik al-Afham, op.cit., Vol. I., P. 171, and Sharh Lumah, op.cit., Vol.III, P.227
58) [1975] A.C. 653
59) Lord Morris, ibid., P. 670

contract, but prevents the law from accepting what has happened as a contract valid in law " (60). Similarly, Lord Simon of Glaisdale said that in the law of contract " Duress... deflects without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side ... the contract procured by duress is therefore not void: it is voidable-at the discretion of the party subject to duress." (61) (emphasis added). It has been said that the same analysis is applicable in both the civil law and the criminal law as there is no difference between the juridical nature of duress in these two branches of law. (62)

1-2- Mistake (ishtibāh)

The two main types of mistake, according to the Civil Code of Iran, are mistakes as to the subject - matter of contract (Article 200) and mistakes as to the identity of the other contractor (Article 201)(63). A mistake does not affect the validity of a contract unless it is

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60) ibid, at P. 680
61) ibid, at P. 695
62) A.G. Guest, et. al., Chitty on Contracts (London: Sweet & Maxwell, 1989) Vol. I, P. 333
63) This is similar to the distinction made in the French Civil Code between *erreur sur la substance* and *erreur sur la Personne*.

fundamental and relates to the very substance of the thing which is the object of the contract (Article 201). The interpretation put on this requirement is that mistake must affect the true intention of the mistaken party on a subjective basis and, thus, prevent the contract from coming into existence. So if bronze is bought in the belief that it is gold, the contract is void, but not if a 1992 car is mistaken for a 1994 model, or an unsound horse is bought in mistake for a sound one. The difference between these situations lies in the fact that, in the first case, what is intended in the mind is the purchase of gold, whereas what happens in practice is the sale of bronze. The intention, therefore, does not correspond with the reality. As it is put by a well-known formula of Islamic law: " what was intended has not happened, and what has happened was not intended": mā waqa'a lam yuqsad wa mā qusida lam yaqi. The same defect exists in cases where the parties are at cross purposes, in the sense that what has been offered is not what has been accepted. If A offers the sale of his *house* to B and B accepts the purchase of A's *flat* or, alternatively, the *rent* of A's house, no contract comes into existence in either case, as the two intentions do not coincide.

In the second situation mentioned above, however, such " qualities " as the soundness of the horse or the model of the car, do not form part of the buyer's intention,

even if it is proved that he would not have bought if he had known that the horse was unsound or the car was a 1992 model. What constitutes the intention in these cases is simply the purchase of either the horse or the car.

In English law also mistake as to quality does not normally affect the validity of the contract. So where a 1939 car was bought in mistake for a 1948 model (64), or a quantity of tea was bought in mistake for a better quality tea (65), the validity of the contract was not affected.

It must be borne in mind, however, that the buyer in such cases is not left without a relief under Islamic law. Unlike common law, in which the adequacy of consideration is not a pre-requisite for the validity of contract and, thus, the sale of an estate in which, unknown to the seller, there is a mine under the surface (66), or the sale of a stone, which later proves to be an uncut diamond, in exchange for a small amount of

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64) See: Oscar Chess Ltd. V. Williams [1957] 1 W.L.R. 370
65) See: Scott V. Littledale (1858) 8 E. & B. 815
66) In Smith V. Hughes [1871] LR 6 QB 597, Cockburn C.J. said : "the question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding." (ibid. at PP. 603-604)

money (67), would be perfectly binding, the Islamic / Shi'i law makes provision for a remedy for inadequacy of consideration. In case of disproportion between the respective gains of the parties, resulting in contractual imbalance, the losing party is given a right of termination, known as an option of lesion khiyār al - ghabn (68), provided he was ignorant and the difference is such that it is not commonly ignored (69). The losing party may also use one of the other various options of termination (khiyārāt) recognised in Islamic law, namely, the option of unfulfilled conditions (takhallufe shart), provided that the soundness of the horse or the model of the car constitutes an express or implied "term" of the contract. Implied terms are also frequently used in English law today as a device to protect buyers in contracts that they conclude upon a mistaken belief as

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67) In the American case of Wood V. Boynton (1885) in which a girl had sold a stone for $1, the Wisconsin Supreme Court refused any relief to the girl when the stone proved to be an uncut diamond. See: J. Adams and R.Brownsword, Understanding Contract Law (London: Fontana Press, 1987) P. 114

68) See Articles 416-417 of the Civil Code of Iran

69) The jurists of Hanafi, shāfi'i and Hanbali Schools limit the operation of the option of lesion to cases accompanied by fraud, except in case of property belonging to vulnerable persons or institutions who are most needful of public protection, like minors. The same view has been reflected in the laws of some Muslim Countries. See, for example, Article 191 of the U.A.E Civil Code, Article 162 of the Kuwaiti Civil Code and Articles 356-357 of Majella (The Ottoman Civil Code).

to the quality of the subject-matter.

Under both Islamic law and English law, the requirement that mistake must be " fundamental " also applies in cases where mistake relates to the "identity" of the other contractor. The English Courts have made it clear that mistake as to the identity of the other contractor may only affect the validity of contract if one party regards the identity of the other party as a matter of " vital importance " (70). Also Article 201 of the Civil Code of Iran provides that mistake as to the person may only affect a contract if the persona of the other party is the main consideration for entering into the contract. No general criteria exist for deciding this issue and, therefore, each contract has to be considered separately. It can, however, be said that the identity of the other contractor is usually an important consideration in contracts of marriage (nikāh) or donation (hiba) and often in all types of gratuitous contracts, but is usually immaterial in a contract of sale. Thus a contract of hiba concluded by a person who believes a stranger to be his son and donates a considerable amount of money to him is void, because the person of the donee constitutes a substantive aspect of

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70) See: Ingram V. Little [1961] 1 Q.B. 31 at P. 57; Lewis V. Averay [1972] 1 Q.B. 198 at P. 209

the contract. His identity is so important as to form part of the " intention " of the donor. The intention having been defective, no contract comes into existence. On the other hand, when X sells goods to Y thinking Y to be Z, the contract of sale so concluded will be valid even though it means that he ends up contracting with someone with a lower credit-worthiness. On certain occasions, it is a particular attribute of the other party which constitutes the main consideration. An example is the donee's poverty in most charitable donations, or the buyer's credit-worthiness in credit sales. It is difficult to imagine situations in which such attributes are so significant as to form part of the " intention ". In most such cases, therefore, the contract stands, while the beneficiary will only have a right of termination under Islamic law if the attribute constitutes an express or implied term of the contract. In this respect English law is similar to Islamic law in holding that a mistake as to attribites, for example as to respectability, social position or credit-worthiness, will not be sufficient to affect the validity of a contract. Thus in King's Norton Metal Co. V. Edridge, Merrett & Co. Ltd. (71), the sale of goods by the Plaintiffs to one Wallis who had posed as a member of a

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71) (1897) 14 T.L.R. 98

mythical firm called " Hallam & Co " was held not to be void on the ground of mistake but only voidable for fraud and thus, it was held, an innocent purchaser from Wallis acquired a good title to them.

Even in cases where the lack of a presumed attribute avoids a contract as, for example, when a plumber is believed to be a surgeon and a personal contract for medical operation is made with him, the invalidity is due to the impossibility of performance and not to mistake. It follows that this latter contract will be void under Islamic law even if it is proved that the true facts were known to the other party, because, he cannot be said to have had a true intention to enter into a contract which he knows can never be enforced. (72)

Having realized the importance of " intention ", as distinct from " consent ", in the formation of contracts in Islamic law, it may now be useful to distinguish between intention and motive. While intention is the primary state of mind of a contractor, motive is his ultimate purpose for entering into the cotract, for example, buying a house as a place of residence or, alternatively, as an investment. When discussing the old Roman law, Barry Nicholas gives the example of buying a piece of land with some olive trees on it. He says that

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72) For details, see chapter II, Section 7, on "Impossible Act"

if, after the land is bought, it is found that the olive-trees on it had been blown or burned down at the time of the sale, the sale shall be void if the land was bought <u>for the sake of the trees</u> (i.e., as an olive-grove), but not if it was bought as a building-plot (73). Under Islamic law, the distinction between these two situations lies in the difference between the two motives. Therefore, such a contract will stand under Islamic law, irrespective of the buyer's motive, subject to what was said above in relation to the options of " lesion " and " unfulfilled condition. "

From what was said above, it is clear that the nullity of contracts entered into as a result of a fundamental mistake lies in the fact that the mistaken party's "intention" - which forms the basis for the validity of every contract in Islamic law-is defective, irrespective of whether or not the other contractor is to blame for the mistaken belief, and also whether the mistaken party is negligent or not. So the discussions in the English law books regarding the differences between unilateral and mutual mistakes have no place in the traditional

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73) Barry Nicholas, <u>French Law of Contract</u>, op.cit.,P.82

fiqh (74) books. All that is important in the Islamic law of mistake for invalidating a contract is that one party's mind never went with the transaction and so we do not have two coinciding real " intentions " to create a contractual relationship. The same thing would be true when dealing with written contracts. While English law is not prepared to allow a negligent signor who is, for example, too lazy to read through a document before signing it to plead that notwithstanding his signature " it is not his deed " (*non est factum*) and therefore to escape liability under it, there is every likelihood that Islamic law would regard this document as no contract at all due to lack of a proper and serious intention on the part of the signor to create the contract in question. However the heavy burden of proving that in spite of his signature he did not have the required " intention ", rests with the signor. This is a corollary of the overal subjective approach of Islamic law towards the issue of formation of contract, as was discussed earlier in this chapter.

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74) Fiqh means the science of Muslim law as developed by jurisprudents. It is usually thought to be the narrower circle, compared to Shariʿa, which is the wider circle; altough the two terms are interchangeable. Fiqh has been divided into two parts: 1) Usūl (literally meaning principles) which deals with the principal rules of jurisprudence, and 2) Furū (literally meaning branches) which deals with the substantive law.

Mistake Induced by Fraud

If mistake is induced by one party's fraudulent misrepresentation, the other party will have another kind of option available to him to terminate the contract, namely, an option of fraud (khiyār al - tadlis)(75). The difference between this option and those mentioned earlier is that this latter type is easier to invoke. So, for example, the requirement that an option of lesion may only be exercised if there exists such a gross loss which is not commonly ignored, or that the option of " unfulfilled condition " may be invoked only if the mistaken belief constitutes an express or implied term of the contract, are not necessary pre-requisites for invoking the option of fraud. This option, therefore gives extra protection to the contracting parties. Examples of acts which were held by the jurists to constitute fraud are numerous. They include: tying up the udders of female animals to give the intending purchaser an optimistic impression of a very productive

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75) According to Coulson, the word tadlis, meaning swindling or cheating, is an Arabized form of the Byzantine Greek dolos. See: N.J. Coulson, Commercial Law in the Gulf States (London: Graham and Trotman, 1984), P. 69

milk-yield (76), and making such cosmetic alterations as dying the hair black, curling the hair to make it appear frizzy, applying blusher to the cheeks, inserting cotton balls in the mouth corners to plump up the face, and padding clothes to imply a strong musculature, with the purpose of inducing the other party to enter into the contract of marriage (77). These acts are sometimes referred to by Shi'i jurists as tadlis al-mashshātah or beautician's fraud. (78)

It seems that the " option of fraud " is limited to fraudulent acts and does not apply to fraudulent statements (taghrir al-qawli) in the traditional Islamic law, which differs in this respect from English law. Thus Article 438 of the Civil Code of Iran, in defining tadlis or fraud, refers to the " activities " (amaliyyāt) of the other contracting party. Also concealment of a fault or defect in goods by the seller does not constitute fraud and will not therefore give

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76) This is called tasriyya and has been prohibited by the Prophet in one of his decisions. See: Ibn Qudama, al-Mughni (Cairo: Matbaat al-Minar, A.H. 1348) Vol. IV, P. 135

77) See: Ibn Qudama, al-Mughni, op. cit., Vol. IV, P. 141; Shahid al Thani, Masalik al-Afham, op. cit., Vol. I, P. 166 cited in S.E. Rayner, The Theory of Contracts in Islamic Law (London: Graham and Trotman, 1991) PP. 217-218. According to some jurists, a woman may ask annulment of her marriage due to lack of marriage equality (Kafā'a) where the husband has misrepresented his status by fraud. See: Shahid al-Thani, Sharh Lum'ah, op. cit., Vol. II, P. 59

78) See: Shahid al-Thani, Masalik al-Afham, op. cit., Vol.I, P. 166

rise to an option of fraud, but it may give to the buyer a right of termination under the option of defect (khiyār al-ʿaib). This option is limited to the buyer in the contract of sale. In such cases, instead of terminating the contract, the buyer can demand compensation (arsh) for the diminution in value of the object of sale (See: Article 422 of the Civil Code of Iran). The existence of an option of defect for the buyer means that, under Islamic law, unlike English law, the seller is required to disclose defects in goods (79). For, otherwise, the buyer will be able to terminate the contract when becoming aware of the defect.

The numerous "rights of option" recognised in Islamic law, of which at least ten have been expressly mentioned in the Civil Code of Iran (80), indicate a distinctive Islamic philosophy of contract, compared to the Western systems. While in the latter, the contract itself is sacrosanct because it is presumed that all the necessary investigations have been made before its conclusion, in

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79) In English law also there are certain exceptional cases where disclosure is required. In addition to many statutory duties, there may also be a duty to disclose under the common law, as where a special relation of confidence exists between the parties (See: Tate V. Williamson [1866] 2 Ch. App 55) or because the contract is a contract uberrimae fidei, of which the clearest example is the insurance contract.

80) The options mentioned in the Civil Code of Iran are the options of: " delayed payment of the price ", "discrepancy", " unfulfilled condition ", " fraud ", " animals ", " defect ", " lesion ", " condition ", " meeting place ", " inspection and incorrect description ". See Article 396.

the Islamic law, only when the extensive system of options is exhausted does the contract gain real sanctity. To escape the potential disadvantages of this situation, it is usual for the contracting parties in some Muslim countries, like Iran, to waive their " options " when making a contract.

The Effect of Mistake in Iranian Law

The provisions of the Civil Code of Iran are confusing as to how mistakes affect the validity of contracts. This has led to divergencies among writers. Some, referring to Articles 199 and 200 of the Civil Code, which provide that contracts concluded by mistake are "not effective", believe that mistakes make contracts only inoperative (ghayr nafidh) but not void. The result is that such a contract can be ratified by the mistaken party at a later stage. Others refer to Articles 353 and 762, which describe certain types of contracts made under mistake as void (81). These writers conclude that a contract made by mistake must be regarded as void because it contradicts the will of the parties.

Bearing in mind the fact that for mistake to be

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81) Article 762 provides: " If a mistake occurs in connection with the other party to the settlement, or in respect of the object of settlement, such settlement shall be void ".

effective it must be fundamental and go to the root of the contract, it is clear that if mistake is established, the contract is necessarily null and not merely inoperative (ghayr nāfidh) (82). The phrase " not effective ", used in Articles 199 and 200 of the Civil Code, does not contradict this, because a void contract can also be described as " not effective ". In other words, this is a general expression which covers void (bātil) and inoperative (ghayr nāfidh) contracts alike.

Before going to the next section one last point must be mentioned regarding the burden of proving mistake. The general rule mentioned in Article 223 of the Iranian Civil Code is that contracts are regarded as valid unless otherwise is proved. This is called Asālat al-sihha or presumption of validity. It follows that mistake must be proved by the person who claims it.

2- Encroachments of the legislature

The concept of sanctity or freedom of contract is a

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82) What supports this view is the fact that the same position is held by French law, which constitutes the second source of the Iranian Civil Code (See Article 1110 of French Civil Code). Under Common law, the effect of a legally operative mistake is usually to render the contract void ab initio. In equity, it may be a defence in an action for specific performance, or it may entitle the parties to have it rectified, or it may afford a ground for rescission of the contract. See: Chitty on Contracts (London: Sweet & Maxwell, 26 ed., 1989) Vol. I, P. 227

reasonable social ideal only to the extent that no injury is done to larger interests of the community. To protect these interests, the legislatures have interfered in many areas of the law of contract, causing the decline of the idea of freedom of contract, particularly in the 20th century.(83)

In this section, we are concerned with situations where Islamic law will interfere into a freely negotiated contract. This covers cases where the contract is contrary to the law. The law does not lend its aid to a person who founds his cause of action upon an illegal agreement. So when prohibition conflicts with an obligation, the prohibition will take precedence (84). In interpreting the Quranic verse : ...Do not consume your property among yourselves in vanity..."(85), most interpreters believe that this refers to transactions prohibited by the Holy Legislator (86). There is also a statement by the Prophet to the effect that " any stipulation which contradicts the Book of God is

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83) For a detailed discussion of the idea of freedom of contract and its decline in this century see: P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979)
84) See Article 52 of the UAE Civil Code
85) Verse 188/II and Verse 29/IV
86) Tabari, Tafsir, op. cit., Vol. III, P. 549 See also: Jassas, Ahkām al-Quran (Cairo: Matbaat al-Bihiya, A.H. 1347) Vol. II, P. 209; Zamakhshari, (Mahmud ibn Umar) Kashshaf, (n.p., al-Dar al-Alamiya Liltibaʿa wal-Nashr, n.d.) Vol. I, P. 502

rejected ": Kollo shartin khalafa kitaballah fahowa mardūd (87). Accordingly, Article 10 of the Civil Code of Iran, makes the effectiveness of contracts dependent upon them not being contrary to the law. There are many grounds which make contracts illegal, the most important of which are the following:

2-1- Contracts With no Legitimate or Reasonable Object or Purpose

Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, such as where one party undertakes to ignore the fast of the holy month of Ramaḍan, or to abstain from praying. Also if either of the things exchanged is extra commercium or has no value in law, the contract shall be invalid and to such things the other contractor acquires no title (Article 215 of the Civil Code of Iran). For example, if the price or the thing sold be carrion, wine, a hog, intoxicants, idols, gambling instruments, or the like, which do not constitute legal property or māl, the sale is absolutely null (88). The Prophet says in one of his statements: " If God prohibits a thing, he also

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87) M. Ansari, Makāsib, op. cit., P. 277
88) In exceptional circumstances such contracts can be valid, e.g., if wine is sold for medical purposes or is sold by a non-Muslim to another non-Muslim.

prohibits the price for it "(89). The price (thaman) for such a thing being prohibited, no contract comes into existence. Similarly, a contract which has no reasonable purpose shall be null and void. The example of useless objects given by Muslim jurists is the sale of an object in exchange for an absolutely similar one or the purchase of vermin (hasharāt).

In some cases, although the contract concerns an apparently lawful object, it is regarded as void, due to the fact that it is intended to effect an illegal *purpose*. Examples are selling of grapes for making wine, or wood for making idols, or renting of a house for establishing a brothel, or selling of weapons to robbers or rebels. Mohammad Baqer Behbahani in his book Adāb-e-Tejarat says:

> It is forbidden to rent houses or ships or animals for an unlawful purpose, e.g., for establishing a gambling house, or a public house, or for transport of wine from one place to another or, the like. It is also prohibited to sell grapes or bananas or dates to someone whose job is to make wine... .(90)

In this respect, Article 217 of the Civil Code of Iran provides: " It is not necessary in contract to mention the reasons for making it. If, however, this is done,

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89) Innallāha idha harrama shai'an harram thamanah. See: Z. Zulmajdein, Fiqh wa Tijarat (Tehran: University Press, 1332 sh.) P.7
90) M. B. Behbahani, Adab e Tejarat (Tehran: n.d.) P. 16

then the reason must be legitimate; otherwise, the contract shall be void ". It is noteworthy that some of the schools of Islamic law adopt a more subjective approach in this respect and search even for the unexpressed motive behind contracts. So, for example under Hanbali law, a bequest made by a man in favour of his mistress is invalid, because it marks the testator's motive in appreciating and encouraging the unlawful activity of extra-marital sexual relationship by the woman (91). This affords a good comparison with the English case of Pearce V. Brooks (92) in which the court refused to enforce a contract to hire out an ornate brougham to a prostitute, who planned to attract customers with it. This has been labelled as " moral paternalism " by some writers.(93)

2-2- undue Influence

This involves showing that one party to the contract was in a dependent position on the other in a way that the other might have taken unfair advantage of the dependence. Such contracts are invalid in English law for

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91) See: N.J. Coulson, Commercial Law in the Gulf States: The Islamic Legal Tradition, op.cit., P. 46
92) [1866] L.R.1 Ex. 213
93) See: H. Collins, The Law of Contract (London: Weidenfeld and Nicolson, 1986), P. 117

the absence of the equality of bargaining power. According to Article 1240 of the Civil Code of Iran, which is in line with the provisions of Shi'i law, a contract made between a guardian and a ward is void. In Islamic law, unlike English law, the presumption that in such a contract the equality of bargaining power does not exist, is absolute and cannot be rebutted. It is not, therefore, open to the guardian to show that the duty of confidence has been fulfilled and, as a result, to have the contract upheld (94). This means that, in Islamic law, this rule is not based on defects of consent or *Vices du Consentement*, but has been adopted as a matter of public policy. This explains why in this work the subject has not been dealt with in the section dealing with duress, which is the normal practice followed in the English law textbooks, but has, instead, been discussed under the title of illegality.

The corollary of the Islamic law approach is that other cases of undue influence recognised in English law, such as contracts between parent and child (95),

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94) This presumption is rebuttable according to a minority of Shi'i jurists, like Allāmeh Hilli. See: M.J.Moghnia, Fiqh e Tatbiqi (Tehran:Senobar,1366 sh.) P.455. For the position of English law on how the presumption of undue influence may be rebutted, See: Morley V. Laughnan (1893) 1ch. 736; Re coomber (1911) 1 ch. 723 and Inche Noriah V. Shaik Allie Bin Omar [1929] A.C. 127

95) See: Wright V. Vanderplank (1855) 2 K.& J.1

solicitor and client (96), doctor and patient (97), fiancé and fiancée (98), religious adviser and the person to whom he gives advice,(99) and " all the [other] variety of relations in which dominion is exercised by one person over another "(100) have not been recognised under either Iranian or Islamic law. All such cases, however, may be dealt with under the doctrine of duress if it is proved that there existed an illicit and intimidating threat, as was discussed earlier in this chapter.

2-3- other Instances

There are many other types of illegal contracts. An example is the prohibition of contracts with an element of uncertainty and risk in them. This includes contracts in which either of the two exchanges is not known (m'alūm, opposite majhūl = unknown) or its achievement is doubtful (for example, the sale of a bird in the sky or a fish in the sea or of a stray animal). Such contracts are

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96) See: Wintle V. Nye [1959] 1 W.L.R. 284
97) See: Mitchell V. Homfray (1881) 8 Q.B.D. 587; Radcliffe V. Price (1902) 18 T.L.R. 466.
98) See: Cobbett V. Rock (1855) 20 Beav. 524; Lovesy V. Smith (1880) 15 ch.D. 655
99) See: Huguenin V. Baseley (1807) 14 ves. 273; All-card V. Skinner (1887) 36 ch.D. 145
100)See: Huguenin V. Baseley, ante, at P. 286 per Sir S. Romilly

referred to as _gharar_ (literally meaning: risk or hazard) transactions and are void because the risk element involved makes them similar to a gamble between the parties resulting in unjust loss or gain. Mālik ibn Anas, the leader of the Māliki sect, in his famous book, _al-Muwatta_, refers to such contracts and says:

> Yahya related to me from Malik from Abu Hazim ibn Dinar from Said ibn al-Musayyab that the Messenger of Allah, may Allah bless him and grant him peace, forbade the sale with uncertainty in it.
> Malik said: An example of one type of uncertain transaction and risk is that a man postulates the price of a stray animal or escaped slave (_'abd_ _ābeq_)(101) to be fifty dinars. A man says, I will take him from you for twenty dinars. If the buyer

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101) In spite of occasional references to the concept of " slavery" in the traditional _fiqh_ books, there are dicta indicating that it was disapproved of in _Shari'a_. There are many sins for which the penance (_kaffāra_) is the setting free of a slave. Rules like this were adopted to fight, step by step, a practice which was well-rooted in the pre-Islam Arabia and could not, therefore, be abolished straight away. Also all the _fiqh_ book have chapters on " setting free a slave " (_bāb_ _al-'itq_) and none has one on "slavery" (_bāb_ _al-riqq_). The following statement of the Prophet shows the overall rejection of the concept in _Shari'a_. He says:
" Gabriel never ceased enjoining me (to use) the tooth - bruth (_siwak_) until I feared that (if I do not use it) I become toothless. And he never ceased enjoining me (to be good) to the neighbor until I thought he would make him my heir; and he never ceased enjoining me about the wife, to the extent that I thought it would be improper to divorce her; and he never ceased enjoining me about the slave, until I thought that he would fix a period within which he should be freed. " See: Asfa A.A. Fyzee, _A Shiite Creed_ (n.p., n.d.) P. 86

> finds him, the seller loses thirty dinars, and if he does not find him, the seller takes twenty dinars from the buyer.
> Malik said: There is another fault in that. If that stray is found, it is not known whether it will have increased or decreased in value or what defects may have befallen it. This transaction is full of uncertainty and risk.
> Malik said: According to our way of doing things, one kind of uncertain transaction and risk is selling what is in the wombs of females... because it is not known whether or not it will come out, and if it does come out, it is not known whether it will be beautiful or ugly, normal or disabled, male or female... .
> Malik said: Females must not be sold with what is in their wombs excluded. That is, for instance, that a man says to another, the price of my sheep which has much milk is three dinars. She is yours for two dinars while I will have her future offspring: This is disapproved of because it is an uncertain transaction and a risk. (102)

Also Article 342 of the Civil Code of Iran mentions lack of uncertainty in respect of the quality, quantity and description of the thing sold as one of the conditions for the validity of the contract of sale (103). Article 514 further provides that in contracts of employment (ijāra) the time period of the contract, or the nature of the services required, must be precisely defined.

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102) Mālik ibn Anas, Al-Muwatta, English translation by Aisha Abdurrahman Bewley (London: Kegan Paul International, 1989) P. 270. See also Kāsāni, Badā'i al-Sanā'i, op. cit., Vol. V, P. 163; Ibn Qayyim al-Jawzia, Zād al-Ma'ād (Beirut: Muassisat al-Risala, A.D. 1979), Vol. IV, PP. 267-8

103) See also Article 189 of the Yemeni Civil Code of 1979

It must be added that if uncertainty is within the limits approved by the usage and custom (*ʿurf*), it will not affect the validity of a contract. Examples given by jurists include renting of a house for a month, in spite of the fact that the exact number of days in a lunar month may vary from 28 to 30 days, or a contract for using of a public bath in spite of the fact that the exact amount of the water used by the customer is not known (104). Thus Article 216 of the Iranian Civil Code Provides: " The object of a transaction should not be ambiguous, *except in special cases where a general knowledge would be sufficient*. " (emphasis added)

Before leaving this subject, one last point must be mentioned. The jurists of the Zāheri (from the root *zāher*, meaning outward appearance) School - a school famous for its rigid approach, manifested by their narrow interpretation of the Quranic verses and the Traditions of the Prophet - are the only jurists who believe that contracts like those concerning the sale of escaped animals are valid. They believe that the transfer of title which takes place as soon as the contract is made is a good enough consideration. They further argue that the risk involved in such contracts, in the sense that the buyer is not certain whether or not he will be

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104) See: M.A. Zarir, *al-Gharar wa Atharuhu fil-Uqud fil-fiqh al-Islami* (n.P. 1967) P. 587

able to catch the stray animal, is not greater than the risk involved in any ordinary contract. No buyer, for example, can be sure that the thing he is purchasing will not perish immediately after the formation of contract, leaving him with nothing in exchange for the price he has paid. These events constitute ghayb (the Unseen) of which only God is aware (Verse 179/III of the Quran). (105)

There are also other types of illegal transactions in Islamic law as well as Iranian law. Examples include : Prohibition of the sale of public properties, such as highways, museums, public libraries, mosques etc. (106); prohibition of the sale of endowed properties (107), narcotic drugs (108) or arms (109); invalidity of a contract made by an insane or infant (110), except in special cases discussed in chapter II below; prohibition of receiving remuneration for teaching religious duties, or for the ablution of the dead (ghosl)(111); and nullity

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105) See: Ibn Hazm. al-Muhalla (Damascus: Idarat al-Tibaat al- Muniriyya, A.H. 1350).
106) See: Articles 24-26 of the Civil Code of Iran
107) See: Article 349 of the Civil Code of Iran
108) See: Article 1 of the "Law on Prohibition of the Use of Narcotic Drugs" passed in December 1988 in Iran.
109) See: Article 43 of the "Law Relating to Punishment of Smugglers" passed in March 1934 in Iran. This Article was subsequently repealed and replaced by the " Law on Aggrevation of Punishment of Arms Smugglers" in February 1972.
110) See: Article 211 of the Civil Code of Iran
111) See: Shahid al-Awwal, Lumat al-Dimashqiya (Persian Translation)(Tehran University Press, 1368 sh.), Vol. I, P. 190

of a contract in which there exists a condition contrary to the essence of the contract (112) (for example, if in a contract of sale, in which transfer of ownership is of the essence, it is provided that the buyer shall acquire no title to the goods) (113) and so on.

Contracts contrary to public morality, e.g., those concerning cohabitation without marriage, or betting and gambling are also illegal and, therefore, void (114). There are only two occasions on which aleatory transactions are allowed under Islamic law: Firstly, in favor of prizes for the winner or winners of horse races and, secondly, in respect of shooting competitions and fencing (115). The philosophy behind these exceptions lies in their importance as a training for the holy war (jihād). According to some jurists, the third exception concerns competitions held with the purpose of choosing those most learned in Islamic law (116). This provision is not surprising if one bears in mind the importance of Islamic law which, as the " core and kernel of Islam itself "(117), lies at the heart of this religion.

A contract which is against public policy is also invalid and, therefore, not sacred. The concept of public

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112) See: Aricle 233 (1) of the Civil Code of Iran
113) Article 233 of the Civil Code of Iran
114) See: Aricles 654 and 975 of the Civil Code, Article 6 of the Civil Procedure Code, and Article 30 of the Notary Public Offices Act (1975) of Iran.
115) See: Aricle 655 of the Civil Code of Iran
116) See: J. Shacht, Introduction to Islamic Law (Oxford: Claredon Press, 1964) P. 147
117) Ibid., P. 21

policy is closely related to the values held by the society. So it is flexible, in the sense that its true meaning changes from one place to another and from time to time. In other words, public policy is not immutable. " Rules which rest in the foundation of public policy, not being rules which belong to the fixed customary law, are capable, on proper occasion, of expansion or modification. "(118)

As far as the present Iranian law is concerned, contracts which, on grounds of public policy, are regarded as invalid may be classified into five groups:

First : Contracts injurious to proper administration of governmental affairs (as if a government employee assigns his post to someone else).

Second : Contracts injurious to marriage and family life (as if the couple agree that the wife should act as the head of the family, contrary to provisions of Article 1105 of the Iranian Civil Code).

Third : Contracts injurious to man's health and integrity (as if someone gives away his right of self - defence or agrees to become another's slave, contrary to Article 960 of the Civil Code).

Fourth : Contracts which tend to interfere with the proper working of the machinery of justice (as if the contracting parties agree to extend the limitation period

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118) Maxim Nordenfelt Guns And Ammunition Co. V. Nordenfelt [1893] 1 Ch. 630, 666

fixed by the law). (119)

Fifth : Contracts economically against the public interest (as if a contract is made to effect hoarding

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119) It must be noted that in the present Iranian law which, according to Article (Principle) 4 of the Constitution of 1979, is based on Islamic law, mere lapse of time is no bar to criminal prosecution or civil litigation. As the Islamic law maxim puts it, " an established right is not extinguished by a mere lapse of time ": al-haqqu la yusqatu bitaqādum al-zamān). There are however few statutes, mainly remaining from the past,i.e., before the Islamic Republic was established, that bar prosecution or litigation after the prescribed periods. For example, Article 9 of the "Act Governing the Issuance of Cheques " passed in 1976 (1355 Shamsi), provides that the drawer of a cheque may be charged with the offence of issuing a dishonoured cheque (punishable by imprisonment from six months to two years, and a fine amounting to one fourth of the total amount of the cheque, or one fourth of the shortage of the funds at the time of the presentation of the cheque to the bank, as the case may be) only if the holder files his complaint within a period of six months from the date of issuance of the " certificate of non-payment " by the bank. This Act was amended in 1993 (1372 Shamsi) by the Consultative Assembly (Majlis) and was approved by the twelve-member Council of Guardians , who have been vested with the duty to examine the compatibility of the laws passed by the Assembly with the principles of Islamic law and the Constitution of 1979. The provisions concerning the limitation period, however, remained unchanged, which may signify an approval.
Exceptional limitation periods have also been recognised by traditional Muslim jurists. According to Abū Hanifa, the leader of the Hanafi School, for example, the punishment for wine-drinking cannot be enforced unless, at the time of trial, the culprit has the smell of drink on his breath! See: Sarakhsi, Kitab al-Mabsut, op.cit., Vol. XXIV, P.32. Also Shaikh Saduq, the famous shi'i jurist, in his book Mustadrak al-Wasā'il mentions that the limitation period for bringing a case in relation to ownership of land is ten years from the date when the cause of action arises.

(ihtikār) of foodstuffs (120) in year of famine. (121)

3- Impossibility of Performance: Sanctity V. Fairness

Although the classical law attached great importance to the idea that the promise must dominate the circumstances, and should be kept "for better or worse", " through thick or thin ", it probably never required the application of the doctrine of absolute contracts in certain cases, such as where the contract called for personal performance by a party who died. By the lapse of time, the grounds for impossibility were extended. The idea may be summarized in the following way:

Subsequent to the conclusion of a contract, an event may occur, or a pre-existing fact may be discovered which makes the performance of the contract impossible, or illegal, or radically different from that contemplated by the parties. On such occasions, in searching for the right balance between fairness and justice, on the one

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120) See: Allameh Hilli: Idahal-Fawā'id fi Sharhi Ishkalat al-Qawā'id (n.p. A.H. 1387), P. 99; S.A. Khoei, Minhaj al-Salihin (Beirut: Dar al-Zahra, n.d.), P. 102; Mughnia, M.J., Fiqh al-Imam Jafar al-Sadiq (Beirut: Dar al-Ilm, A.D. 1965), PP. 141-147

121) It must be mentioned that although this classification covers many cases, it is by no means conclusive, in the sense that certain cases may not fit clearly in any of these five categories.

hand, and the principle of sanctity of contract, on the other, the scales have now in many legal systems started to tip against sanctity and in favour of fairness. So, for example in English law, while Paradine V. Jane (122) established the principle that a tenant was bound to continue the payment of rent, even though he was evicted from the house by soldiers during the Civil War, because he had not provided against it by his contract, in Taylor V. Caldwell (123) it was ruled that destruction of specfic subject-matter would excuse performance even though no provision to that effect existed in the contract itself. About thirty years later the development was followed in America with the case of Chicago Milwaukee & St. Paul Ry V. Hoyt. (124)

However, the courts were cautious not to be seen as enemies of the principle of sanctity of contract and, therefore, in an attempt to reconcile between the two ideals, they tried to justify the doctrine of impossibility of performance on the basis of the implied term theory. When it was realized that the ideal of sanctity of contract could create injustice, the implied

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122) [1647] Aleyn 26
123) [1863] 3 B. & S. 826
124) [1892] USI 149

term theory developed. The courts could then believe that they were still holding contracts as sacrosanct by reading an unexpressed term into a contract to the effect that its performance was subject to it being and remaining possible to perform. (125)

By the lapse of time, the defects of this theory became apparent. It, for example, could not be applied where an implied term could not be read into the contract. Lawyers then tried to find other theories to justify the coming to an end of the contract. At least five theories have been advanced at one time or another. These theories can be found in many standard text books and it is not necessary to repeat what is well known (126), particularly when each theory produces

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125) See, for example, F.A. Tamplin Steamship Co. Ltd. V. Anglo American Petroleum Products Co. Ltd. [1916] AC 397 Per Lord Loreburn at PP. 403-404, and British Movietonews Ltd. V. London and District Cinemas Ltd. [1952] AC 166 at P. 184. It is believed that Taylor V. Caldwell marks the introduction of the concept of "implied term" in the area of impossibility and Frustration.

126) See, For example, G.H. Treitel, The Law of Contract (London: Stevens & Sons, 8th ed., 1991), PP. 818-821; A.G. Guest, Anson's Law of Contract (Oxford: Clarendon Press, 1987) P. 487; M.P. Furmston, G.C. Cheshire and, C.H.S. Fifoot, Law of Contract (London: Butterworths, 11th ed., 1986), PP. 556 et. Seq.; R. Clark, Contract (London: Sweet & Maxwell, 2nd ed., 1986), PP. 282 et. Seq; D.W. Greig and J.L.R. Davis, The law of Contract (Melbourne: The Law Book Co. Ltd., 1987), PP. 1299 et. seq. and K.E. Lindgren et.al., Contract Law in Australia (Sidney: Butterworths, 1986) PP. 664-668

almost the same result as the other. (127)

It may be added here that the doctrine of " absolute contract " never applied so rigidly in Islamic law. In this respect reference can be made to Article 478 of the Ottoman Civil Code (Majella) which can afford a good comparison with the above-mentioned case of <u>Paradine</u> V. <u>Jane</u>. The said Article reads as follows " If the benefit to be obtained from the thing hired is entirely lost, no rent is payable ". The same rule must be applicable in all other frustration cases. The following chapters will show the more flexible attitude of Islamic law to the doctrine of impossibility of performance.

The Scope of This Work

It is proposed in this work to deal with the doctrine of impossibility of performance of contracts under Islamic law. Throughout this study the main emphasis shall be on Shiʿi law -which is the official school of

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127) See the statement by Viscount Simon in the British Movietonews case, at P. 184, and his statement in Joseph Constantine Steamship Line V. Imperial Semelting Corp. [1942] A.C. 154; [1941] All E.R. 165

jurisprudence adopted in Iran (128) - and so special references will be made to the laws of Iran and particularly to the Civil Code. References will also be made, by way of comparison, to English law and, occasionally, to the laws of other schools of Islamic law and to various jurisdictions throughout the contemporary Islamic world.

At this stage, it may be useful to give a brief account of the reasons for choosing Islamic law, on the one hand, and emphasizing on Shiʿi law and the laws of Iran, on the other, for the purpose of this study.

Firstly : The study of Islamic law may be justified on several grounds. There are more than fifty Muslim countries and about one billion Muslims around the world, most of whom regulate their lives to some extent by the provisions of Islamic law. The nations of the world have to live together. To have a peaceful life and overcome distrust between them, they need to understand each other's culture. The best way to achieve this is

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128) Article (Principle) 12 of the Constitution of 1979 declares the official religion of Iran to be Islam and the official school of jurisprudence to be the Ithna ʿAshari Shiʿi School. The Article adds that the other schools of Islamic law are to be accorded full respect and their followers are free to perform their religious duties in accordance with teachings of their own schools. They are also subject to their own personal status laws. Article 13 adds that the Zoroastrian, Jewish and Christian Iranians are the three recognized religious minorities, who are free to perform their religious ceremonies and are subject to their own laws in personal status matters.

through the study of other nations' laws. It has been remarked that law is the " distilled essence of the civilization of a people ", and it reflects that people's soul more clearly than any other organism (129). If this is true of civilizations in general, it is particularly true of the world of Islam for, as Joseph Schacht says: " Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. " (130)

The study of Islamic law is also useful for the Western lawyer not only because, like every other comparative study, it will help him enrich his knowledge of the law, and understand his own legal system better, but also because there is evidence showing a cross - cultural influence between Islamic law and the Western legal systems. In his article, "An Inquiry into Islamic Influences During the Formation Period of the Common Law" (131), John Makdisi, detects similarities between the Islamic and English actions for the recovery of land and contrasts them with the marked difference in Roman law. He suggests that the evidence of the contact which King

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129) See: J.N.D. Anderson, The Study of Islamic Law (Published in 1977 and based on a lecture in the United Arab Emirates) P.3

130) J. Schacht, op.cit., PP. 20-21

131) See: Islamic Law and Jurisprudence (London: University of Washington Press, 1990), P. 1431

Henry II had with Islamic administration in Sicily in the 12th Century A.D. shows an Islamic influence. He concludes his article by saying:

> In the absence of direct evidence of such influence more cannot be said at this juncture, but perhaps, as we begin to lift our eyes from the glories of Roman law to the glories that lay beyond, we may come to realize the tremendous impact which Islam and its legal system must have exercised on the west. (132)

The study of Islamic law is of more than academic interest. It also has practical benefits in the light of an increasing volume of trade with Muslim countries. For example, LLoyds Bank International lost a case in the Ras al-Khaima Civil Court on the application of a peculiar rule of the traditional Islamic law which provides that a contract of loan is dependent for its legal effect on the delivery of the monies to the borrower (133). Also, the contracts concerning large construction projects between Muslim governmental agencies and foreign contractors are usually made subject to the laws of the

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132) Ibid.
133) For details of this case see chapter II, footnote 39

country in which performance is to take place (134), such laws being in themselves based on Islamic law. To mention only one aspect of Islamic law which might be of concern to these foreign contractors, one has to refer to the fact (discussed in more detail in Chapter IV below) that under Islamic law, as reflected in the laws of many Muslim countries, no court can give judgment for the payment of interest to the winning party. Such practical benefits of studying Islamic law is further realized if one bears in mind the recent trend in Muslim countries to even more " Islamize " their laws, including their law of contract.

It is in the field of such commercial contracts that the subject of impossibility of performance gains its prime importance. In the changing world of today, endangered by wars, riots, rebellions, revolutions

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134) See, for example, Clause 7(g) of Contract CBT001 concluded in 1976 between the Government of Iran, represented by Iran Helicopter Support and Renewal Company, and Bell Helicopter Textron of America, for the supply of certain goods and services. The Clause provides that the contract is to be interpreted in accordance with the laws of Iran. This contract was ultimately made subject to I.C.C. Arbitration No. 6406 in 1988, in which the present author acted as a co-arbitrator. Similar provisions can be found in Article 24 of the contract negotiated in 1991 between the Telecommunication Company of Iran and the French Company ALCATEL ESPACE for the launch and delivery of two spacecrafts, called Zohreh Satellite System. This contract, in which I acted as the legal adviser to the French Company, has not yet been finalized.

and natural disasters, and faced with many economic uncertainties, caused by currency fluctuations, inflation and other economic factors, the contractors may frequently find themselves in a situation which they could never foresee when entering into the contract. To find relief in such circumstances, they usually invoke the doctrine of impossibility of performance. In fact, this is what has happened in many of the cases which the Iranian Government faced as a result of the Islamic Revolution in 1979 (135). These cases, the majority of which are between the Governments of Iran and the United States in the "Iran -U.S. Claims Tribunal" in the Hague, to which we shall refer in more detail in Chapter IV below, are estimated to be more than 6000 with a total value of 65 billion U.S. Dollars (136). In this work an attempt has been made to provide a systematic account of this important topic, by analyzing various rules and principles of Islamic law contained in its main sources, and illustrating their application in such important contracts as sale, lease and hire, etc.

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135) See, for example, case No. 7304 in the Arbitration Court of the International Chamber of Commerce, between Ministry of Defence of the Islamic Republic of Iran (as claimant) and the German Company, Howaldtsweke-Deutsche Werft AG (as respondent), concerning an agreement for manufacture and delivery of six submarines. The present writer acted as a co-arbitrator in this case.

136) S.H. Amin, " Iran - U.S. Claims Settlement ", 32 (1983) International And Comparative Law Quarterly, PP. 750-756

Secondly : The fact that Shi'i law is not known to the world in its full details has been the main reason for emphasizing on it in this thesis. It is believed that Shi'i law (in which, unlike Sunni law, the gate of ijtihād (137) - personal legal reasoning - was never regarded as closed) has some of its own commendable features which can be used by legal reformers in the Muslim world.

Thirdly : Although a study of Sharī'a is useful, a study of the development of the contemporary laws of the Islamic states is equally important. Such studies will demonstrate how Islamic states adopted Islamic law while, at the same time, trying to conform it to the requirements of contemporary life. In this respect, references to the Civil Code of Iran (hereinafter referred to as the Civil Code), which is the main code in the Muslim world based on Shi'i law, and has at the same time imported certain provisions of the French Civil Code, are justified. For the same purpose, references

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137) The ijtihād means exerting oneself in an attempt to discover Islamic law from its sources. The free exercise of ijtihād which existed during the first centuries of Islam in Sunni law ceased to exist at a later stage, and the so called "door" of ijtihād was closed. This is usually believed to have happened at the end of the 3rd century of hijra (The Migration of Prophet Muhammad from Mecca to Medina and the beginning of the Islamic era) after the death of Ahmad ibn Hanbal, the leader of the Hanbali School of Jurisprudence in A.D. 855). The concept of ijtihad will be discussed in more detail in chapter VI.

have occasionally been made to the laws of other Muslim countries as well.

Plan of Thesis

Impossibility of performance can be classified in different ways. The method adopted in this work is to distinguish between the different kinds of impossibility according to their origin. Thus, in the following chapters II-IV, three main types of impossibility will be discussed in the following order:

1) Impossibility relating to the subject - matter of the contract;

2) Impossibility arising from the conditions of the promisor or promisee, and

3) Impossibility arising from external factors. This, in turn,is divided into three types: legal impossibility; failure of the ultimate purpose of the contract, usually referred to as frustration of adventure, and impracticability or economic frustration, resulting from a fundamental change in the very foundation of the contract, in a way that the contract, if eventually performed, would be in fact fundamentally different from the one originally contemplated by the parties.

After discussing the different kinds of impossibility in Chapters II-IV, I proceed to discuss the legal consequences of impossibility in Chapter V, and to provide a consolidated review and a critical analysis of the subject, together with a number of suggestions for reform, in Chapter VI.

A further point may be made on the division of impossibility into three categories. The categories are not mutually exclusive. Take the example of " temporary impossibility ". This may be due to the unavailability of the subject - matter, which has been discussed in Chapter II, or to the illness of the promisor, which has been discussed in Chapter III, or to the operation of the law, which has been discussed in Chapter IV. However, bearing in mind the fact that the position of the law is the same in all the three situations, and in order to avoid unnecessary repetitions, such subjects have been discussed in the most appropriate chapter.

The last point which must be mentioned here is that the subject of " impossibility of performance ", discussed in this thesis, is a wider concept than the English law doctrine of frustration. It includes all the cases in which the performance of contract is or becomes " impossible " or " impracticable " for one reason or another irrespective of whether or not it results in the discharge of one or both parties.

CHAPTER II

IMPOSSIBILITY RELATING TO THE SUBJECT-MATTER OF CONTRACT

The clearest and most frequent case of impossibility is where it relates to the subject-matter of contract, i.e.,to the property or act which a contractor has undertaken to deliver or perform (1). Such impossibility may be of various kinds. The method adopted in this chapter is first to distinguish between existing impossibility of this nature, which covers cases of non-existence of the subject-matter of contract at the time of its formation; and subsequent impossibility arising after the contract has been made, which covers cases of subsequent destruction of the subject-matter of contract. Other relevant types of impossibility will then be

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1) According to Article 214 of the Civil Code, the subject - matter of a contract is the property or act which either party agrees to deliver or execute.

discussed in the subsequent sections covering, in turn, cases of partial impossibility, unavailability, perishing of a "necessary" thing or person, impossible act, impossible method of performance, impossible condition and temporary impossibility.

1- Existing Impossibility of Performance: Non Existence of the Subject - Matter

It is a general rule of Islamic law that a promise to do what is initially impossible is void, as the Latin maxim has it: *impossibilium nulla obligatio est.* The reason probably is that no serious intention to create legal relations (qasd e inshā e ʿaqd) can be supposed where both parties know of the impossibility (2). Merely going through a form of words which the parties know can mean nothing, will not make a contract. In cases where the parties contract for a result both deem possible, the invalidity of the contract can be based either on the existence of an essential error, or on the basis of impossibility of performance. Both approaches shall have the same result, as in both cases the contract will be void under Islamic law as well as English law.

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2) See Articles 190 and 191 of the Civil Code. Section 306 of the German Civil Code also provides: "A contract the performance of which is impossible is void."

An alternative approach to contracts concerning an impossible obligation was adopted by Lord Denning in <u>Solle</u> V. <u>Butcher</u> (3), where he said:

> The cases where goods have perished at the time of sale ... are really contracts which are not void for mistake but are void <u>by reason of an implied condition precedent</u> because the contract proceeded on the basic assumption that it was possible of performance. (4) (emphasis added)

Such an alternative cannot be accepted in Islamic law in which, as we shall see in section 9 below, the effect of an impossible condition is not to make the contract void, but only voidable at the instance of the party who benefits from that condition. This theory cannot, therefore, justify the nullity of an impossible contract under Islamic law.

There is an important difference between the approaches adopted by Islamic law and common law towards the subject of impossible contracts. The difference lies in the fact that Islamic law sees a contract as a promise of a performance. When performance is impossible, the promise is a nullity. Common law, on the other hand, sees a contract as a guarantee of a result. Therefore, under common law, a promisor may still be held liable in damages when the contract concerns a promise of the impossible (for example, a promise to deliver a thing

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3) [1950] 1K.B. 671
4) <u>ibid.</u> at 691

which does not exist) if, as a matter of construction, the contract can be regarded as an " unconditional" guarantee rather than a guarantee "conditional" upon the possibility of performance. In such cases, the promisor can be held to have "warranted" the possibility of performance. It was this approach that enabled the Australian High Court in Mc Rae V. Commonwealth Disposal Commission (5), concerning a contract for the sale of a non-existent ship, to construe the contract as embodying a promise that the ship existed and, thereby, to hold the obligor liable.

The requirement for the absolute possibility of performance of an obligation in Islamic law necessitates the existence of the specific subject - matter of a contract (for instance the thing sold, as distinguished form the price) at the time of the formation of contract (6). So the sale of a foetus in the womb, or of fruits to appear on a tree at a later stage (unless they have already started to ripen), or of dates which are still unripe, to be delivered when they have

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5) [1951] 84 C.L.R. 377, cited in B.Nicholas, French Law of Contract (London: Butterworths, 1981) P.110

6) Zain al Din Ali (called Shahid al-Thani), Kitab al-Raudat al- Bihiyya fi Sharh al-Lumat al-Dimashqiya, op.cit., P.281; Kasani (Abu Bakr ibn Masud) Badāʿi al-sanāʿi fi Tartib al-Sharāʿi, op.cit., Vol.V, P.138; shirazi (Ibrahim ibn Ali) al-Muhadhdhab fil-fiqh (Cairo: Matbaat al-Babi al-Halabi, A.D. 1940) Vol. I, P.262

ripened, is void (7). In this respect, the following statement from the authoritative book of al-Muwatta by Mālik ibn Anas, the leader of the Māliki School, is noteworthy:

> Yahya related to me from Malik from Nafi' from ibn Umar that the Messenger of Allah, may Allah bless him and grant him peace, forbade selling fruit until it had started to ripen. He forbade the transaction to both buyer and seller. Yahya related to me from Malik from Humayd at-Tawil from Anas ibn Malik that the Messenger of Allah, may Allah bless him and grant him peace, forbade selling fruit until it had become mellow. He was asked, " Messenger of Allah, what do you mean by "become mellow" ? He replied: " when it becomes rosy." The Messenger of Allah ... added " Allah may prevent the fruit from maturing, so how can you take payment from your brother for it ?"
> Yahya related to me from Malik... that the Messenger of Allah... forbade selling fruit until it was clear of blight.
> Malik said: selling fruit before it has begun to ripen is an uncertain transaction (gharar).(8)

As can be seen, in the above statement the invalidity of a transaction concerning a non - existent subject -

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7) S.A. Mousavi Esfahani, Wasilat al-Najah (Najaf:Matbaat al-Heidariya, A.D. 1956) P. 196; Ibn Qudama al Maqdesi, al-Mughni (Cairo: Matbaat al-Salafiya, 2nd ed., A.H. 1382) vol.II, P.82. See also Article 205 of Majella (The Ottoman Civil Code) which provides: " The sale of a thing not in existence is void. Example: the sale of the fruit of a tree which has not yet appeared is void ".

8) Malik ibn Anas, al-Muwatta, op.cit., p.251

matter has been based on the fact that such a transaction has a degree of uncertainty in it and can, therefore, be classified as a gharar transaction which is void under Islamic law, as was explained in chapter I above. This has led some jurists, like Ibn Qayyim and his teacher Ibn Taimiya (d.A.D. 1328), the famous Hanbali jurists, to hold that when the subject - matter of a contract, for instance the thing sold, is non-existent at the time of the formation of contract, but is certain to come into existence in the future, and at any rate, not later than the date fixed for delivery, the contract shall be valid; because, they say, such a transaction cannot be regarded as uncertain. (9)

It must be borne in mind, however, that the majority of jurists do not base the invalidity of such contracts on the principle of gharar. Instead, they regard the requirement for the existence of the subject-matter at the time of contract as an independent element in the formation of the contract and a necessary condition *per se* (10). This is the right approach because, as Article 362(1) of the Civil Code provides, in a sale of specific goods the title passes when the contract is made, and

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9) Wahbah Zuhaili, al-Fiqh al-Islami wa Adillateh (Damascus: Daral-Fikr, A.D. 1984) Vol. IV, P. 429; Wahbah Zuhaili, al Fiqh al-Islami fi Uslubihil-Jadid (Damascus: Dar al-Fikr, n.d.) P. 202

10) See, for example, Shahid al-Thani, Sharh al-Lumah, op. cit., P.303; Hilli, N. Mukhtasar al-Nafi (Tehran: Bongahe Tarjome Wa Nashre Ketab, 1343 Sh.) P.153

this necessitates the existence of the subject - matter at that time, as provided in Article 361 of the Civil Code. (11)

English law in this respect is similar to Islamic law (subject, of course, to what was said earlier regarding unconditional guarantees) and adopts the rule that when, in a contract for the sale of specific goods, the article regarding which the parties are contracting is not in existence, the contract is void. This is established by Section 6 of the Sale of Goods Act, 1979 which says: " Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void" (12). Similarly, in Bell V. Lever Brothers Ltd. (13), Lord Atkin observed:

> The agreement of A and B to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is useless, the consent is nullified. (14)

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11) Under English law, according to Section 17(1) of the Sale of Goods Act 1979, in contracts for the sale of specific goods, the property in them is transferred to the buyer " at such time as the parties to the contract intend it to be transferred ". If no intention is apparent, the property in the goods passes to the buyer when the contract is made (Section 18, Rule 1).
12) The Same view is accepted in Article 1601 of the French Civil Code.
13) [1932] A.C. 161
14) Ibid. at 217

It is clear that the rule that necessitates existence of the subject - matter of contract at the time of its formation only applies to contracts concerning specific goods. In a contract concerning generic goods, the quality, quantity and description of the goods must be determined at the time of the making of contract (Article 351 of the Civil Code), but the contract will remain valid even if the seller had a particular stock of the goods in mind which at the time of the formation of contract had already perished. Such contract is valid because a whole species of goods cannot normally perish. As the Latin maxim puts it: genus numquam perit. In such a case, therefore, the seller will be required to give another stock. It is no concern of the buyer that the seller had relied on a particular stock which either did not exist at the time of the making of contract or destroyed subsequently. As per Pickford L.J. in Blackburn Bobbin Co. V. Allen & sons (15)

> Why should a purchaser of goods, not specified goods, be deemed to concern himself with the way in which the seller is going to fulfil his contract... ? (16)

Thus it can be concluded that a contract for the sale

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15) [1918] 2K.B. 467

16) ibid. at 469. In the same case, McCardie, J. who was the trial judge in the King's Bench Division observed: "... a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of Krell V. Henry...". [1918] 1K.B. 550. See Similar Provisions of Section 279 of the German Civil Code.

of pure generic goods will not come to an end because the seller's expected source of supply (for instance the factory he relies on) is or becomes unavailable.

It has been suggested by some writers on Islamic law that a contract concerning generic goods will automatically become a contract concerning specific goods as soon as the seller has chosen the article he intends to deliver. It follows that the property in the goods chosen but not delivered shall pass to the buyer and that their destruction shall bring the contract to an end, and discharge the parties from their obligations. This argument, however, cannot be accepted, because it means that the nature of a contract (agreed between the parties) is changed with the sole intention of one party, i.e., the seller, and without the other's assent. This cannot be reconciled with the basic principle of Islamic law underlying the law of contract that all aspects of contracts are governed by two free wills. In fact it is this principle which distinguishes contracts from unilateral legal acts (iqāʿāt) in Islamic law. An example of this latter category is the acquittance of a debtor by his creditor which shall be effective with the sole consent of the creditor.

Under English law, where there is a contract for the sale of unascertained goods, the property in the goods will pass to the buyer when one party unconditionally

appropriates goods to the contract with the assent of the other. The assent may, however, be express or implied. (17)

It must be emphasized here that a contract concerning generic goods may also be avoided in the very exceptional case of destruction of an entire class of things where the contract calls for one or a portion of the class. Russel J. in Badische co. Ltd. (18) said:

> Speaking for myself, I can see no reason why, given the necessary circumstances to exist, the doctrine should not apply equally to the case of unascertained goods. It is, of course, obvious from the nature of the contract that the necessary circumstances can only very rarely arise in the case of unascertained goods. That they may arise appears to me to be undoubted. (19)

It must be noted, however, that the mere fact that such goods are not easily available in the market (or available only at an increased price) is no excuse.

Sometimes it may be difficult to ascertain whether a given contract concerns generic or specific goods and, therefore, whether the existence of goods at the time of formation of contract is essential or not. Consider the case of Howell V. Coupland (20), concerning the sale of 200 tons of potatoes to be grown on a particular field.

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17) See Rule 5, Section 18 of the Sale of Goods Act, 1979
18) [1921] 2Ch 331
19) ibid. at 332. The same view was upheld in the case of Lewis Emmanuel & Son Ltd. V. Sammut [1959] 2 LLoyd's Rep. 629
20) [1876] 1 Q.B.D. 258

The traditional common law position upheld in this case (21) corresponds with the view maintained by Islamic law in that, according to both systems, such sale is believed to concern specific goods. However, the modern tendency in English law, following the enactment of the Sale of Goods Act, appears to be to confine the meaning of specific goods under the Act to cases of existing goods which have already been "identified and agreed on at the time a contract of sale is made" (Section 61 of The Sale of Goods Act, 1979). Thus in HR & S Sainsbury V. Street (22), it was held that a sale of 275 tons of barley to be grown on a particular farm was not a sale of specific goods. (23)

The same view is adopted by English law in the case of a sale of an unidentified part of a bulk. Thus in Re Wait (24), it was held that a sale of 10,000 tons of wheat on a particular ship was not a sale of specific goods. Islamic law regards this type of sale as a middle category between specific and pure generic goods and gives to it the name of kolli fil mo'ayyan (unascertained part of a specific bulk). The validity of such sale

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21) See the statement by Mellish L.J. at P. 262
22) [1972] 1WLR 834
23) It seems that there must be a difference between a contract for a particular crop which can only be satisfied in one way, and a contract for 275 tons of barley, which can be satisfied is various ways. This makes Sainsbury V. Steert very difficult to understand.
24) [1927] 1 Ch 606

depends on the existence of the specified amount in the bulk. In the above - mentioned case, for example, the sale will only be valid under Islamic law if at least 10,000 tons of wheat exist in the ship. The passing of property will then take place not at the time of the conclusion of contract, but when the said amount is chosen by the seller and " delivered " to the buyer. English law also has no difficulty with the validity of contracts for the sale of unascertained goods, but the view adopted by Section 16 of the Sale of Goods Act, 1979 prevents the passing of property in such contracts until the goods are " ascertained ". (25)

If, in the above - mentioned sale, it transpires that only 10,000 tons of wheat existed in the ship at the time of sale, the title of the existing amount will, under Islamic law, be transferred to the buyer immediately upon the formation of contract as, in such a case, no room is left for the seller's exercise of choice.

If, on the other hand, the wheat existing in the ship is discovered to be less than 10,000 tons, the buyer will have an option either to accept the existing wheat at a proportionate rate of the price, or to cancel the contract altogether, exercising his option of discrepancy

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25) See also Section 18, Rule 5 mentioned earlier

(<u>khiyār</u> <u>al-tabaud</u> <u>al-safqah</u>), which enables a buyer to cancel a contract of sale when the contract is void in part, for example, as a result of non-existence of part of the subject - matter. Article 441 of the Civil Code describes this option in the following way:

> The option of discrepancy arises when the contract, in respect of a part of the thing sold, is void for any reason. In such a case the purchaser will have the right to cancel the contract or else to accept that part of the thing in respect of which the contract was valid while returning the price of that part in respect of which the contract was void.

The principle mentioned in this (and some other) articles of the Civil Code (26) is only applicable where the contract is divisible into two separate contracts. Otherwise (if, for example, part of the dress to be sold is burnt), the contract will be avoided altogether.

2- Supervening Impossibility: Subsequent Destruction of the Subject - Matter

We now turn to cases where an obligation possible at the time of contracting becomes impossible by a change in the circumstances before the date of performance. In such cases, unlike cases of existing impossibility, a contract

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26) See, for example, Article 372 which provides : " If the seller is only able to deliver part of the goods sold, the sale shall be valid in respect of that part and void in respect of the remainder. "

has of course come into existence, but the obligor is freed from his obligation to perform. In this respect special consideration must be given to cases involving destruction of the subject - matter of contract, which has attracted most of the attention of Muslim jurists, as well as many lawyers writing on English law.

In fact, as far as English law is concerned, it was in a case dealing with the destruction of the subject-matter of contract (i.e., the burning down of a music hall, which was the subject - matter of a contract of lease between the parties) that the first attempt was made to state a general principle of frustration. (27)

Under Islamic law, the effect of destruction of the subject - matter of contract depends on the time at which such destruction takes place. It seems advisable to distinguish between three such stages. This classification is particularly relevant when dealing with sale or similar contracts:

1) Destruction of the subject - matter after the formation of contract but before delivery;
2) Destruction of the subject - matter after delivery;
3) Destruction of the subject - matter after part performance.

It is to a study of these problems that we now turn:

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27) Taylor V. Caldwell [1863] 3 B. & S. 826

2-1- Destruction of the Subject - Matter After the Formation of Contract but Before Delivery

Under both Islamic law and English law, an agreement to sell specific goods is avoided if the goods perish before the risk passes to the buyer. The two systems, however, differ as to the time on which the risk passes to the buyer. Islamic law, in an approach similar to the German and old common law (28) and also to the position held by the International Sale Convention (The Hague, 1964)(29) holds that the risk does not pass with property. As a result, the risk of destruction of goods sold but not delivered remains with the seller and would, therefore, frustrate the contract unless the seller has called upon the buyer or the relevant authorities to take possession of the goods. (Article 387 of the Civil Code)(30). Thus, Mālik ibn Anas, the leader of the Māliki School, gives the example of someone buying oil from a container and concludes that if the container

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28) See, for example , Hansen V. Craig & Rose [1859] 21D. 432. See also Section 446 of the German Civil Code
29) Article 97
30) Similar provisions are made in the Civil Codes of other Muslim countries. For example Article 437 of the Egyptian Civil Code (which corresponds with Article 405 of the Syrian Civil Code) provides "If the thing sold perishes before delivery, as a result of a cause beyond the control of the vendor, the sale shall be dissolved and the price refunded to the purchaser, unless he was summoned to take delivery before the loss". See also Article 179(2) of the Iraqi Civil Code.

breaks and the oil is wasted before it is delivered to the buyer, the buyer has his money back "and there is no transaction between them". (31)

This approach is opposite to the approach adopted by the modern English law, according to which a contract for the sale of specific goods passes both the property and the risk at once. Section 20 (1) of the Sale of Goods Act, 1979 provides in this respect:

> Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. (32)

The same approach has been adopted in French law which holds that the property and risk is transferred to the buyer at once even if the delivery has not taken place, unless a demand has been made upon the seller to deliver the thing sold, in which case the thing remains at the risk of the seller. (33)

The scope of this rule in Islamic law is comparatively narrow. It is not every damage to the article sold which shall cause automatic cancellation of the contract. In

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31) Mālik ibn Anas, al-Muwatta , op. cit., P. 254

32) It must be noted that Section 20 also makes risk pass when unascertained goods become appropriated to the contract, since property then passes under Section 18, Rule 5.

33) See Articles 1138 and 1853 of the French Civil Code. This is contrasted with German law, which provides that the risk of accidental destruction of the thing sold passes to the purchaser " upon delivery ". (See: Section 446 of the German Civil Code).

Islamic law, unlike German law (34), the rule only applies when the destruction is total and is caused by the so-called Act of God. If the thing sold is not totally destroyed but it merely becomes defective before delivery, and the defect is not caused by either party's fault, the purchaser shall, according to Article 388 of the Civil Code, have a right of termination. If the act of an individual causes the destruction of property, the law holds that person liable for bearing the loss or damage. Thus, if it is seller who causes the destruction, he shall still be entitled to receive the agreed price (which has become due to him by the formation of contract of sale), but shall be required to give either a substitute, or the fair price of the thing sold (calculated at the time of destruction) to the buyer. The obligation to give a substitute will arise in case of similars (_mithlee_ goods) ,i.e., goods which can be replaced by an equal quantity of something similar to them. In case of dissimilars (_qimee_ goods) ,i.e., goods which , because of their comparative uniqueness, cannot be replaced by something similar, the obligor will be bound to pay for their value.

If, on the other hand, it is the buyer who has caused the destruction, he shall be responsible for payment of the agreed price to the seller, as the title has already

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34) See: Section 446 of the German Civil Code

passed to him (Article 389 of the Civil Code). Similarly, if a third party destroys the thing sold, he shall be liable to the buyer, and the buyer will still be liable to the seller for payment of the price (thaman).

2-1-1- The Reasons for the Application of The Rule

The rule that destruction of the subject - matter of sale before delivery is at the risk of the seller, is based upon a statement of the Prophet which has expressly provided for it: Kollo mabi'en talefa qabla qabdeh fahowa min mali baye'eh. (35)

Muslim jurists have tried to find an answer as to why the property having been passed, the goods remain at the risk of the seller, in the sense that their subsequent destruction will bring the contract to an end. They argue that the nature of a non - gratuitous contract requires that a party who does not receive his part of the bargain should not be asked to perform his obligation vis-a-vis the other contractor. Therefore, they say, in the case of destruction of the subject - matter of sale before delivery, justice requires that the goods must be presumed to have returned to the ownership of the seller shortly before destruction. So it is his property which

35) M.H. Najafi, Jawahir al-Kalam (Tehran: Dar al-Kutub al-Islamiyya, 6th ed., A.H. 1399), Vol. XXIII, P. 158

is destroyed and he must, therefore, bear the risk of total destruction.

The fact that goods are presumed to have returned to the ownership of the seller only shortly before destruction means that all the benefits arising from them between the time of the conclusion of contract and the time of destruction must go to the buyer, who is the true owner of the goods within that period. So, for example, the offspring of an animal sold shall belong to the buyer if born within the said period. This may seem unjust to the seller, but is a logical result of the above - mentioned rule.

2-1-2- Application of the Rule in Contracts Other Than Sale

Muslim jurists differ as to whether the rule which necessitates the coming to an end of the contract in case of total destruction of undelivered goods is limited to the contract of sale or whether it also applies to other types of contract. The basis of the difference lies in the nature of the evidence that, according to each group, supports the rule. Those who base the rule on the requirements of "common sense" (bināe 'uqalā) obviously maintain that it is applicable to all non - gratuitous

contracts (36), as the nature of these contracts requires that a contractor should "obtain" something in return for what he "gives"; otherwise, they say, the contract will have no " cause". On the other hand, those who belive that the rule has only been accepted in Islamic law on the strength of the Prophet's statement, limit its application exclusively to the contract of sale, as the above - mentioned statement only refers to " the thing sold." (37)

It seems that even by basing the rule on the statement of the Prophet, one need not come to the conclusion that the rule is only applicable to the contract of sale. It is quite possible that the contract of sale (ba'i) has been referred to as the most important contract in the eyes of Shari'a, a contract which forms the core of the Islamic law of obligations, as discussed in chapter I above. So there seems to be no objection in applying the rule to other types of non - gratuitous contracts. Thus the Civil Code has accepted the rule in contracts like

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36) H.M. Bojnurdi, al-Qawaid al-Fiqhiya, op. cit., Vol.II P.65

37) Bojnurdi, op.cit. P. 73; R.M. Khomeini, Kitāb al-Ba'i (Qum: Esmailiyan Puplications, n.d.) Vol. V, P.390

lease (Article 496) and loan (Article 649) too. (38)

In leases, for example, destruction of the subject - matter of lease before delivery will have the effect of putting an end to the contract and relieving the parties of their contractual obligations, in spite of the fact that the tenant becomes the owner of the benefit to be derived from the leasehold property as soon as the contract of lease is made.

It must be emphasized at this stage that the above - mentioned rule will only apply to contracts in which delivery is not a pre - requisite for _validity_ of the contract. In the latter cases (for example in case of sale of coins for coins - _ba'i sarf_) transfer of the title will take place when delivery is made (Article 364 of the Civil Code). Any destruction of the subject - matter of contract before delivery will, therefore, make the contract void _ab initio_, and not merely frustrated

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38) As far as Article 649, regarding the contract of loan (_qard_), is concerned, this rule can be inferred by applying an _argumentum contrario_. The said Article provides: " If the property which forms the subject-matter of a loan is destroyed or becomes defective _after delivery_, the loss falls upon the borrower". (emphasis added)

from the date of destruction. (39)

The practical difference between the two situations is that in the former case, i.e., when the contract is regarded to be void *ab initio*, no legal effect, whatsoever, will arise from it, and the parties will be put in their pre - contract situations. In the latter case, on the other hand, the contract must be regarded as a valid contract with all its legal effects up to the

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39) In the traditional Sunni law, the contract of loan (*qarḍ*) is also dependent for its legal effect on the delivery of the monies to the borrower. This resulted in the LLoyds Bank International losing a case in Ras al-Khaima civil Court (Ras al-Khaima is the last state to add, in 1972, its territory to the Federation of the United Arab Emirates). The facts of the case were as follows:
A European businessman entered into a contract for a loan of DM 20,000,000.00 to be given to the Ras al-Khaima Asphalt Company. The monies were to be delivered within a few days and were to be repaid by some bills of exchange which were drawn on and accepted by the company and guaranteed by the Bank of Oman. The loan monies never arrived, but the bills, having been discounted in the European finance market, were partly bought by LLoyds Bank International who, as holders in due course, would seek restitution from the Asphalt Company. The Civil Court held, in accordance with classical *Shariʿa* law, which, by virtue of Courts Law of 1971, is a recognised source of law in Ras al-Khaima, that a loan has no legal effect until the monies have been delivered to the borrower, and since a guarantee must relate to a binding debt there was no legal basis for the guarantee given by the Bank of Oman. See: *The Ras al-Khaima Asphalt Company and Bank of Oman* V. *LLoyds Bank International*, Suit No 397/78 September 1978; Cited in N.J. Coulson, *Commercial Law in the Gulf States* (London: Graham & Trotman, 1984) PP. 1-3 and S.E. Rayner, *The Theory of contracts in Islamic Law* (London: Graham & Trotman, 1991) PP. 166-167

time of destruction. Accordingly, all the separable produce or income, for example the offspring born to an undelivered animal within the period between the making of contract and the death of the animal, must go to the purchaser in this latter case, although he will not be required to pay anything in return for it.

2-2- Destruction After Delivery

Islamic law and English law concur in holding that in contracts like sale , in which delivery signifies performance of the contract, the destruction, by any cause, of the subject - matter after delivery will not avoid the contract, because a fully executed contract cannot be avoided. However, in contracts like lease (ijārah) and dormant partnership (muḍārabah : whereby one party provides the capital for another to trade with for an agreed percentage of the profit)(40), one is dealing with a continuous performance. In such cases, delivery is only a pre - requisite for performance and, therefore, destruction of the subject - matter even after delivery may have the effect of bringing the contract to an end. Thus Article 496 of the Civil Code provides that a contract of lease will be avoided from the date of

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40) See Article 546 of the Civil Code

destruction of the subject - matter of contract. Similarly, according to Article 551, a contract concerning dormant partnership will be avoided in case of total destruction of the capital.

It is interesting to note that for many years there was uncertainty in English law as to whether the doctrine of frustration could ever apply to leases. The reason for this was that under English law - unlike Islamic law and the Civil law - a contract of lease does not merely transfer the usufruct of the property to the lessee, but it is regarded as a conveyance and vests in the lessee an estate in the land itself. This estate in the land was thought never to be frustrated. However, in National Carriers Ltd. V. Panalpina (Northern) Ltd. (41), the majority of the House of Lords held that the doctrine of frustration can, in principle, apply to leases too, although its application may be less frequent than to other types of contract.

It must be emphasized at this stage that if the lease concerns unascertained goods, the destruction of the thing given by the lessor may, under Islamic law, impose upon him an obligation of substituted performance (42). Thus if A agrees to rent his car to B

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41) [1981] A.C. 675

42) M.H. Najafi, Jawahir al-Kalam cited in M.J. Mughniah, Fiqh al-Imam Jafar al-Sadiq (Beirut: Dar al-Ilm, A.D. 1965) P. 268. See also Article 482 of the Civil Code

and the car is destroyed in the hands of the latter, the contract will come to an end and the parties will be discharged from their future obligations under the contract (43). On the other hand, if he agrees to rent a car and the car given is destroyed while in the possession of the lessee, the lessor may be required to offer substitute (44). The reason for this is that in this case it is not the subject - matter of contract which has perished, but merely one of the alternatives chosen by the obligor in performing his contractual obligation. And, for reasons discussed earlier in this chapter, a contract concerning unascertained goods cannot be said to have automatically changed into a contract concerning specific goods because of the obligor's exercise of choice.

It was mentioned at the beginning of this section that in contracts like sale the promise of the seller is deemed to have been fully executed when delivery is made. The result is that subsequent destruction of the thing sold shall have no effect on the contract. In very exceptional situations, however, the risk of subsequent destruction of the subject - matter of sale remains on

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43) See: Article 483 of the Civil Code (of Iran) and Article 1722 of the French Civil Code

44) See: S.M.T. Hakim, Mustamsak al-Urwat al-Wothqa (Beirut: Ihyaul-Tarath al-Arabi, 3rd ed. A.H. 1392) P.53, which gives the example of an animal. See also S.H.Emami, Huquq e Madani (Tehran: Islamiya,1355 sh.) Vol. II, P. 55

the seller and, therefore, its destruction shall bring the contract to an end. This, according to Article 453 of the Civil Code, takes place in cases where the thing sold is destroyed after delivery but during a period within which the buyer has a " conclusive " right of termination (45). Such a right may have either been provided for the buyer in the contract (called an option of termination: khiyār al-shart)(46), or may arise from a right known as the option of meeting place (khiyār al-majlis), as a result of which the parties to a contract of sale have the right to cancel the contract while still in the meeting place (47); provided that the contract has an express provision to the effect that the seller's option of meeting place has been waived. (This condition is necessary because the rule only applies to cases where there exists a " conclusive " right of rejection for the

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45) See: Hilli, Sharā'i al Islam, (Najaf: Matbaat al-Adab, A.D. 1969) Vol.,II P. 24

46) This option is mentioned in Article 399 of the Civil Code.

47) Article 397 of the Civil Code (of Iran) and Article 136 of the U.A.E Civil Code. See also Article 183 of the Majella. The option of meeting place is recognised by the Hanbali ad Shāfi'i Schools of Sunni law, but rejected by the Hanafi and Mālikis who regard it as contrary to Verse I/V of the Quran which orders Muslims to fulfil their obligations. Those who recognise the validity of the Option believe that it exists during the period of the meeting for bargaining (majlis). Certain interruptions during the majlis are believed to terminate it, such as, stopping to pray, changing the subject, or falling asleep. See: Kāsāni, Badā'i al-Sanā'i, op.cit., Vol. V, P. 136; Ibn Qudama, al-Mughni (Cairo: Matbaat al-Salafiya, A.H. 1382), Vol. III, P. 565. See also S.E. Rayner, The Theory of Contracts in Islamic Law, op. cit., PP. 109 et. Seq. & 307 et. Seq.

buyer). Alternatively, a right of termination may arise from a right known as the option of animals (khiyār al-heiwān), whereby the purchaser of an animal has the right to cancel the contract of sale within three days (48), unless he does any act in relation to the animal which is inconsistent with the ownership of the seller, for example, if he shoes the horse. In such cases his option is extinguished.

An interesting case in English law in which the court seems to have adopted a similar approach and confirmed that the risk shall always remain on the seller where the buyer has a right of rejection is the old case of Head V. Tattersall (49). Although this case relates to the right of a buyer to rescind a contract of sale for "misrepresentation", it can afford a good comparison with Islamic law. In this case the plaintiff bought a horse from the defendant which the defendant warranted to have been hunted with Bicester hounds. The plaintiff was given the right to return the horse by a certain day if it did not answer the description. The horse was accidentally injured before the end of the specified period and the plaintiff claimed to return it because it was discovered

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48) There is a saying by Imam Jafar al-Sadiq (the sixth Shi'i Imam and the leader of the Ja'fari Sect) to the effect that an animal sold will remain at the seller's risk within the three days in which the purchaser has a right of rejection.

49) (1870) LR 7 EX 7

that it had not been hunted with the Bicester hounds. The court held that the loss fell on the seller, and the buyer of the horse was, therefore, allowed to return it. According to P.S. Atiyah, there is no reason to suggest that this decision has not survived the Sale of Goods Act and it is, therefore, very likely that it will be decided on similar terms today. (50)

2-3- Destruction After Part Performance

It may be the case that before impossibility arises, the contract has partly been performed. An obvious example is where the object of the lease is destroyed after the lessee has had some use and enjoyment of it. In such a situation, according to some Muslim jurists, the contract will be regarded as void _ab initio_, but, to meet the requirements of justice and avoid undue loss, a quasi-contractual obligation is imposed on the party receiving such performance to pay a fair rent or quantum meruit. The specified rent will, in such a case, not be payable or, if already paid, will be returned to the lessor. This is because an obligation to pay rent cannot arise out of a void contract. (51)

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50) P.S. Atiyah, The _Sale of Goods_ (London: Pitman Publishing, 8th ed. 1990) P. 324

51) S.M.K. Tabatabaei, _Urwat al-Wuthqa_ (Qum: Maktabat al-Wojdani, A.H. 1400) P. 569

However, the view expressed by the majority of Muslim jurists, which has also been accepted in the Civil Code, (Article 483) is that such a contract is avoided from the time of destruction and the rent should be reduced proportionately. In this respect, Mālik ibn Anas refers to a contract for hiring out a specified riding-camel or letting a house and taking money in advance. He says that if an accident happens resulting in the death of the animal or the destruction of the house, then, the owner of the camel or the house returns what remains of the rent to the one who advanced him the money and reckons what will settle that up in full. For instance, he says, if the owner has provided half of what he was paid for, he returns the remaining half of the advance payment. (52)

Another situation which may be relevant here is where a person has bound himself by contract to create a specified object or result (for example, erection of a building on a land, or instalment of machinery in a factory or making of a statue) and to deliver it to the other party upon completion. He shall not be discharged by the fact that, during the course of performance, the partly completed work is destroyed. He must start again and perform to completion, as performance has not been made impossible, but merely more burdensome. The

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52) Mālik ibn Anas, al-Muwatta, op. cit., P. 255

situation may differ if the contract is such that the title of each completed section can be said to have passed to the promisee upon completion. If, for example, the land on which the building is to be erected belongs to the promisee, it appears that, under Islamic law, the building, or part thereof, shall automatically become the property of the owner of the land as and when built. In such case, therefore, the risk of destruction of any part of the building will be upon the owner, and the builder will therefore have to be paid for the value of his work and materials.

The view held by Islamic law in this respect seems to be diametrically opposite to the English law approach, according to which, the contractor can have no claim against the owner even on the assumption that the building built on the land or the machinery installed in the factory had become the property of the owner at an earlier stage. The builder will thus remain bound to complete the building or the installation without extra charge. (53)

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53) See: Appleby V. Myers [1867] L.R. 2 c.p. 651 regarding the destructions by fire of the premises and the partly built machinery and materials thereon. See also: R. Gottschalk, Impossibility of Performance in Contracts (London: Stevens & Sons, 1938) PP. 9-10; W.M. Gloag, The Law of Contract (Edinburgh: W. Green & Son Ltd., 1929), P. 351 dealing with the subject in Scots law, and G.H. Treitel, The Law of Contract (London: Stevens & Sons, 1991), P. 769.

3- Partial Impossibility

The destruction of goods forming part of the subject-matter of contract need not be total. If, for example, the goods sold suffer partial loss without fault of either party and before the risk of loss passes to the buyer, the seller remains bound to perform that portion of his promised performance which remains possible, but the buyer will have an option either to avoid the contract (known as the option of discrepancy), whereupon both parties will be relieved of their contractual obligations, or to accept the goods at a rateable portion of the price (54). This latter option will only be available to him if it is possible to presume that a special portion of the price was allocated to the part which was lost or destroyed. So if, for example, half of the wheat sold is destroyed before delivery, one can easily presume that half of the price was allocated to the lost wheat. The buyer will, therefore, have an option either to accept the remaining wheat at half the agreed price or to have the contract avoided altogether, by exercising his option of discrepancy, as explained in detail earlier in this chapter. Similarly, if A contracts to sell 100 chairs to B for 10,000 Pounds and the

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54) Article 388 of the Civil Code

performance of contract becomes impossible after the delivery of 50 chairs (because, for example,the other 50 are destroyed), the performed part of the contract can be severed and treated as a separate contract, in which case, the money payable to A ought to be determined by prorating the contract price, unless the buyer chooses to avoid the contract altogether. The following statement from Mālik ibn Anas regarding " partial destruction " is worthy of note:

> The way of doing things among us about selling melons, cucumbers, water-melons and carrots is that it is halāl [lawful] to sell them when it is clear that they have begun to ripen.... If, blight strikes and a third or more of the crop is damaged, an allowance for that is deducted from the price of purchase. (55)

On the other hand, if, for example, the colour of a car sold but not delivered is, for some reason, changed without fault of either party, the purchaser will have no right to ask for a reduction of the price, because the colour cannot be said to have formed an identifiable part of the price. Accordingly, the buyer can either accept the contract as it is, or have it cancelled altogether, provided the original colour constituted an express or implied term of the contract. (56)

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55) Mālik ibn Anas, al-Muwatta, op.cit., p. 251. The reason for referring to a damage of a third or more is that anything less is not counted as crop damage according to Mālik. See: ibid., P. 252

56) Wahbah Zuhaili, al-Fiqh al-Islami wa Adillateh, op.cit., P.409

The same principle applies to leases. If the property leased is destroyed in part, the lessee has, according to Article 483 of the Civil Code, the option either of claiming an abatement of his rent, corresponding to the loss sustained, or of cancelling the lease as from the date of destruction. (57)

It is to be noted that if the deterioration is of a kind to make the contract no longer suitable for its normal purpose, for example where the ceiling of a leasehold property is destroyed, and the defect cannot be removed, the contract will be avoided as from the date of deterioration, without any option for the lessee (58). If the lessor is prepared to make the loss good without causing any damage to the lessee, the latter will lose his right of avoiding the contract (59). Some Muslim jurists disagree and maintain that the right of avoidance, having been established by the very destruction or deterioration of the subject -matter, cannot be said to be extinguished by the subsequent repair of the subject -matter of lease. In other words, by applying the principle of istishāb (legal presumption of continuity of the status quo in doubtful cases) they

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57) A similar provision can be found in Article 1722 of the French Civil Code
58) Article 481 of the Civil Code
59) Article 478 of the Civil Code

conclude that the existence of the lessee's right of avoidance must be presumed even after the lessor's repair of the subject - matter of lease.

The common law has difficulty in knowing how to deal with partial impossibility. This is due to the fact that when the common law doctrine of frustration operates, it discharges the whole contract. In other words, the common law thinks of impossibility of performance (or frustration) of *a contract* and not merely of *an obligation*. However, the courts have used other means to deal with the problem. An example is the English case of H.R. & S. Sainsbury Ltd. V. Street (60), concerning the sale of 275 tons of barley from a crop growing on a land. When, without the seller's fault, only 140 tons were produced, the court rejected the seller's claim that he was excused from delivering any at all, by *implying* a term in the contract, under which he was obliged to deliver the smaller amount if the buyer so requested; in which case the buyer is required by Section 30(1) of the Sale of Goods Act, 1979 to pay for it at the contract price. (61)

In Australia, there are exceptions to the rule that frustration operates to discharge the whole contract; the most notable of such exceptions is where a part of the

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60) [1972] 1 WLR 834; [1972] 3 ALL ER 1127
61) See also Howell V. Coupland [1876] 1 Q.B.D. 256

contract is so distinct from the remainder as to be, for all practical purposes, a separate contract (62). Similar provisions are to be found in Ss 465 of the Restatement of Contracts in America:

> Where impossibility of performing part of the performance promised by a party to a bargain is of such character that if it related to the entire performance it would prevent the imposition of a duty or would discharge a duty that had arisen, and the remainder of the performance is not made materially more difficult or disadvantageous than it would have been if there had been no impossibility, *the existence of duty is affected only as to that part*...(italics added).(63)

According to Section 139 of the German Civil Code, if part of a transaction is void - because of impossibility or otherwise - the whole transaction shall be void, " unless it may be assumed that it would have been entered into even if the said part had been omitted."

In French law, the *Jurisprudence* allows the court to reduce or vary the obligation in cases where performance becomes partially impossible. In one case, for example, advertising space had been taken on an illuminated pillar under a long term contract. During the Second

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62) See: K.E. Lindgren et. al., Contract Law in Australia (Sidney: Butterworths, 1986), P. 671

63) It has been suggested that there is no reason to suppose that this section does not represent English law. See: R.G. McElroy Impossibility of Performance (Cambridge University Press, 1941), P. 59

World War the pillar had to be blacked out at night. The *Cour d'appel* of Paris held that performance had become partially impossible and ordered a 20 per cent reduction in the amount paid by the plaintiff. (64)

4- Constructive Destruction (Unavailability)

Contractual obligations may also be discharged due to impossibility of performance where the subject - matter, though not destroyed, ceases to be available or useful for the purpose of performing the contract. So if the goods sold are stolen or requisitioned, the contract will come to an end. Similarly, serious deterioration or alteration of nature of the thing may amount to destruction. Thus a contract for agricultural partnership (muzāra'ah: from the root meaning " to sow seed ", a contract whereby one party provides the land for another to cultivate for a fixed share of the produce) will come to an end if the land becomes unworthy of cultivation. (65)

This is similar to the case of Asfar & Co V. Blundell (66), in which a cargo of dates was sunk and so

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64) Paris 13.11.1943, Gaz Pal 1943.2.260, Cited in Barry Nicholas, French Law of Contract, op.cit., P. 201

65) Article 527 of the Civil Code. See also Articles 481 and 545 respectively relating to the contracts of lease (ijāra) and musāqāt (lit.: " tending by watering ": a contract between the owner of trees and a worker for the consideration of a share in the profit).

66) [1896] 1QB, 123

affected by water and sewage. The court held that, as far as business purposes were concerned, the subject -matter of the contract had become something else by losing its merchantable character, though it was still in existence and saleable.

5- Perishing of a " necessary " thing or person

There may be cases where a specific thing itself is not to be sold, or transferred in any other way, but the contract requires for its performance the continued existence or coming into existence of that specific thing. In such cases non-existence, destruction or unavailability of that " thing " will bring the contract to an end. Thus a contract to install machinery in a particular factory or to carry out work in a specific building is discharged by the destruction of that factory or building, even though the latter do not constitute the subject-matter of contract. Similarly, a contract for agricultural partnership (muzāraʿah or musāqāt) will come to an end if the underground water-channel which is used for irrigating the land loses its capacity for irrigation.

Sometimes it may be the given " person " who perishes. Consideration of the cases where such person is either

of the two contracting parties will be reserved for Chapter III, while this section is devoted to situations where the given person is someone else, whose existence is essential for the performance of contract. Thus a contract between X and Y to paint a portrait of Z could be frustrated if Z died before the completion of work. Similarly, when a father contracts with a teacher to teach his son, but the son dies subsequently, the contract will come to an end, and the parties will be discharged from their contractual obligations (67). If the teacher has already performed part of the work, he will be entitled to an appropriate portion of the agreed fee, unless it was agreed that complete performance would be a condition precedent to recovery on the contract. (68)

Another example of the death of a necessary person is offered by Article 746 (6) of the Civil Code, whereby it is provided that the death of the principal debtor

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67) See the American case of Stewart V. Loring, 5 Allen (Mass) 306, cited in S. Williston, A Treatise on the Law of Contract (New York: The Lawyers Co-operative Publishing Co. 3rd ed., 1978), Vol. 18, P. 59

68) This is the basis of the common law concept of " entire contracts ", known also as the rule in Cutter V. Powell [1775-1802] All E.R. 159. In this case, a sailor's administratix was denied a remedy for the value of the work the sailor had done before dying on the voyage from Jamaica to Liverpool, because the contract was construed to be entire. Glanville Williams has denounced this rule as arbitrary. See his " Partial Performance of Entire Contracts " in 27 (1941) Law Quarterly Review, 373 at PP. 392 - 393.

(makfūl) in a contract of suretyship will bring the contract to an end and discharge the surety (kafil) from his obligation to produce the principal when summoned by the beneficiary (makfūlun lah) (69). Similarly, when a car is rented or a worker is hired for the sole purpose of carrying a cargo or a particular person, the contract of hire so concluded will be discharged if the cargo is subsequently destroyed or the person dies(70). In English law also where a man contracted with his daughter's intended husband to bequeath unto her an equal share with his other children, his obligation was held to have been discharged when the daughter died during the lifetime of the father. (71)

6- Impossible delivery

In contracts like sale and lease, the ultimate purpose of the buyer or lessee is to get delivery of the subject-matter of contract. Delivery, according to

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69) See also: Hilli, Sharā'i al-Islam, op.cit., Vol. II, P. 117 and Shahid al-Awwal, Lumah (Persian translation)(Tehran University Press, 1368 sh.) P. 268. In America also it was early decided that the liability of a surety on a bail bond was discharged by the death of the principal debtor. For cases on this subject, see: S. Williston, A Treatise on the Law of Contract, op.cit., Vol. 18, P. 72

70) See: S.H. Emami, Huquq e Madani, op.cit., Vol. II, PP. 18 & 52

71) Jones V. How, 9 C.B. 19, cited in C.G. Addison, A Treatise on the Law of Contracts (London: Stevens & Son Ltd., 1911) P. 149

Article 367 of the Civil Code, consists in the object of contract being placed at the disposal of the buyer, so that he has absolute control over it and can benefit from it in any possible way. Article 369 further provides that what can be regarded as " delivery " differs according to the varying nature of the things sold. Thus when dealing with movables, delivery can normally be made by giving the goods into the hands of the other party. On the other hand, an immovable property is delivered when it is evacuated and the key is given to the purchaser or lessee, as the case may be. (72)

Articles 348 and 470 of the Civil Code provide that possibility of delivery is one of the conditions for the validity of the contracts of sale and lease respectively. This view corresponds with the view held by all schools of Islamic jurisprudence (73) with the exception of the Zāheris who, as was explained in chapter I, are famous for their narrow interpretation of the Islamic law sources, most notably the Quranic verses and the Prophet's statements (sunna). They maintain that as possibility of delivery has not been expressly mentioned in the Quran or the Sunna of the Prophet as a pre-

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72) See: Shahid al-Awwal, Lumah (Arabic text), Op.cit., Vol. I, P. 234

73) See, for example, Shahid al-Thani, Sharh al - Lumah, op.cit., P. 282; Ibn Qudama, al-Mughni (Cairo : Matbaat al-Minar, A.H. 1348), Vol. IV, P. 200; Ibn Abidin, Radd al-Mukhtar alal - Durr al-Mukhtar (Cairo: Matbaa Bulaq, 3rd ed. A.H. 1286), Vol. IV, P.7

requisite for the validity of contracts, it cannot be regarded as such by Muslim jurists (74). They further argue that the only obligation imposed on the seller in a contract of sale is that he should not prevent the buyer from taking possession of the thing sold (Yahūlu bainal Mushtari wa baina qabḍa mā bā'a minh). (75)

In spite of the fact that, in both Sunni and shi'i laws, the possibility of delivery is regarded as a necessary condition for the validity of contract, there, however, exists a difference between the two systems in this respect. Under Sunni law, the possibility of delivery is an independent and necessary condition *per se*. As a result, it is essential that delivery should be possible at the time of the making of contract (76). Otherwise, the contract shall be regarded as void, even if delivery becomes possible before it is due. (77)

In Shi'i law, on the other hand, possibility of delivery is not an end in itself, but merely a means for achieving an end, i.e., for ensuring that the promisee can, by taking possession of the goods, obtain the benefit he was expecting from the contract. Thus in Shi'i law, unlike Sunni law, delivery need not be possible at

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74) Ibn Hazm, al-Muhalla (Damascus: Idarat al-Tibaat al-Muniriya, A.H. 1350), Vol. VIII, P. 388
75) Ibid., P. 379
76) Some Sunni jurists consider contracts of Salam (the ordering of goods to be delivered later for a price to be paid immediately) legal by way of exception to this rule.
77) Kāsāni, Badā'i al-sanā'i, op.cit., Vol. V, P. 147

the time the contract is made; it will be sufficient if it becomes possible when it is due (Article 370 of the Civil Code)(78). As to the time at which delivery becomes due, Article 344 of the Civil Code provides that delivery must be made immediately, unless express or implied conditions of the contract or local and commercial usage require otherwise.

The rule that delivery (taslim) must be possible at the time it becomes due means that if delivery is possible at the time of the formation of contract, but becomes impossible at the time it is due, the contract will be avoided, and the parties discharged from their contractual obligations. The avoidance of contract in such cases will be automatic if the " impossibility of delivery " is due to the destruction of the specific goods which form the subject-matter of contract, as was seen earlier in this chapter. In all other cases, a subsequent impossiblity of delivery will give to the other contracting party an option to avoid the contract. This option is not expressly mentioned in Article 396 of the Civil Code, which lists the various rights of option,

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78) See also: Hilli, Sharā'i al-Islam, op. cit., Vol. II, P.17

but it is implicit in a number of articles. (79)

Conversely, the contract will still be valid under Shi'i law if the facts are such that, although the promisor cannot deliver the goods, the promisee has the ability to take possession himself (Article 348 of the Civil Code)(80). So where A agrees to sell his stray animal to B, the contract will be valid if both parties believe that, in spite of the seller's inability to deliver the animal, the purchaser has the ability and means to capture it himself.

According to Article 372 of the Civil Code, in cases where only part of the thing sold can be delivered, the contract will only be valid in respect of that part. However, the buyer can, by exercising his option of discrepancy, avoid the contract altogether, as expressly mentioned in Article 441 of the Civil Code.

7- Impossible Act

The cases in which an act, as the subject - matter of

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79) See, for example, Articles 239, 240, 476, 488 and 534. Article 476 provides: " The lessor must deliver the thing hired to the hirer. If he refuses to do so, he will be compelled; and if it proves impossible to compel him, the lessor will have an option to avoid the contract". In the traditional Islamic law this option is called the " option of impossibility of delivery": Khiyār taadhur taslim.

80) See also: M. Ansari, Makasib, op. cit., P.187 and R.M. Khomeini, Kitab al-Ba'i, op. cit., Vol.III, P. 204 and S.H. Emami, Huquq e Madani, op.cit., Vol.II, P.18

contract, is or becomes impossible due to the conditions of the promisor or promisee or due to external factors will be discused in Chapters III and IV respectively. This section is only concerned with cases where the act is manifestly and objectively impossible at the time of the formation of contract. At one time, the most common example given of such a situation was " flying to the moon "(81). This may no more be the case. But if, for instance, a person undertakes to deliver a cargo by lorry from Europe to America within one hour, the contract is null under Islamic law, either because of lack of serious intention to contract (in cases where one or both parties are aware of impossibility), or as a result of an essential error (in cases where they are not aware of impossibility).

English law differs in this respect from Islamic law. While the starting point of Islamic law, as was seen earlier in this chapter,is the principle that a promise of the impossible is null (*impossibilium nulla obligatio est.*), under English law the parties may bind themselves by a lawful contract to perform what is in fact impossible.

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81) See, for example, A.B, Keith, The Law of Contracts (Oxford University Press, 1931) P. 85; A.L. Corbin, Corbin On Contracts (West Publishing Co., 1962), P. 337

It must be emphasized that in some legal systems which regard a promise of the impossible as null, the rule does not apply in cases where impossibility depends on the application of scientific principles which are not known to the ordinary men. Thus in the Scottish case of Gillespie V. Howden (82), in which the promisor had undertaken to build a ship with certain dimensions and having a fixed capacity, the promisor's claim that it was scientifically impossible to build a ship with the specified conditions was rejected and he was, therefore, held liable. The distinction is not recognised in Islamic law, but an approach similar to that adopted in the above - mentioned case, has been adopted by Seyyed Mohammad Kazem Tabatabaei, the famous Shi'i jurist, in his commentary on the authoritative book of Makāsib. While discussing the issue of whether for a contract to be condidered as valid, there must exist real possibility (maqdūriyah), or whether apparent possibility, in the view of the ordinary people and the parties to the contract, will be sufficient, he comes to the conclusion that the latter view is to be preferred. The corollary is that an impossibility which depends on the application of seientific principles would not be sufficient to discharge a contract. It must, further, be known to the

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82) 1885, 12 R. 800, cited in W.M. Gloag, The Law of Contract, op. cit., P. 338

ordinary men; because it is only in this case that even apparent possibility (as a pre-requisite for the validity of contract) does not exist.

8- Impossible Method of Performance

Where the parties have expressly provided that the contract is to be performed exclusively in the stipulated manner, impossibility in the agreed method of performance may bring the contract to an end. If, for instance, a vendor contracts to deliver a particular cargo via a special road, or in a named ship, he may not be held responsible if the road is blocked or the ship stranded on that date. (83)

The same result follows if it is implicit from the terms of the contract - read in the light of all the relevant circumstances, like the previous dealings between the parties, the ordinary usage of the particular trade and so on - that it was contemplated by both parties that the contract was only to be carried out in a

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83) See the French case of cass req 28.11.1934, S 1935,1,105, the Australian case of Cornish & Co V. Kanewatsu (1913) 13 SR (N S W) 83 and the English case of Nicholl & Knight V. Ashton Edridge & Co. [1901] 2 K.B. 126

particular way. This requires that both parties should have contemplated a particular method of performance as an implied term of the contract. And in this respect it must be remembered that Islamic law - like English law - is very reluctant to interfere with a freely negotiated contract by implying a term into it, unless there can be no doubt that, although the term was not expressly mentioned in the contract, it was, nevertheless, intended *by both parties* that it should form part of the contract. If this cannot be proved, the impossibility of a particular mode of attaining a result cannot bring the contract to an end, when another reasonable method is available. Thus in Tsakiroglou and Co., Ltd V. Noblee Thorl G.m.b.H (84), the House of Lords held that closure of the Suez Canal, due to Anglo - French invasion of Egypt in 1956, did not frustrate the contract in question, since it would still be possible to ship the goods via an alternative route, which was not commercially or fundamentally different from a journey by the Canal, but merely more expensive. This was in spite of the fact that the price had clearly been calculated on the basis of shipment via the Canal, although this was

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84) [1962] A.C. 93

not expressly mentioned in the contract. (85)

Also where a contract provides that the promisor shall, at his own option, perform in one of two alternatives, and one of these alternatives is or becomes impossible, the promisor shall be bound to perform in the manner which remains possible. In other words, such a contract ceases to be an alternative contract. The same principle shall apply if the option lies with the promisee and, before he makes his choice, one alternative becomes impossible. In such a case he will be left only with one alternative.

If, on the other hand, the alternative " chosen " by the promisee becomes impossible, it will affect the promisor's duty under English law just as it would if there never had been any alternative. Although this question has not been expressly dealt with by the Civil Code, it seems that the same principle will apply under Islamic and Iranian law, as it corresponds with the

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85) In this case it was even suggested that the contract in dispute would not have been frustrated even if it had provided for shipment via Suez, as long as the difference between the two methods of performance was not fundamental (ibid. at P. 112). The United States Court of Appeal followed the decision of the House of Lords, in the case of Transatlantic Financing Corp. V. United States of America, 363 F. 2d 312 (1966). It appears that Islamic law will come to the same conclusion if a term can be implied in the contract to the effect that the specified method is not to be conclusive.

established principles, namely, that after a promisee has made his choice with the assent of the promisor, it can be said that a contract containing this " chosen " alternative replaces the previous alternative contract.

9- Impossible Condition

In discussing the cases that fall properly within this subject, we must first consider the meaning of the word " condition ". In this context, " condition " refers to a fact which, although is not an essential part of the contract, has, nevertheless, been made part of it by the contracting parties. According to Article 233 of the Civil Code, conditions are of various kinds. A condition may either concern the description of the subject-matter, or it may be an act, omission or event.

On some occasions the parties may have agreed that the promisor's duty shall be conditional upon a specified fact or event, not realizing that its occurrence is impossible, or that other subsequent events would make it impossible. In such cases, according to Article 232 of the Civil Code, which corresponds with the view held by the majority of Shiʿi jurists, the condition shall be regarded as null, but the contract will remain valid. However, the person who was intended to be the

beneficiary of the condition shall have the right to avoid the contract according to Article 240, unless impossibility was due to his own fault. Suppose that A sells his car to B, in return for a consideration, and *on the condition* that the purchaser shall paint the seller's house. If the house is subsequently destroyed (or if it is later discovered that it did not exist at the time of the formation of contract of sale between A and B) the contract will not come to an automatic end, but the seller (as the beneficiary of the condition) can either terminate the contract or accept it without the stipulated condition (86). It appears that when both parties can be regarded as beneficiaries, the right of termination will be created for both of them. In such a case, therefore, each party can exercise his right of termination, but this must be done without any delay, which may signify approval.

In this respect the Civil Code does not follow the view held by some Shi'i jurists (like 'Allāmeh Helli, in the famous book of Tadhkirat al-Fuqaha) who hold that in such cases the beneficiary has the right to accept the contract with a price-adjustment (87). This latter alternative is, according to the Civil Code and the majority of Shi'i jurists, available only in cases where

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86) See: Article 243 of the Civil Code
87) See: Article 242 of the Civil Code

the subject - matter of contract is " defective ". (88)

The approach of English law to contracts containing an impossible condition is different from that of Islamic law. Under English law, no liability appears to arise from a contract containing an impossible condition. However, the exception to this rule, according to some writers, is where the condition may be regarded as immaterial, in the sense that its non - performance will do no substantial harm to the other party. In such cases the courts may excise the impossible condition and regard the promisor's duty to perform as unconditional if performance of the condition becomes impossible (89). An example of an " immaterial " condition in this sense is the requirement for the giving of a notice by the insured person informing that an accident has occurred, or prosecution has started, as a condition precedent to the duty of the insurer. In such cases if death or illness of the insured makes it impossible for him to give the required notice, it may be held that the

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88) See: Article 422 of the Civil Code
89) Ss 463 of the Restatement of Contracts, to which reference was made earlier in this chapter, provides: "... if performance of the whole contract is possible with only an unsubstantial variation, the promisor is under a duty to render performance with that variation."

insurer must pay without such notice (90). This can be inferred from the decision of the Court of Appeal in Lickiss V. Milestone Motor Policies At LLoyds (91), in which the Court held that an insured motor cyclist was entitled to recover his damages from the insurers , although he did not fulfil the conditions of the policy which required him to send to the insurers the notice of prosecution or the summons. The court held that the insurers were not prejudiced because they had received the required information from the police. As per Lord Denning, " it would be a futile thing to require the motor cyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary" (92). This may be compared with the judgment of the court in Pioneer Concrete U.K. Ltd. V. National Employers Mutual General Insurance Association Ltd. (93), in which the court made it clear that the insurers were not entitled merely to rely on a breach of the condition in order to avoid indemnity but had also to show that they had been prejudiced. The court, however, added that the

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90) A.L. Corbin, Corbin on Contracts (West Publishing Co. 1962) P. 500, and S.L.Williston, A Treatise on The Law of Contract (New York : The Lawyers Co-operative publishing Co, 1978), P. 216.
91) [1966] 2 All E.R., P. 972
92) ibid. at P. 975
93) [1985] 2 All E.R., P. 395

notification condition in the insurance policy was a condition precedent to the insurer's liability to make payment under the policy, and that the insurers had been prejudiced by the lack of notification of the proceedings.

10- Temporary Impossibility

There may be cases where the subject - matter of contract is only temporarily unavailable, because of the causes beyond the parties' control. In such cases the question arises as to whether or not such temporary unavailability will bring the contract to an end; in other words, whether in such cases we are faced with an impossibility of performance causing cancellation of the contract, or merely a suspension of performance.

The rules of Islamic law on the subject of impossibility of performance are flexible. Unlike the common law rules of frustration, they do not involve an all or nothing approach. Impossibility does not necessarily terminate a contract. To discuss the effect of temporary impossibility under Islamic law one has to distinguish between three situations:

First> where performance by a particular date has not been expressly mentioned as a " term " of the contract

and cannot be implied in it either. In such cases, delay, in itself, is insufficient to discharge a promisor except to the extent of such delay. The contract redeems its validity and may be enforced when the impossibility ceases; unless, the delay is so long as to put an end in a comercial sense to the transaction, and to " make it unreasonable to require the parties to go on with the adventure." (94)

In this respect, Article 150 of the Maritime Law of Iran provides:

> If a ship cannot leave the port as a result of force majeure, the charterparty will remain valid *for a reasonable period*, and the damages resulting from the delay in departure cannot be claimed. (italics added)

Secondly> Where the contract contains an express or implied " time stipulation ", but time is not of the essence of the contract. In such cases temporary impossibility means that fulfillment of a " condition " of the contract has become impossible. So, as was discussed in the preceding section, the promisee, who is the party benefiting from the condition, has the right

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94) Per Lord Blackburn in Dahl V. Nelson (1881) 6 App Cas. at P.53. See also the case of Metropolitan Water Board V. Dick, Kerr & Co. Ltd. [1918] A.C. 119, in which the House of Lords held that the interruption caused to the work was of such a nature and duration as to make the contract, if resumed, a different contract. The original contract was, therefore, held to have been discharged.

to terminate the contract, but the contract will remain valid while he has not exercised his right of termination.

Thirdly> There may be contracts in which performance on the specified time is of the essence, in the sense that if the contract is performed at any other time, it will in effect be a different contract. An example is shown by a person hiring a car on a particular date, in order to attend a conference, which is to be held on that date. When discussing this kind of contract, Muslim jurists say that in such cases performance of the obligation and the time of such performance constitute a " desirable combinaton " (wahdat e matlūb). Therefore, in such cases, the contract will come to an automatic end even by a temporary unavailability of the subject-matter. The reason is that, in such cases, time stipulations, whether expressed or implied, go to the root of the contract, and form its basis. When the basis of a contract falls away, the contract falls away with it.

To decide on when expressed or implied " time stipulations " must be deemed essential, i.e., how to identify those time stipulations which cause automatic cancellation of the contract, one has to bear in mind all the relevant circumstances such as, the nature of the goods forming the subject-matter of contract (e.g., perishable commodity, or something likely to change

rapidly in value), the nature of the contract, and the circumstances surrounding its formation (e.g., commercial contracts for the sale of property to be used in commerce, rather than for private use)(95), the contemplated duration of the contract (where the contemplated duration of the contract is long, a temporary unavailability does not normally bring the contract to an end), and any other relevant factors, for example, the terms of the contract itself. In this respect Section 10 (1) of the Sale of Goods Act, 1979 states: " unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale ." Section 10 (2) further provides: " whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract". (96)

One last question must be answered. At what point in

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95) For example M.C. Cardie in the case of Hartley V. Hymans [1920] 3 K.B. 475 (at P.485) said: " In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery. "

96) See also Law of Property Act, 1925, Section 41 which adopts an equitable approach regarding contracts for the sale of land and provides:" Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules." Thus if equity did not regard time as being of the essence it is not of the essence at common law.

time can a contract in which " time " is of the essence be said to have come to an end, as a result of temporary impossibility? Although the question has not been dealt with by Muslim jurists in any direct way, an analysis of the basic principles of the Islamic law of contract shows that a distiction must be made between two situations. If at the time of the occurrence of impossibility, it can be presumed, bearing in mind all the relevant factors, that the interruption shall be so long as to fundamentally change the identity of the performance, when resumed, from what was initially intended, the contract shall come to an end immediately after the occurrence of such impossibility. The reason is that in such a case there is no point in leaving the parties' rights indefinitely in suspense and holding them to a contract which they know can never be duly performed.

When, however, such a *prima facie* presumption cannot be made at the time of occurrence of the impossibility, i.e., if the delay is of uncertain duration, the contract will remain valid until the elapse of such period of time after which it can be reasonably presumed that the contract can no longer be performed properly. The date at which such a presumption can reasonably be made must be determined exclusively on the facts of each case. Thus in a series of disputes arising out of Iran - Iraq war,

which commenced in September 1980, and resulted in some 60 ships being trapped in Arvand Rood (Shatt al - Arab) Waterway, the judges and arbitrators came to different conclusions " as to the date on which informed businessmen would have concluded that the conflict was likely to last so long as to put an end to the charterparty." (97) Thus while in one case the relevant date was found to be 4 October 1980, (98) in some others it was felt to be 24 November (99) and in another case the arbitrators decided that the charter was frustrated on 9 December (100). Yet none of the appeal courts interfered with these findings. The issue was one "to be determined by an informed judgment based upon all the evidence". (101)

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97) D.W. Greig and J.L.R. Davis, The Law of Contract (Merlbourne : The Law Book Co. Ltd. 1987) P. 1312

98) Kordos Shipping Corp. V. Empresa Cubana de Fletes [1983] 1 A.C. 736

99) International Sea Tankers Inc. V.Hemisphere Shipping Co. Ltd. [1983] 1 LLoyd's Rep. 400

100) Uni - Ocean Lines Pte Ltd. V. C-Trade S.A. [1983] 1 LLoyd's Rep. 387

101) Per Lord Roskill in Pioneer Shipping Ltd. V. B.T.P. Tioxide Ltd [1982] A.C. 724 at 752

CHAPTER III

IMPOSSIBILITY RELATING TO THE CONDITIONS OF THE PROMISOR OR PROMISEE

This chapter deals with situations in which the performance of a contract is or becomes impossible as a result of certain conditions prevailing in one or both parties. For the sake of convenience, various types of such impossibility will be discussed in the following order:

Interdiction; bankruptcy; insolvency; death; illness; inability, and refusal of one party to perform or to receive the agreed performance.

1- Interdiction (hajr)

The capacity of the parties to contract is essential for its validity. Islamic Law distinguishes

between two types of capacity: capacity to enjoy rights (ahliyya tamattu) and capacity to enforce rights (ahliyya istifā) (1). Every human being, and even a child in the womb who is born alive, and also juridical persons (within the limits laid down by the law)(2) have the capacity to "enjoy" rights (Article 957 of the Civil Code)(3). Moreover, according to Article 959 of the Civil Code, whose provisions are similar to those made in the Civil Codes of many other Muslim countries, no person may divest himself of his capacity to enjoy rights (4). However, the right to "enforce" rights is more restrictive (5). Certain groups of people are regarded to be incapable of exercising their rights. The three most common classes of interdicted persons,

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1) When distinguishing these two types of capacity, Katoozian in his book Huquq-e-Madani (Tehran: Behnashr, 1366 sh.), Vol.II, P.2, prefers the terms ahliyya tamalluk (capacity to gain ownership) and ahliyya tasarruf (capacity to take possession).
2) According to Article 588 of the Commercial Code of Iran, " a juridical person may have all the rights and assume all the obligations granted by law to natural persons save those pertaining exclusively to the capacity of natural persons, such as rights and obligations resulting from paternity, affiliation, etc." Similar provisions can be found in the laws of other Muslim countries. (see, for example, Articles 93 (1) and 93 (2) (b) of the U.A.E. Civil Code)
3) Articles 851 and 875 of the Civil Code have, respectively, recognised the right of an unborn child to take a bequest or to inherit from a deceased, provided that it is born alive.
4) See, for example, Article 89 of the U.A.E. Civil Code
5) Article 958 of the Civil Code provides:" Every human being is entitled to civil rights but nobody can enforce these rights unless he has legal capacity for so doing."

according to Islamic law and the Iranian Civil Code, are: minors, lunatics, and prodigals (spendthrifts) (6). These persons lack full legal capacity required for concluding a contract. In the following two sub-sections, we first deal with the effect of " existing " interdiction, i.e., interdiction existing at the time when the contract is made, before proceeding to discuss, in the following sub-section, The effect of " subsequent " interdiction of one or both parties on the contact.

1-1- Existing Interdiction

Interdiction can be defined as "prohibition of any particular person from dealing with his own property"(7). Article 1207 of the Civil Code provides in this respect:

> The following persons are regarded to be under interdiction and are forbidden to interfere in their property and proprietary rights:
> 1) Minors ; 2) Spendthrifts ; 3) Lunatics.

It must be emphasized here that the above article refers only to cases of " general " interdiction (hajr ʿāmm). There are also cases of "special" or "relative" interdiction (hajr Khāss). An example is the prohibition of a murderer from inheriting from his victim or taking a bequest made by the latter in his favour (8); or the

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6) See Articles 211, 212 and 1207 of the Civil Code
7) Article 941 of Majella, the Otoman Civil Code
8) Article 880 of the Civil Code

interdiction of the pledgor from dealing with the property he has handed over as a pledge to the pledgee , which is meant to safeguard the right of the latter. (9)

As far as general interdiction is concerned, the effect of each type of interdiction on contracts made by the interdicted person is different. In some cases the contract is void ab initio, while in others it is only defective (fāsid) and can be ratified at a later stage. The third category concerns cases in which contracts made by an interdicted person are regarded to be valid. It is, therefore, essential to distinguish between the three general types of interdiction and to study their effect on contracts separately.

1-1-1- Infancy (sighar)

It must be made clear at the beginning of this section that infancy (and in fact all other grounds of interdiction discussed here) constitute bars only to contractual (and not delictual) liability. The reason for this, as Kenny put it, is that " a child may know right from wrong long before he knows how to make a

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9) There are also other " special " types of interdiction. Examples include bankruptcy and insolvency, discussed under sub-sections 2 and 3 below

prudent speculation or a wise will " (10). Thus Article 1216 of the Civil Code provides: " A minor or an insane or a spendthrift person shall be held responsible for any loss that he may cause. " (11)

As far as contractual capacity is concerned, every person entering into a contract must have reached the age of majority. It is a general principle of Islamic law that legal majority comes with physical puberty. In practice, however, majority or minority is usually determined by legal presumptions. There is a presumption in Shiʿi law that a girl above the age of nine lunar years and a boy above the age of fifteen lunar years have reached puberty and are not, therefore , minors (12). Their interdiction may, however, continue until they reach the age of " prudence " (rushd) which is

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10) C.S. Kenny, Outlines of Criminal Law (Cambridge University press, 19th ed. 1966) P.80

11) See also Article 50 of the " Islamic Punishment Act " (1991) of Iran which provides that an infant shall be liable in damages for any destruction of property.

12) Article 1210 of the Civil Code. The minimum age of puberty differs in other schools of Islamic law. In Shafii and Hanbali Schools it is set at 15 and in Hanafi and Maliki Schools it is fixed at 17 for both sexes. See: Allameh Hilli, Tadhkirat al-Fuqahā (n.p., n.d.) Vol.II, PP.76-77

determined subjectively in each case (13). The basis of this provision is Verse 5/IV of the Quran which provides: " Make a trial of the orphans until they reach marriageable age. Then if you are accustomed to their acting with prudence, deliver to them their property." (emphasis added). Although this verse refers exclusively to orphans, the consensus is that it is applicable to other cases too.

Minors who have not reached the age of puberty are divided into two classes of discerning (mumayyiz) minors and minors without discretion (ghayr mumayyiz). Minors without discretion have no capacity. " Contracts "

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13) See the note to Article 1210 of the Civil Code. The problem with the present Iranian law is that it does not fix the age at which the legal presumption of prudence (rushd) must naturally be made. Although in practice the courts and notary publics have no alternative but to rely on an Act passed in 1934 (or 1313 Iranian calendar) which provides that the natural legal presumption of rushd is at the age of 18. According to some lawyers, however, the said law which is entitled " The Law Relating to the Prudence of Contractors " has been annulled after the victory of the Islamic Revolution in 1979 by provisions of Article 1210 of the Civil Code and the note thereto. Similar problems do not exist in the laws of other Muslim countries. For example, according to Article 96 (2) of the Kuwaiti Civil Code, the natural legal presumption of rushd is at the age of twenty-one years.

made by them are absolutely void (14). On the other hand, limited capacity is granted to minors manifesting discernment, i.e., those minors who are capable of discerning good from evil or, as Majella put it, of discerning " the difference between a sale and a purchase. " (15)

A contract made by a discerning minor is not void but only defective, and can thus be ratified by the minor's guardian. The reason for this lies in the fact that under Islamic (and particularly Shi'i) law a distinction is made between an intention to create legal relations (qasd-i-insha'i aqd) and the consent thereto (ridā). While any defect in the former nullifies the contract

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14) Iranian law does not fix the age of distinction. However, some Shi'i jurists fix it at the age of seven years (see, for example, M.H.Tusi, kitāb al-Istibsār (Tehran : Dar al-Kutub al-Islmiyya, 3rd ed. A.H. 1390), Vol. IV, P.249. A child below this age is irrebuttably presumed to be incapable of distinction (tamiz). The same age has been mentioned as the age of discernment in the laws of some Muslim countries (see, for example, Article 86 (2) of the Kuwaiti Civil Code and an Article of the same number in the UAE Civil Code). Also under Section 104 of the German Civil Code (BGB), a person who has not completed his seventh year of age is incompetent to enter into legal transactions; but those who have reached this age have been granted limited capacity under Section 106. It is noteworthy that the age of seven was also of significance in the common law, under which a child below the age of seven was presumed to be doli incapax (incapable of crime). This age was, however, raised first to 8 and then to 10 by subsequent legislation.

15) Article 934 of Majella: The Ottoman Civil Code

altogether, a defect in the latter factor can easily be removed by attaching true consent to a formerly made contract at a later stage.

The difference between contracts made by a minor of imperfect understanding and a discerning minor is that in the former case the defect is in the intention (qasd). Such a minor cannot have a rational appreciation of what he is doing and, therefore, he cannot be said to have " intended " to create legal relations. Thus his " contract " is a nullity from the beginning and confers no rights and imposes no obligations on any of the parties to it.

On the other hand, a discerning minor's contract is only defective or inoperative (ghayr nāfidh), because although he knows what he is doing, he may not be able to protect his interest in the best possible way. So his contract can be regarded as valid, provided that his guardian gives his consent (idhn) or ratification (ijāza). (16)

The approach adopted by Islamic law towards

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16) A similar principle underlies the approach of Islamic law towards contracts made under duress. As was seen in Chapter I above, such contracts can be regarded as valid if the person who makes them under duress gives his consent at a later stage. This is because, in such cases, the defect is not in the " intention " but only in the " consent ".

inoperative contracts is similar to that adopted by common law towards " negative voidable contracts "(17). These were contracts which were not continuous in their operation (i.e., did not involve continuous rights and duties) and were entered into by an infant during his infancy. These contracts required an express ratification after majority before the infant could be bound. The second section of the Infants Relief Act 1874, however, abolished this type of contract by making it impossible for a person to be sued on a contract entered into during infancy, even though he ratified it after attaining his majority.

The other type of contract in common law, which works in the opposite direction compared to " negative voidable contracts ", is what has been referred to as " positive voidable contracts " (18). Where an infant acquires an interest in permanent property or makes a contract involving continuous rights and duties and takes some benefit under the contract, his obligation remains until he decides to put an end to it. He can repudiate these

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17) This terminology has been used by Guest in Anson's Law of Contract (Oxford: Clarendon Press, 24th ed. 1975) who (at p.197) admits that it is strictly misleading, as the essence of a voidable contract is that it is binding unless repudiated, whereas these contracts were not binding unless affirmed.

18) See : A.G. Guest, op. cit., P. 203

contracts during infancy or within a reasonable time of attaining his majority. What is a reasonable time is determined by taking note of the circumstances surrounding each particular case.

The other capacity granted to a discerning minor under Islamic law is that he can enter into all types of contracts which do not involve interference into his financial affairs, even without his guardian's consent or ratification. Thus Article 1212 of the Civil Code provides:

> The acts and words of a minor are null and void and of no effect insofar as they concern his property or proprietary rights. A discerning minor may, however, gain ownership for no consideration in cases such as accepting a gift, or a free transfer, or assuming possession of unclaimed property.

As the article clearly shows, the capacity granted to a minor with discretion is not limited to the three examples given, but extends to all types of gratuitous contracts by which no obligation is imposed on the infant, for example , accepting a bequest. It is interesting to note that, according to some schools of Islamic law, a minor with discretion has even the capacity to make a bequest (19). The reason for the

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19) For example, Maliki and Hanbali laws recognise the validity of a bequest made by a minor who has reached the age of seven and can, therefore, be described as a discerning minor. See: N.J. Coulson, Succession in the Muslim Family (Cambridge University Press, 1971) P. 217

relaxation of the rules of legal incapacity in this case lies in the fact that a discerning minor is interdicted in order for his property to be protected "during his lifetime". The same reason does not apply to dispositions which will be effective only after his death. This opinion has not, however, been accepted in the Civil Code (of Iran) which, by Article 211, expressly requires the parties to a contract to be mature (bāligh), sane ('āqil) and prudent (rashid). And there is no doubt that a bequest (wasiyya) under Islamic law is a contractual transfer of property ('aqd) which is completed by the offer (ijāb) of the transferor and the acceptance (qabūl) of the transferee. Moreover, according to Article 835 of the Civil Code, a testator must have the capacity to deal with the property which forms the object of the will.

The difference of approach between Islamic law and English law to the question of " valid " contracts entered into by infants is noteworthy. While Islamic law maintains that a contract made by an infant will only be valid if it does not involve dealing with his financial affairs, and if the infant is a discerning minor, English law holds that a contract made by an infant will only be valid if it either constitutes a " beneficial contract of service " or is for the sale of

" necessaries " (20), which include " goods suitable to the condition in life of the minor and to his actual requirements at the time of the sale and delivery. " (21)

The validity of a contract for necessaries, as an exception to the general invalidity of contracts made by an infant, has no equivalent in Islamic / Iranian law. However, it may be argued, that the principle underlying a beneficial contract of service in English law is the same as that underlying the exceptions mentioned in Article 1212 of the Civil Code of Iran (discussed earlier), in the sense that benefit to the infant is the keynote to the validity of contract in both cases.

1-1-2- Insanity (jonūn)

Under Islamic law, any contract entered into by an insane person is null and void (bātil). On a par with minors without discretion, such a person is devoid of all capacity. The reason is that he cannot have an " intention to create legal relations ", which forms the basis for the validity of all contracts in Islamic law. Thus Article 1211 of the Civil Code provides:

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20) Although there is no doubt that under English law a contract for necessaries imposes liability upon the infant, there exists controversy as to whether this is of a contractual nature.

21) Sale of Goods Act, 1979, S. 3(3)

" insanity, to whatever degree, causes interdiction."

The importance attached by Islamic (and particularly shi'i) law to the concept of " intention to contract " in a subjective (and not merely objective) sense is not shared by common law (22). As a result, a contract made by an insane person can only be avoided under common law if it is proved that the other party to the contract was aware of insanity. The principle was established over one hundred years ago by Lord Esher M.R. in Imperial Loan Co. V. Stone (23):

> When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. (24) (emphasis added)

The Islamic law rule that a contract made by an insane is absolutely void applies also to those who lose

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22) This is not to say that " the intention to create legal relations " has no importance under English law. In the leading case of Balfour V. Balfour [1919] 2 KB, 571, for example, the Court of Appeal held that a husband was not contractually bound by his informal promise to pay his wife 30 Pounds maintenance until she was able to return from England to rejoin him in Ceylon, because his promise was not intended to create legal relations.
23) [1892] 1 Q.B. 599
24) ibid. at 601

their senses through illness, intoxication (25), sleep, unconsciousness etc., but not to simpletons (m'atūh) who are capable of having a rational appreciation of what they are doing. In case of periodical insanity (jonūn adwāri), i.e., insanity which recurs at intervals, the contract shall be regarded as valid if it is made during lucid interval. (26)

1-1-3- Prodigality (safah)

Prodigals are those persons who, by carelessness or design, tend to squander their property immoderately and to no good purpose (27). In order for prodigality to be regarded as a basis for interdiction it must be continuous and recurring, so that it becomes a habit

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25) It must be emphasized that due to the prohibition of alcoholic drink in Islam, certain schools (e.g., Hanafis) distinguish between voluntary and involuntary drunkenness, giving legal effect to the contracts entered into in the former case • See: Ibn Nujaim, al-Ashbah wal-Nazā'ir, op. cit., P. 124. However, bearing in mind the fact that in neither case there exists an " intention to create legal relations", this distinction is baseless.

26) See Article 1213 of the Civil Code (of Iran) and Article 14(2) of the UAE Civil Code. The same principle applies in criminal cases. Thus Article 51 of the " Islamic punishment Act" of Iran provides that in case of periodical insanity the offender shall only be relieved of responsibility if he is insane at the time of the commission of crime.

27) See Article 1208 of the Civil Code

(malaka nafsāniya) for the person (28). Ibn Qudama, the famous Hanbali jurist, and Shahid al-Thani, the famous Shiʿi jurist, define prudence or rushd in a person (which is the opposite to prodigality or safah) as the " protective safekeeping of his property and soundness in the ordering of his livelihood. " (29) Thus the practice followed by certain Muslim jurists (fuqahā) in regarding prodigality as a kind of "unsoundness of mind" seems to be justified. (30)

Some jurists have tried to establish a connection between sinfulness (fisq) and safah, arguing that a sinful person cannot be regarded as having sound judgment. But this argument has generally been rejected in favour of the view that prudence in property must be distinguished from prudence in matters of religion (31). Of course, if a person spends his wealth in sinful ways, this might constitute safah or prodigality. As per Allameh Hilli:

> If the sinful person (fāsiq) is one who spends his wealth in sinful ways, such as buying wine or musical instruments, or he

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28) Shahid al-Thani (Zain al-Din Ali), Masalik al-Afham, op.cit., Vol. I, P. 248
29) Ibn Qudama, Mughni, op. cit., Vol.IV, P. 456; Shahid al-Thani Masalik al-Afham, op. cit., Vol. I, P.248
30) See, for example, A. Naraqi, Awaid al-Ayyam, op. cit., P. 179
31) Najafi, Jawahir al-Kalam, op. Cit., Vol. XXVI, P.52

> uses it in a way that brings about corruption, then he is not rashid and has no competence, because he squanders his property and loses it to no advantage. (32)

In fact, it may be argued that squandering property constitutes safah (imprudence) even if done for charitable purposes, as Verse 26/XVII of the Quran orders believers to give the needy their right but not to squander. The verse describes squanderers as " brothers of Satan. "

Prodigality in the sense of unsound commercial sense may, of course, be of various kinds. So the involvement of the court is essential to establish whether interdiction on this ground is or is not appropriate in each particular case. As a result, a judicial decree is necessary both to establish and to terminate interdiction on the ground of prodigality. (33)

Prodigals in Islamic law are treated in the same way as discerning minors. Both groups are competent to

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32) Allameh Hilli, Tadhkirat al-Fuqaha , op. cit., Vol. II, P.74. Similar words have been used by Ibn Qudama in Mughni, op. cit, Vol.IV, P. 467 cited in N.j. Coulson, Commercial Law in the Gulf States: The Islamic Legal Tradition (London: Graham & Trotman, 1984) P. 34

33) This can be inferred form Articles 1225 and 1226 of the Civil Code which make references to the " decree of prodigality " and its publication by the Public Prosecutor. But for an opposite view, see: S.A. Tabatabaei, Riyaḍ al-Masail fi Bayani Ahkam bil-Dalail (Qum: Muassisah Ahl-albait, A.H. 1404) Vol. I, Section on " Conditions to Terminate Interdiction ", and A. Gorji, Maqālāt-e-Huquqi (Tehran: Wezarat Irshad, 1365 sh.) Vol. I. P.16

understandd what they are doing when they enter into a contract. Their interdiction is only based on the grounds of defective consent: They cannot fully protect their interests in financial affairs and, as a result, their "consent" (riḍa) in such matters cannot be a true one. Prodigals, therefore, can make all types of contracts with the exception of contracts involving interference into " their property and financial affairs "(34). And, even in such cases, the contract will not be regarded as void but valid subject to the guardian's ratification. The guardian can either authorize a transaction in advance, for example, buying a house at a specific price (which is called idhn) or ratify it after conclusion (which is called ijāza). (35)

According to all schools of Islamic law, in ratifying or rejecting a contract, the guardian must take into account the prodigal's interests. So he cannot ratify a gift made by him or settle a lawsuit relating to him without the approval of the relevant authorities (which, according to Article 1242 of the Civil Code, is the Public Prosecutor). Also he cannot give the prodigal a general authorization to make contracts involving interference into his financial affairs. Such a broad

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34) Article 1208 of the Civil Code
35) See Article 1214 of the Civil Code

authorization is against public policy and shall, therefore, be regarded as null. According to Allameh Hilli:

> If the guardian authorizes the prodigal to conclude various kinds of contracts, such a broad authorization shall be regarded as null. But if he specifies a particular contract and also the consideration thereto, the authorization shall be valid. (36)

There is divergency among Muslim jurists as to whether a spendthrift (safih) can act as someone else's representative in the latter's financial affairs. The famous view in Shi'i law is that the interdiction of a prodigal, unlike that of an insane or a minor without discretion, is not due to an inherent deficiency. His interdiction is only meant to safeguard his proprietary interests. So he must be regarded as competent to deal with another's financial affairs, if the latter so permits. This view, however, does not seem to have been accepted by the Civil Code which, in Article 662, provides that a person cannot act as another's representative in executing a duty for which he is not competent to act as a principal. Thus one should conclude that, under Iranian law, a prodigal or discerning minor cannot deal with someone else's financial affairs, without the approval of his guardian.

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36) Allameh Hilli, Tadhkira, op. cit., Vol. II, P. 77

Another point of considerable disagreement among Muslim jurists is the extent to which a prodigal is authorized to make contracts involving " indirect " interference into his financial affairs, like contracts of employment or marriage. According to some jurists, a prodigal can be employed under a contract of service (ijāra), as his work is not part of his property. Similarly, they say, a prodigal man can conclude a contract of marriage without the approval of his guardian. The opposite view insists that in these and similar cases, financial losses are probable. The hired worker (ajir) may agree to be paid less than what he deserves, and the bridegroom may undertake to pay a substantial amount of dower (nuptial gift or mahr payable by the bridegroom to the bride on their wedding) which may be far in excess of the usual amount. They, therefore, say, that these contracts also need the guardian's authorization or ratification (37). The better view, however, is that such authorization or ratification would only be needed for approving the amount of the remuneration paid to the prodigal in a contract of service, or the amount of dower payable by him in a contract of marriage. On the other hand, the

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37) Allameh Hilli, Tadhkira, op. cit., Vol.II, P.78

guardian's approval would not be necessary as far as non-pecuniary aspects of such contracts are concerned, for example, the type of the work or the characteristics of the girl chosen for marriage. (38)

1-2- Subsequent Interdiction (hajr hādith)

Before discussing the effect of the subsequent interdiction of one or both parties to the contract on its validity, a few words must be mentioned about the distinction between revocable (jā'iz) and irrevocable (lāzim) contracts in Islamic law (39), as the effect of

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38) As far as infants are concerned, it may not be easy to make a similar distinction between pecuniary and non-pecuniary aspects of a contract under Iranian law. A contract of service made by a discerning minor may need the approval of the guardian for its entirety and not only in respect of the amount of the wages payable to the infant. This can be inferred from Article 85 of the " Non-Litigious Matters Act " of Iran, and is due to the fact that a guardian is expected to supervise and take care of all aspects of an infant's life, and not merely his financial affairs.

39) The common mistake of translating jā'iz as permissible or lawful, and lāzim as binding, must be avoided here. Rayner, for example, after translating jā'iz as permissible and lāzim as binding, continues to observe: " the objective sense of jaiz... is that the contract is unobjectionable in that it has been formed in conformity with the provisions of the law, and, therefore, subjectively speaking, the contract is valid." See: S.E. Rayner, The Theory of Contracts in Islamic Law, op. cit., P. 149

subsequent interdiction varies from one type to the other.

We saw in chapter I above that contracts result from the operation of two free wills, and this is the very reason for their sanctity. It follows that a contract, having come into existence by the operation of two free wills, can also be brought to an end by the mutual consent of both parties. Under Islamic law, this agreement to terminate a binding contract is called iqāla or mutual cancellation of a contract. Article 283 of the Civil Code provides : " After concluding a contract, the parties may cancel and terminate it by mutual consent. "

The above-mentioned Article shows that the Civil Code has adopted the view of those Muslim jurists who do not limit the operation of the principle of iqāla to the contract of sale, but extend it to other contracts too. This opinion seems justified, because the right to terminate a contract by mutual consent is based upon a general principle, namely, that the two persons who willfully decide to create a legal relationship should also be able to bring it to an end if they so wish. Thus there is no reason to limit the application of the rule to the contract of sale. Of course, the right of the parties to bring their contractual relationship to an end is qualified by the consideration of public policy. So,

for example, a pious endowment (_waqf_) cannot be terminated by _iqāla_.

There exists divergency among Muslim jurists as to whether _iqāla_ is a new contract or only cancellation of a previously made contract. Consider , for example , a contract for the sale of a horse by A to B in exchange for 10,000.00 Pounds payable by B to A. Is the agreement to cancel this contract by _iqāla_ a new contract of sale (concluded in the reverse order compared with the original contract) or only a cancellation of the previously made contract ?

Each of the two opposing views that one may accept will have considerable practical effects. If the view held in Sunni law is accepted and the agreement is regarded as a new contract (in the reverse order) it will, in our above example, have all the features of a contract of sale. So, for instance, right of pre-emption (recognised in Article 808 of the Civil Code) will be created for a joint owner, in the sense that if the horse is jointly owned by B and C, the latter will have the right to prevent the return of B's share in the horse to A and to take possession of it by paying to A the price that is agreed between A and B. Similarly, by accepting this view the " options " of " meeting place " (whereby the parties can terminate a contract of sale while still

in the meeting place)(40), "delay in payment of the price" (whereby a seller has the right to cancel a contract of sale if the price is not paid within three days)(41) and " animals " (whereby the purchaser of an animal has the right to cancel the contract within three days)(42), Will be created for one or both parties, as the case may be. Thus, for example, A will have the right to cancel this new " contract " within three days from the date of iqāla using his option of animals (khiyār heiwān). Under the opposite view held in shiʿi law (43), on the other hand, the agreement for iqāla is not a new contract and, therefore, no " right of option " (khiyār) will be created for either party. (44)

The difference between the two approaches also affects certain procedural matters. Under shiʿi law, the place where the original contract is made, as opposed to the place where iqāla is made, is regarded as the place of conclusion of the contract and may, therefore, be relevant in deciding the appropriate forum or the governing law of the contract in case of any dispute.

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40) Article 397 of the Civil Code
41) Article 402 of the Civil Code
42) Article 398 of the Civil Code
43) See: Shahid al-Awwal, Lumat al-Dimishqiyya, op.cit., Vol. I, P. 239
44) It must be emphasized, however, that although iqāla is not a new contract under shiʿi law, it does possess certain features of contracts; for example, the parties must have legal capacity and also the " intention " to bring their legal relationship to an end.

Under Sunni law, on the other hand, the original contract is replaced by the new contract of iqāla. To solve such procedural matters, therefore, reference must be made to the laws of the locality where iqāla takes place.

The corollary of the Shi'i view is that the price (thaman) which is returned by the original seller to the original buyer cannot be more or less than the price agreed between the parties in the original contract (in our example, 10,000.00 Pounds), since iqāla is only a repetition of the original contract in the reverse order (45). However, certain Shi'i jurists have, somewhat surprisingly, indicated that the destruction of either of the two considerations (for example, the thing sold or the price paid in a contract of sale) is no bar to iqāla (46). The same view is adopted in Article 286 of the Civil Code (of Iran) which provides that in such cases the lost object must be replaced by an object of similar quality and quantity if it was fungible (replaceable), or by its price (at the time of iqāla)(47) if it was non-fungible (48). Similarly, according to

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45) Shahid, Lum'ah, op.cit. Vol.I, P. 239; Esfahani, Wasilat al-Najah, op. cit., P. 51
46) Shahid, Lum'ah, op. cit., Vol. I, P. 239
47) The Civil Code is silent as to whether the price must be calculated at the time of iqāla or at the time of destruction. But, as the contract remains valid up to the point of iqāla, it seems that the price must be calculated at that time.
48) The difference between fungible and non-fungible goods according to Article 950 of the Civil Code is that non-fungible goods are relatively unique and cannot be found in great quantities.

Article 285, iqāla may concern only part of a transaction. Thus a contract to build a four-storey building may be terminated by iqāla after only two floors have been built, in which case the original contract will be divided into two separate contracts (one valid and the other terminated) and the remuneration shall be reduced proportionately.

Iqāla has no retroactive effect. The contract will remain valid up to the point of cancellation. So if, for example, the property is rented to a third party by the original buyer, the contract of lease will remain valid even after iqāla. For the same reason, all the separable produce or income : nama'at monfasil (for example the young of animals or the fruit of orchards) will remain the property of the person who obtained ownership of the animal or orchard through the original contract. On the other hand, all the attachments : nama'at mottasil , i.e., the usufruct forming an integral part of the property (for example, the growth of a tree) will be to the benefit of the person who obtains the thing through iqāla (49). If, however, this improvement is effected by the act of the original buyer (as opposed to natural factors), he will be entitled to be paid for his work when the thing is returned to the seller (50). Suppose

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49) Article 287 of the Civil Code
50) Article 288 of the Civil Code

that A sells a piece of stone to B who uses it to make a statue. The parties then decide to terminate the contract of sale by iqāla. The statue will be returned to A and the original price paid back to B. But, in addition, B shall be entitled to receive the difference between the price of the stone and that of the statue. Conversely, if the act of the buyer causes a depreciation in value of the goods sold (for example, if he has an accident with the car he bought), he will be liable to pay the difference between the original price and the price of a damaged car to the seller.

There may be cases where the act of the contractor (for example, the buyer) combined with natural factors is instrumental in bringing about an improvement. The animal sold might have gained some weight as a result of being taken to pastures by the buyer; a sick animal might have improved in health by being looked after by the buyer, who happened to be a veterinarian. It seems that, in such cases, the "prevailing factor" is of importance. In the second example given above (unlike the first one) the prevailing factor is the work of the buyer. In such a case, therefore, the buyer will be entitled to the difference between the price of a sick and a healthy animal.

Unlike irrevocable contracts, termination of revocable contracts does not need to be done by iqāla. Such contracts can, instead, be terminated unilaterally (Article 186 of the Civil Code). It must be noted, however, that there is a presumption in Islamic and Iranian law (called presumption of irrevocability - Asālat al-lozūm - inferred from Article 219 of the Civil Code) according to which every contract is presumed to be irrevocable (lāzim) unless the law expressly provides otherwise. For example, Articles 611, 638 and 679 of the Civil Code provide that contracts of deposit (wadi'a), loan ('āriya) and agency (wikāla) are revocable (jā'iz) contracts (51). The contract may also be a hybrid: revocable for one party and irrevocable for the other. An example is the contract of rahn (mortgage or pledge) which, according to Article 787 of the Civil Code, is irrevocable for the mortgagor (pledgor: rāhin) but revocable for the mortgagee (pledgee: mortahin).

The parties to a revocable contract may of course contract out of the above principle, so making the contract irrevocable in the literal sense of the word.

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51) Concerning the contract of agency, Ibn Qudama observers: " Agency is a revocable contract as regards both parties. The principal may discharge the agent if he so wishes and the agent may also discharge himself whenever he wants. " See: Mughni, op.cit., Vol V, P. 113

Thus article 679 provides that an agent (representative) can be dismissed at any time, *unless the parties agree otherwise.*

Apart from the right of unilateral termination, revocable contracts differ from irrevocable contracts in another respect. A revocable contract comes to an end by subsequent death or interdiction of either party. Article 954 of the Civil Code provides: " All revocable contracts are terminated by the death of either party and also by subsequent prodigality (safah) in cases where prudence (in property) is a necessary condition " (for the validity of contract).

As can be seen, the above article does not refer to subsequent infancy or insanity. Infancy, of course, has no relevance here. One cannot imagine a situation where a contractor who is a major person at the time of the formation of contract becomes an infant at a later stage (52). But as far as insanity is concerned, it has been suggested by some eminent Iranian lawyers that non-inclusion of the word " insanity " in the article is due to a typing error (53) and it must, therefore, be read

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52) The only situation in which subsequent infancy may occur is where the law on the minimum age of majority is changed after the conclusion of a contract. This, however, will be discussed in chapter IV below, where legal impossibility is discussed.

53) See, for example, S.H. Emami, Huquq-e-Madani (Tehran: Islamiyya, 1355 sh.) Vol. II, P. 164

into the article. This may well be the case, because some other articles of the Civil Code refer to insanity when they discuss certain revocable contracts. For example, Articles 628 and 678 referring, respectively, to the revocable contracts of deposit (wadi'a) and agency (wikāla) provide that insanity of the depositor, the agent or the principal will terminate the contract. This approach is also supported by common sense. If subsequent prodigality of a party brings revocable contracts to an end, his insanity must, *a fortiori*, have the same effect. The reason is that prodigals only lack prudence in their financial affairs, whereas insane persons lack rational appreciation.

Unlike revocable contracts, irrevocable contracts do not come to an end by subsequent interdiction of one or both parties. The only exception is where the contract involves " personal skill and taste "(54), i.e., where it is based on personal involvement of a particular person. If, for example, a famous writer undertakes to write a book, his subsequent death or insanity will bring the contract to an end. Similarly, if a house is rented for the " sole " use of a particular person, such person's death would terminate the contract (55). If, on the other

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54) Per Parke B. in Siboni V. Kirkman (1836) I M. & W. 418 at 423

55) Article 497 of the Civil Code

hand, the contract does not require personal involvement of a party, his subsequent interdiction or death will not affect the validity of contract, and the quardian or the heirs, as the case may be, will have the right to perform it and to receive the consideration. (56)

In addition to cases where the contract expressly provides that it concerns " personal " services of a particular person, it is a matter of construction to decide whether it involves " personal skill and taste." the common law cases on the subject show that contracts to play piano (57), to paint a portrait (58), to write a book (59), or to act as solicitor (60) or consulting engineer (61) are examples of " personal " contracts. It seems that these contracts should be regarded as personal in character under Islamic law too.

2- Bankruptcy (iflās)

Bankruptcy is a ground for interdiction according to all schools of Islamic law. It has been categorized as a

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56) For details see sub-section 4 below
57) Robinson V. Davison (1871) L.R.6 EX. 269
58) Hall V. Wright (1859), E.B. & E. 746 , 749
59) Marshall V. Broadhurst (1831) I Tyr. 348 , 349
60) Whitehead V. Lord (1852) 7 EX. 691
61) Stubbs V. Holywell Rly. Co. (1867) L.R.2 EX. 311

" special " rather than a " general " type of interdiction or, to use the classification adopted by Allameh Hilli, it is an interdiction provided for safeguarding the interests of others, rather than the interests of the interdicted person himself. As a result, bankruptcy only affects those contracts which can be potentially detrimental to the benefits of others. Thus a bankrupt person, having the competence " to intend the creation of legal relations " (qasdi inshāè ʿaqd) may, unlike an insane or a minor without discretion, validly conclude contracts not involving such a potential prejudice, like a contract of service or marriage - subject perhaps to the approval by the creditors of the amount of the dower payable by the bankrupt man in this latter case. (62)

Muslim jurists have different views regarding the effect of bankruptcy on contracts involving a potential prejudice to the rights of creditors. According to some, such contracts are void ab initio. Others, however, maintain that any transaction by a bankrupt constitutes a foḍūli (unauthorized) transaction which is a nullity unless his creditors agree to it. (63)

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62) Hilli, Sharāʿi al-Islam, op. cit., Vol. II, P.P. 89-90
63) Shahid al-Thani, Masalik al-Afham, op. cit., Vol. II, P. 238, R.M. Khomeini, Tahrir al-Wasila, (n.p.: 3rd ed., A.H. 1397) Vol.II, P.18

This second view seems to be more in line with the general principle outlined earlier that the interdiction of bankrupts is not an inherent interdiction arising from incompetence to " intend the creation of legal relations ", but is only meant to safeguard the interests of creditors. It is for the same reason that a declaration of bequest by bankrupts is not <u>per se</u> invalid. The interests of creditors cannot be prejudiced either during the bankrupt's lifetime or after his death by any declaration of bequest he may make, as it is a general principle of Islamic law that bequests deal with solvent estates. They take effect from the point where funeral expenses and debts have been paid and net estate is available for succession.

In spite of the logic underlying the second approach, the Iranian law has, in Article 423 of the Commercial Code, adopted the first approach and provided that prejudicial contracts of a bankrupt are null and void. Similarly, Article 557 of the Commercial Code provides that contracts made by a bankrupt from the time his payments cease, shall be declared null and void with regard to all persons. The same article requires the contracting parties to restore to whom it may concern any sums or property they have received by virtue of the cancelled contracts.

It is noteworthy that in some cases the Commercial Code of Iran has had a volte-face and preferred the second approach, by holding that a contract made by the bankrupt is valid subject to the creditor's ratification. One example is the composition contract (qarārdād - e - erfāqi) made between a bankrupt merchant and his creditors. Such a contract can only be valid if agreed to by more than half of the creditors, representing a minimum of three quarters in value of the total amount of debts. (64)

As far as subsequent bankruptcy is concerned, Islamic law concurs with English law in holding that a contract is not terminated by the bankruptcy of one of the parties thereto. Both systems agree that a person only becomes bankrupt on the making of an appropriate decree by the court (65), and that his bankruptcy commences on the day on which such decree is given (66). It is from such date that the bankrupt's property vests in the liquidator and he steps in the shoes of the bankrupt in respect of all the latter's property and proprietary rights. (67)

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64) Article 480 of the Commercial Code of Iran

65) M.J. Mughniya, Fiqh-e-Tatbiqi (Tehran: Danishmand, 1366 sh.) P.456. According to Article 415 of the Commercial Code of Iran, a bankruptcy order may be issued upon the request of the merchant, his creditor, or the public prosecutor.

66) See: Insolvency Act, 1986, S. 278 (a), and Article 416 of the Commercial Code of Iran

67) See: Insolvency Act, 1986, S. 145 and Article 418 of the Commercial Code of Iran

It must be added that, according to the Commercial Code of Iran, the date on which the payment of a bankrupt's debts stops (tārikh-e-tawaqquf) is the starting point for his interdiction. The court must, therefore, specify such date in its decree if it precedes the decree (68). The result is that the transactions entered into by a bankrupt prior to the bankruptcy order, but after the date of " cessation of payment of debts ", may also be avoided.

Moreover, according to Article 424 of the Commercial Code, the liquidator or a creditor may even challenge a transaction entered into by the bankrupt prior to the "cessation of payments", on the grounds that the bankrupt entered into the transaction to avoid his liabilities, or to cause loss to his creditors, provided that the loss constituted more than one quarter of the value of the goods which formed the subject -matter of contract. Such a transaction can only be challenged within two years from the date of conclusion. This provision of the Commercial Code is similar to the position held by English law in which certain transactions entered into by a bankrupt prior to his bankruptcy can be challenged by his trustee. These are: (i) transactions at an undervalue, (ii) preferences, i.e., those transactions

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68) Article 416 of the Commercial Code

which have the effect of putting a creditor or a surety or a guarantor of his debts in a better position and (iii) extortionate credit transactions which contravene "ordinary principles of fair dealing". (69)

Although bankruptcy does not, in the normal circumstances, terminate prior contracts, it may, under Islamic law, confer certain rights on the other party. In the case of the sale of goods, for example, bankruptcy (or insolvency) of the buyer confers on the seller the right to withhold delivery. This is reflected in Article 363 of the Civil Code and Article 533 of the Commercial Code of Iran, and is similar to the approach adopted by English law in this respect (70). In cases where goods have already been delivered, but not paid for, the seller is entitled to restitution. This right is known as the " option of bankruptcy " (khiyār al-taflis) (71) and is reflected in Article 380 of the Civil Code. This means that, under Islamic law, an unpaid seller who has parted with the goods should, *a fortiori* have the right to stop them in transit, which is similar to the position held by English law. (72)

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69) See Sections 339-343 of the Insolvency Act, 1986
70) See: The Sale of Goods Act 1979, S. 41 (1)(c)
71) Shahid al-Thani, Sharh Lumah , op,cit., Vol III, p. 511,; Najafi, Jawahir al-Kalam, op. cit., Vol. XXV, PP. 295 et seq
72) See: The Sale of Goods Act, 1979, S 39 (1) (b)

In leases, the bankruptcy of a tenant does not put an end to the lease, unless there is an express provision to that effect. However, by applying the same option, Muslim jurists belive that the landlord has the right either to terminate the contract or to hold to it. In the latter case, he will be classified among the creditors. It appears that when the lease is held by a partnership having legal capacity, then the tenant's dissolution resulting from its bankruptcy must bring the lease to an end under Islamic law, as there is no longer a tenant (73). This is because, as was seen earlier, under Islamic law, juridical persons enjoy all rights and duties except those pertaining exclusively to the capacity of natural persons. (74)

The " option of bankruptcy " also applies to other contracts. So, although a contract of service is not determined by the employer's bankruptcy, the servant (ajir) is not bound to continue his service with a bankrupt employer. He can, instead, terminate his contract of service using his " option of bankruptcy " (khiyār al-taflis).

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73) For a similar solution see the Scots case of Walker V. M'Knight 1886, 13 R. 599
74) See footnote 2 above

3- Insolvency (*i'asār*)

The main difference between bankruptcy and personal insolvency under Islamic law is that the latter - unlike the former - does not depend on a court decree. A person may be regarded as insolvent (*mo'asar*) even if he has not been declared as such by the court. The other difference between the two concepts under Iranian law is that bankruptcy may be declared only against a merchant or commercial company. (75)

Insolvency usually does not discharge an obligor from his obligation under a contract. In certain cases, however, the insolvency of a contractor may have certain effects on his contract. For the sake of convenience, it is preferable to discuss the effect of insolvency in such cases under two separate headings: (i) insolvency at the time of formation of contract, and (ii) insolvency at the time of performance.

3-1- Insolvency at the Time of Formation of Contract

Under Islamic law, in certain contracts, the solvency

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75) See: Article 412 of the Commercial Code of Iran

(malā'at) of the obligor at the time of conclusion of contract is a necessary pre-requisite for its validity. Should this not be the case, the other party will have a right of termination if he can prove that he was unaware of insolvency when entering into the contract. Thus Articles 690 and 729 of the Civil Code provide that if in contracts of guarantee (ḍamān) or assignment (ḥawāla), the guarantor (ḍāmin) or assignee (muḥālun ʿalaih who assumes a third party's debt) is insolvent, the other party (the creditor) will have the right to terminate the contract, provided he can prove that he was unaware of insolvency when making the contract.

3-2- Insolvency at the Time of Performance

Insolvency of an obligor at the time of performance of a contract does not usually discharge him of his obligations. On certain occasions, however, the insolvency of an obligor at the time of performance of contract may either suspend or terminate his obligation. One example for " suspension " of an obligation under Islamic and Iranian law is the suspension of the obligation of an insolvent man to maintain his family, for as long as his insolvency lasts (76). In such a case,

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76) Article 1198 of the Civil Code

however, the wife of the insolvent man has been given the right to apply to the court for a divorce (77), which will be granted if the court is satisfied that the man is unable to fulfil his absolute duty of maintaining his wife.

An example for " discharge " of an obligation due to insolvency is the case of a declaration of bequest, where the testator becomes wholly or partially insolvent at a later stage. This is discussed here because, as mentioned earlier in this chapter, under Islamic law, a bequest or wasiyya is a " contractual " transfer of property (ʿaqd) postponed until after the death of the testator. As such it needs the offer of the testator (mūsi) and the acceptance of the legatee (mūsa lah). (78)

To start with, it has to be emphasized that the approach adopted by Islamic law on the issue of the personal right of an individual to determine the disposition of his property after his death, stands somewhere between the approach of the primary laws and that of modern law. In early societies, the individual was wholly subordinate to the group, and the law imposed compulsory rules of succession. By contrast, under most modern systems (for example English law) freedom of the

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77) Article 1129 of the Civil Code
78) Article 827 of the Civil Code

individual to determine the devolution of his property upon his death is recognised (79). According to Islamic law, on the other hand, the right of an individual to dispose of his property by will is recognised, but is restricted to one - third of his net assets (80). Only where the legal heirs (which include husband or wife and also blood relatives in accordance with rules describing priorities) are prepared to waive their right, will testamentary disposition in excess of this limit be operative. (81)

The origin of the one-third rule is to be found <u>inter alia</u> in the following report by the Prophet's companion S'ad ibn Abi Waqqas:

> The Prophet came to visit me in the year of the farewell pilgrimage when I was afflicted with a severe illness. I said to him: " O Prophet, you see how ill I am. I have property and no heir except my daughter. Shall I then give away two thirds of my property as alms? " He replied " No." I said " A half then? " He still said "No." I then asked " A third? " He replied : " A third. And a third is much. It is better that you leave your heirs rich than that you should leave them destitute, begging from their neighbours." (82)

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79) There are of course certain restrictions in English law. According to the Inheritance (Provisions for Family and Dependents) Act, 1975, the person must endeavour to make reasonable provision for his dependents.

80) Article 843 of the Civil Code

81) Article 843 of the Civil Code

82) Ibn Qudama, <u>Mughni,</u> op. cit., Vol. VI, PP. 1-4 Cited in Coulson, <u>Succession</u>, op. cit. P. 214

Although the one-third rule is common to all schools of Islamic law, they differ as to the time at which the valuation of net estate is to take place. The view accepted in shiʿi law (which in this respect is similar to the view held by Hanbali and Shāfiʿi Schools of Sunni law, but different from the view adopted by Māliki and Hanafi Schools) (83) is that the bequeathable third is to be calculated solely by reference to the value of the net estae <u>at the time of the testator's death</u>, on the ground that this is the time when the rights of the legal heirs mature. (84)

This leads us to the problem of impossibility of performance of a will, caused by an appreciation or depreciation in the value of the estate, or a change in the financial status of the testator, after a declaration of bequest has been made and prior to the testator's death.

In case of total insolvency of a testator, the declaration of bequest will become invalid and, thus, impossible of performance. On the other hand, in case of an increase in the value of bequeathed property or a decrease in the net value of the total assets of the testator (due to market fluctuation, misfortune from

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83) The proper time for calculation of the bequeathable third is, in Māliki law, the time of the Legatee's acceptance and, in Hanafi law, the time of the actual distribution of the estate. See: Coulson, <u>Succession</u>, op. cit., P. 236

84) See: Article 845 of the Civil Code

heaven - āfāt samāwiyya - etc.) the declaration of bequest will be regarded as " unauthorized " (*ultra vires*) to the extent that it exceeds the permitted limit of the discretionary transmission of property. Such a declaration of bequest may only be performed if ratified by legal heirs. (85)

One last point must be mentioned here. Under Sunni law, a testator is not permitted to make a bequest in favour of any of his legal heirs. This rule, according to them, is meant to prevent enmity which might arise among the heirs as a result of the preferential treatment of one of them by the deceased. As a result, any bequest in favour of a legal heir (even within the one - third limit) is not enforceable unless ratified by other heirs. The Shiʿis, however, do not recognise this limitation.

The difference between the two main schools of Islamic law in this respect arises from the fact that they each rely on a different version of a well-known statement of the Prophet on this issue. The Sunnis rely on a statement indicating : " No bequest in favour of a legal heir (lā wasiyya lil wārith). Whereas, the shiʿis claim that the most authentitic version of the Prophet's statement ends with the additional words: "except within

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85) Article 843 of the Civil Code

the (bequeathable) third." The result is that, under Sunni law, the prescribed share of a legal heir is the " maximum " that he or she can get after the deceased's death, whereas in Shi'i law it is the " minimum " that he or she can get in addition to what may be bequeathed to him / her.

4- Death

As was seen under sub-section 1-2 above, the death of either party to a revocable contract has the effect of bringing it to an end (86). In the more usual case of irrevocable contracts, on the other hand, the death of an obligor has no effect on the validity of contract, and does not free his estate from liability.

It must be noted, as a general rule, that under Islamic law rights and obligations survive against the heirs and may even accrue to a deceased's estate, as a result of events that happen after his death. For example, according to Ibn Qudama, the famous Hanbali jurist, if the deceased has set a snare during his lifetime, animals caught by it after his death belong to the estate. Conversely, the deceased's estate shall be liable in damages for injury caused to a person falling

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86) Article 954 of the Civil Code

on a well dug by the deceased during his lifetime. (87)

In contracts involving a " personal " element, i.e., in which some personal act of the debtor himself is required, his death brings the contract to an end, under both Islamic and English law. Examples of personal contracts include contracts made by a surgeon to operate on patients, or by an author to write a book (88). This position has been held by English law from an early period. In fact it has been suggested that if we go back far enough, the number of obligations which died with the person exceeds the number of those which survived against executors or heirs. (89)

Similarly, if a contract grants to one party rights which are expressly mentioned to be limited to him personally, it will come to an end on his death (90). Therefore, death of the person to be cared for will usually operate as a discharge.

It must not of course be assumed that because the obligation of the promisor is personal that of the

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87) Ibn Qudama, Mughni, op.cit., Vol. VI, P. 300 cited in Coulson, Succession, op. cit., P. 187

88) See the illustrations given by Bramwell B. in Jackson V. Union Marine Insurance Co. Ltd. 1874 L.R. 10 C.P. 125 at 145. Also see the American case of Stearns V. Blevins, 262 Mass 160 NE 417 Cited in S. Williston, A treatise on The Law of Contract, op. cit., P. 58

89) W.H. Page, " The Development of the Doctrine of Impossibility of Performance ", Vol. 18 (1919-20) Michigan Law Review, P. 591

90) Lobb V. Vasey Housing Auxiliary 1963 V.R. 239

promisee must also be personal. There is no reason to support this view in either Islamic or English law. For example, the death of a painter who undertakes to paint a portrait will make the contract impossible to perform and will, therefore, bring it to an end. But the death of one who has agreed to buy the painting will not free his estate from liability.

The rule that in contracts involving the element of delectus personae, the obligation does not transmit against the representatives of the deceased and the estate is not liable for non-performance is stated by Pollock C.B. in Hall V. Wright (91), who bases the rule on the existence of an implied condition in the contract:

> All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death. (92)

This can be contrasted with Marshall V. Broadhurst (93), where a person who had agreed to do certain work died before it was begun. It was held that the executors who had done the work using his materials might sue in that capacity for work and labour as well as

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91) 1858 E.B. & E. 746
92) At 793
93) (1831) 1 C. & J. 403. See also Werner V. Humphreys (1841) 2 M. & G. 853

for the value of the materials.

One last point is worth mentioning. Although death usually operates to affect contractual obligations in a negative sense, it may have the reverse effect of activating a contractual obligation in Islamic law. Thus a valid declaration or offer of bequest becomes binding only upon the death of the testator. Similarly, immediately upon the death (or bankruptcy) of a debtor all his debts mature. (94)

5- Illness (*maraḍ*)

Serious illness of an obligor (or a promisee) may determine personal contracts. It will do so if illness is so prolonged or of such a disabling character as to preclude performance. Thus in *Robinson* V. *Davison* (95), it was held that the illness of an eminent pianist excused him from performance of his obligation to give a concert on a fixed date. Also in the case of *Marshall* v. *Harland & Wolff Ltd.* (96), the factors which should be taken into account in assessing whether a contract of employment has been frustrated by the long term absence

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94) Shahid, *Lumah*, op. cit, Vol. I, P. 242; Article 421 of the Commercial Code of Iran.
95) (1871) L.R.6 EX. 269
96) (1972) IRLR 90

due to illness of the employee were discussed (97). Under Islamic law, too, the Quranic verse " God charges no soul save to its capacity (98) " can be said to support a discharge of obligation due to illness.

On the other hand, if the obligation is not personal, the obligor's illness will not bring it to an end. In such cases he is expected to arrange for performance even by appointing a representative, if necessary. Whether the obligation is personal or not is a question that must be determined by interpretation of the contract in the light of all the relevant circumstances, including custom and usage (99). In case of continuous performances, a temporary illness, which does not prevent substantial performance, does not discharge the promisor, except insofar as his performance is prevented by his illness. (100)

A question arises here: In contracts of service (for example, contracts of employment), does the well-founded

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97) Such factors being the terms of the contract, the length and nature of the employment, the length of service of the employee and the nature of the illness. See also the case of <u>Spencer</u> V. <u>Paragon Wallpapers</u> <u>Limited</u> (1976) IRLR 373, decided by The Employment Appeal Tribunal (EAT)

98) Verse 286/II

99) See also sub-section 1-2 above

100) As to what period of time should elapse before a continuous illness can be said to have brought a contract to an end, see chapter II above, sub-section 10, on temporary impossibility.

fear of death or serious illness or other dangers to life or health also serve as an excuse? It has been suggested that: " ... Contracts of employment cannot be frustrated by the risk of an employee's health deteriorating, since frustration results from an event and not by the risk of it occurring." (101) (emphasis added). It may be argued, however, that the frustrating event in such cases is not the illness itself, but the conditions creating the risk of its occurrence as, for example , epidemic of a disease in the place of performance of a contract. And it is the " existence " of these conditions that frustrates a contract and not merely the " risk " of the occurrence of a future event. In these conditions, the promisor must be excused from his obligation, " for the law will not compel a man to venture his life (102) ", unless such risk-taking is part of his obligation, as is usually the case with doctors and nurses. Similarly, an acrobat is not discharged by the fact that his performance involves risks of injury, unless such risks are so extraordinary

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101) K.E. Lindgren et al, Contract Law in Australia (Sidney: Butterwoths, 1986) P. 20

102) S. Williston, op. cit., P. 61. See also Verse 286/II of the Quran mentioned earlier. It is noteworthy that the American Restatement of the Law of Contracts also treats reasonable apprehension of impossibility in the same way as impossibility. The Restatement, further, acknowledges that " where the threatened consequences relate to land or goods, freedom from duty is less readily obtained than where the threat is to life or health. "

as not to have been reasonably in contemplation when the contract was made.

It must be added that even dangers to the life and health of third persons, who are not parties to the contract, may discharge a contractual obligation. A driver may be discharged if performance of his obligation to drive a vehicle will endanger the lives of his passengers, even if the latter are not parties to his contract. Whether or not he is so discharged, however, is a matter of degree depending on how serious the danger is and how great is the probability that it would materialise if the contract is performed.

The Civil Code (of Iran) does not take a clear position on this last point, but it has been suggested by some eminent Iranian writers that the existence of such conditions shall bring the contract to an end and shall discharge the obligor from his obligation. (103) Similarly, some famous Muslim jurists have expressly provided that a contract to rent a house or a contract of agricultural partnership (mozāraʻa) may be brought to an end by the epidemic of a disease in the region where the house or the land is located (104). This is certainly in

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103) N. Katoozian, Huquq-e-Madani (Tehran: Bahnashr, 1368 sh.), Vol. IV, P. 211, S.H. Emami, Huquq-e-Madani, oP.cit., Vol. II, P. 85

104) M.T. Hakim, Mustamsak al-Urwat al-Wuthqa (Beirut: Ihia al-Tarath al-Arabi, 3rd ed., A.H. 1392) Vol. XII, P. 58

line with the requirements of the principle of " no undue loss " (lā ḍarar), which will be discussed in more detail in chapter IV below.

Death Sickness (maraḍ al-mawt)

Under Islamic law, the dispositions during death sickness, even of a dying person whose rational appreciation or legal capacity is not impaired, are interdicted to protect the interests of the person's creditors or heirs. Death sickness has been defined as " a sickness where in the majority of cases death is imminent (105) ", or as " circumstances in which death comes as no surprise (106) ", provided that death occurs before the expiration of one year by reason of such illness. It is interesting to note that a minority of jurists have extended the interdiction to all cases causing reasonable grounds for apprehending death, such as where a person is imprisoned for murder (which is punishable by death-as retaliation or qiṣās-under Islamic law) or is fighting in the battle front. (107)

Considerable divergency exists among the different

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105) Majella, Article 1595
106) al-Sawi, Bulghat al-Salik (Cairo, 1952) Vol. II, P. 144 Cited in Coulson, Succession, op.cit., P. 262
107) al-Sawi, op. cit., P.144

schools of Islamic law on the extent of interdiction imposed on dying persons. According to the majority view in shi'i law, the interdiction extends to all gifts and other types of gratuitous transactions made by the dying person, such as pious endowment (waqf), acquittance of a debtor (ibra'), amicable settlement (solh) etc. Even a sale can be challenged on the ground that it was a disguised gift, because the price received by the dying person (as a seller) or paid by him (as a buyer) was greatly below or in excess of the true value. If the person who contracted with the deceased fails to prove that the consideration was reasonable, the contract will be regarded as a mohābāt transaction, i.e., one in which part of the consideration was waived or released. In such a case, the amount overpaid or not received by the deceased, as the case may be, shall be regarded as a bequest and subject to the one-third rule. Thus if the amount exceeds one third of the person's net assets, the transaction will be regarded as unauthorized (*ultra vires*) to the extent of such an excess. The contract will therefore be impossible to perform, unless ratified by the legal heirs. (108)

The Civil Code (of Iran) has not accepted the

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108) Shahid, Lum'ah, op. cit. Vol. I, P. 258; Ibn Qudama, Mughni, op. cit. Vol. VI, P. 491

majority view in shiʿi law in its full extent. It only refers to death-sickness in Article 944 whereby - in line with the view adopted by all the schools of Islamic law, with the exception of the Shāfiʿi School - it provides that a wife's right to inherit from her husband is not extinguished if she is divorced during the husband's death-sickness, and the husband dies by reason of such illness within one year from the date of divorce, provided that she does not remarry within that period.

6- Inability (ʿajz)

This section is closely related to section 7 of Chapter II entitled " impossible Act ". The difference between the two, however, is that in Chapter II we were dealing with cases of absolute or " objective " impossibility. Here, on the other hand, we deal will relative or " subjective " impossibility.

The difference between objective and subjective impossibility is the difference between " the thing cannot be done " and " I cannot do it ": " All the king's horses and all the king's men cannot put Humpty Dumpty together again " (109). Even the Creator was

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109) A.L. Corbin, Corbin on Contracts (West Publishing Co, 1962) P. 337

thought to be unable to make a two year colt in a minute (110). On the other hand, subjective impossibility refers to the inability of the promisor to fulfil his obligation for causes personal to him only, such as that he does not have sufficient funds or necessary experience for carrying out the obligation.

It has been suggested that the rules of frustration in traditional Islamic law are so liberal that almost any kind of subjective impossibility can excuse. Coulson observes:

> ... either party to a contract of hire of premises may revoke the contract because of a changing in personal circumstances - the owner, for example, because he incurs a debt which he can pay only by the sale of the premises : or the renter because, for example, he becomes bankrupt and leaves the market, or wishes to undertake a journey, or changes his profession or craft. (111)

This statement, however, is no less than saying that contracts lack any binding effect in Islamic law. The examples given are so broad and may include so many different situations that no contractor can ever be even relatively sure that the other party will keep his

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110) See Totten V. Houghton, 2 S.W. 2d 530 (Tex. Civ. App. 1928) concerning a contract to construct a book case four feet wide and to install it between two windows that were 18 inches apart, cited in Corbin, op. cit., p. 337

111) Coulson, Commerscial Law , op. cit., P.85.See also Rayner, op. cit. P. 260

promise. In fact the statement is not supported by any principle of Shari'a law and is contrary to the requirements of such Quranic verses, as Verse I/V, which orders people to honour their contracts, and the statement of the Prophet indicating that Muslims must keep their promises (al-Muslimūn inda shurūtihim). It is on the basis of such legal injunctions that Shaibani, the famous Hanafi jurist, says that a tailor cannot terminate a contract of employment made with his assistant, on the ground that he (the tailor) indends to change his profession (112). Similarly, it has been said by some contemporary fuqahā (Muslim jurists) that a contract to hire a car will not be affected by the mere fact that the hirer becomes ill and, therefore, unable to use the car on the relevant date. (113) So it seems that the above - mentioned writers have made an error in extending the overall subjective approach which, as was seen in chapter I, has been adopted by Islamic law when dealing with the issue of " formation " of contract to the stage where the issue of " continuation " and " performance " of the contract is under consideration. This " analogy " is not justified. The reasons mentioned above make it clear that *after* the contract has been properly concluded between the parties, then Islamic law treats it on an

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112) M. Shaibani, al-Jami al-Saghir (Cairo, n.d.), P. 129
113) See: S.H. Emami, Huquq e Madani, op. cit., Vol. II, P. 18

objective basis except in the exceptional case of revocable (jāiz) contracts discussed earlier in this chapter.

It follows that subjective impossibility cannot discharge a contractor. The only exception in irrevocable contracts is where the contract is such that it requires the contractor's personal performance. In such cases, the act to be done is bound up with the person who is to do it and, therefore, the inability of the promisor involves not only subjective impossibility, but objective as well. Thus a teacher's (or a pupil's) long term imprisonment will discharge the teacher of an obligation to teach his pupil.

There have been suggestions that in English law a promisor's imprisonment cannot operate as a frustrating event. In Hare V. Murphy Brothers Ltd. (114), concerning dismissal of an employer imprisoned for unlawful wounding, the National Industrial Relations Court observed that the rule that a person who is responsible for the frustrating event will not be able to rely on it as an excuse for non-performance, prevents the operation of the doctrine of frustration in the imprisonment situation. The court regarded this as analogous to self-induced frustration. In the Court of Appeal, however, Lord Denning rejected this stance and held that in such a

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114) (1974) IRLR 342

situation there is no connection between imprisonment and the contract of employment and, therefore, he said, imprisonment can be a frustrating event. He observed that this situation is not different from that of a promisor who is " grievously injured in a road accident - due to his own fault " (115), or that of " a prima donna who thoughtlessly sits in a draught and loses her voice" (116). In both cases the contract is terminated and the obligor is discharged of his obligation. One may add that, in such cases, non-performance is not due to a " direct " fault of the obligor. The intervening event (being imprisonment, accident, illness etc.) is so strong as to overshadow the obligor's fault and to relieve him of his " personal " obligation under the contract.

In spite of Lord Denning's view and similar views expressed, as *obiter dictum*, by Lords Simon and Russell in the case of Joseph Constantine (117), it has been suggested by some English lawyers that, generally, negligence should exclude frustration (118). Negligence

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115) [1974] 3 All E.R. 940; (1974) I.C.R. 603
116) [1974] 3 ALL E.R. 940 at P. 942 Here Lord Denning was referring to Lord Russell's *obiter dictum* in Joseph Constantine Steamship Ltd. V. Imperial Smelting Corporation Ltd. [1942] A.C. 154 and took it to mean that there was frustration of prima donna's contract.
117) Sup. cit.
118) See, for example, G.H. Treitel, The Law of Contract (London: Stevens & Sons, 8th ed., 1991), P. 804

in this context has been defined in such a way as to include " an event which the party relying on it had means and opportunity to prevent but nevertheless caused or permitted to come about ". (119)

The position of American Courts is to regard imprisonment as a frustrating event. In the case of Hughes V. Wamsuta Mills (120) a contract of employment provided that the employee should give notice before leaving and for a forfeiture of his wages if he did not do so. When the employee left without giving notice, because of his conviction for a criminal offence, the court did not allow the forfeiture of his wages, referring to the fact that the commission of crime, although voluntary, was not a direct cause, but only a remote cause, of his leaving without notice.

7- Refusal (imtinā)

In some cases, the promisor may refuse to fulfil his obligation under the contract and he may have to be forced by the court to do so. What may surprise an English lawyer is that this subject is discussed in a

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119) The Super Servant Two [1990] 1 LLoyd's Rep. 1 at P. 10

120) 93 Mass. (11 Allen) 210 (1865) cited in A.L. Corbin, op. cit. P. 453

thesis written on " impossibility of performance. " The explanation is probably to be found in the generalisation made in the subject of this thesis to cover all cases where exact performance of a contract is or becomes " impossible ", irrespective of whether or not this results in the discharge of the promisor, as was explained in chapter I above. An example of such cases is where A sells his car to B, but then fails to deliver it. In this situation the court may be asked to force the seller to deliver the car. Article 376 of the Civil Code provides in this respect: " In case of delay in delivery of the goods sold or of their price, the party in default shall be forced to make delivery. " Similarly, Article 42 of " the Enforcement of Civil Judgments Act ", 1977 provides: " If the object of judgment concerns a specific property which can be delivered to the winning party, the enforcement officer will take possession of it and hand it over to him. "

The common law rarely permits the issuance of an order to perform a contract, as it is usually believed that damages would normally be adequate to compensate. Nevertheless, there are two common devices created by Courts of Equity by which a court may compel performance: An order for specific performance insists that the party should complete his contractual obligations. An

injunction, on the other hand, normally orders a party to refrain from breach of his obligations. (This is compared with Article 237 of the Civil Code regarding the power of the court to order specific performance or an injunction). Specific performance in the contract of sale has been recognised by Section 52 (1) of the Sale of Goods Act, 1979, which is similar to Article 376 of the Civil Code (of Iran) mentioned earlier. Section 52(1) provides as follows:

> In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

There may, of course, be cases in which compulsory performance is impossible. A surgeon or painter cannot be physically forced to operate on a patient or to paint a portrait. And even if he is so forced, the result will almost certainly not be satisfactory to the promisee. In such cases, other alternatives have been provided. According to Article 238 of the Civil Code, where the subject-matter of contract is an act and it is impossible to force the obligor to perform the act, the court may arrange for its performance by some other person at the

expense of the person at fault (121). If the act cannot be performed except by the promisor himself, the court will, in its judgment, specify an amount which must be paid by the promisor to the other party, for each day of delay in performance (Article 729 of the Civil Procedure Code of Iran). This is meant to be a deterrent to the promisor encouraging him to perform.

From the provisions of Article 730, which authorizes the court to revise the amount that it has previously determined as being payable by the recalcitrant promisor, it can be inferred that such amount is not necessarily equal to the actual damage caused to the promisee as a result of the delay in performance, and may be higher or lower than that. Exemplary damages, however, are not common in the Iranian courts.

The court has even the power, according to some Muslim jurists, to imprison a recalcitrant party who, in spite of his ability, refuses to perform, until he is prepared to fulfil his obligation. Thus Hilli in Sharāʿi al-Islam says that a surety may be imprisoned until he is prepared either to bring the principal to the court or to pay his debt (122). This power has not been recognised under Iranian law except in a few situations. The most notable

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121) See also Article 1172 of the Civil Code
122) Hilli, Sharāʿi al-Islam, op. cit., Vol. II, P. 115

is Article 139 of " The Discretionary Punishments Act ", 1983 (123), which provides that a convicted offender will be sent to prison if he refuses to pay the fine. Apart from this provision, Iranian law has abolished imprisonment for debt since 1973. The abolition is supported by the injunction contained in the Quranic Verse 280/II requiring people to let a debtor, who is in difficulties, have respite till things get easier for him. (124)

What was said above regarding the power of the Muslim judge to impose fines or to send a recalcitrant party to prison is, broadly speaking, shared by the English judge who has the same power against an obligor who refuses to carry out an order for specific performance or for injunction.

There may be cases, however, in which none of the above-mentioned alternatives is available, as, for example, where a pianist refuses to perform a concert on the agreed date. In such cases the contract will come to an automatic end upon his refusal. He will not be

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123) Criminal punishments in Islamic law are divided into three main categories. Prescribed Punishments (hudūd) are those expressly prescribed either in the Quran or by the Prophet for the most serious crimes. Retaliation (qisās) is the appropriate punishment for murder and bodily harms. Discretionary Punishments (t'azirāt) are punishments which can be prescribed by the judge or the ruling authority for those crimes with no fixed penalty in Shari'a.

124) See: Hilli, Sharā'i al-Islam, op. cit., Vol. II, P. 93

required to perform on any other day, and the other party will also be discharged from his obligations, including the obligation for payment. The pianist will, of course, be liable in damages for breach. Similarly, according to Article 1191 of the Civil Code, if an executor appointed in the will refuses to take care of the ward or his property, he shall be discharged.

In cases where impossibility is caused by the act of the promisee, as when an apprentice willfully refuses to be taught, this shall result in the discharge of the other party but, again, such a discharge results from breach of the contract by the promisee who, from another point of view, is a promisor vis-a-vis the other party. As Lord Blackburn said in Mackay V. Dick (125):

> Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of the thing. (126)

The other party will, therefore, not only be discharged but also entitled to appropriate remedies.

Another example of the refusal by a promisee is the refusal of a purchaser to take delivery of the goods. In such cases, under Islamic law, the seller can deliver the

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125) 6 App Cas 251
126) at 263

goods to the relevant authority (hākim)(127). From article 387 of the Civil Code, it may be inferred that the same solution is accepted in the Iranian law. The said Article reads as follows:

> If the object sold perishes before delivery, even without fault or neglect of the seller, the sale will be cancelled and the consideration restored, unless the seller has already applied to the judge or his substitute to give delivery, in which case the loss shall be borne by the buyer. (emphasis added) (128)

The same rule shall apply in cases where the buyer refuses to take delivery and it is not possible for the seller to refer to the judge or to any other authority for delivering the goods. (129)

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127) Najafi, Jawahir al-Kalam, op.cit.,Vol. XXIII, P.116, Shahid al-Thani, Sharh Lumah, op.cit., Vol. III, P. 520

128) This can be compared with Section 37(1) of the Sale of Goods Act, 1979 which reads as follows:
" When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery , and also for a reasonable charge for the care and custody of the goods. "

129) Najafi, Jawahir al-Kalam, op. cit., Vol. XXIII, P. 118, Shahid al-Thani, Masalik al-Afham, op.cit., Vol. I, P. 215

CHAPTER IV

IMPOSSIBILITY DUE TO EXTERNAL FACTORS: FRUSTRATION

Although the concept of frustration has been discussed in cases such as Paradine V. Jane in 1674 and Taylor V. Caldwell in 1863, the word itself is said to derive from an opinion of Baron Bramwell in 1874 (1), and has ever since been used in a variety of senses. In this Chapter, the term has been used to encompass situations where although literally performance is possible, the promisor may, nevertheless, be discharged from his contractual obligation. There are three types of situation which might cause frustration of contract in this sense. The three types resemble each other in that none is concerned

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1) Jackson V. Union Marine Insurance Co. (1874) L.R. 10 C.P. 125 at P. 145

with cases in which performance has become literally impossible.

The clearest case for frustration in this sense arises when, after the contract is entered into, its performance becomes illegal. It is common to treat supervening illegality as an example of frustration because, in such cases, there is often no impossibility in fact. The promisor could still perform his obligation if he were willing to violate the law.

The second category of frustration comprehends situations where the contract may be both physically and legally capable of being performed, but it would be radically different performance from that contemplated by the parties. This has been referred to as " impracticability " , " economic frustration " or " commercial impossibility ". " impracticability " has been defined in the Restatement of Contracts as " extreme and unreasonable difficulty, expense, injury or loss. " (2)

The third type of frustration covers cases in which performance could take place, but its purpose has vanished. To this type, the term "frustration of purpose" or " Frustration of the adventure " has been given.

In the following sub-sections, we deal with each of these three categories separately.

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2) Restatement of Contracts Ss 454

1- Legal Impossibility

The topic of illegality was discussed in chapter I from the point of view of contracts invalid at the time of formation. The present concern is with supervening illegality, that is, cases where performance of the contract is legal at the time the contract is entered into, but it becomes illegal after formation and before the time for performance.

Legal impossibility is not based upon the implied will or intention of the parties (who may even wish to continue with their transaction in spite of illegality), but rests on the requirements of public policy, which was discussed in chapter I above. As a result, parties may contract out of discharge for impossibility, but not so out of illegality. Moreover, the court must raise the question of illegality at its own initiative and deny the plaintiff a remedy, even if the promisor does not plead the illegality. This is not done in other cases of supervening impossibility.

In English law, legal impossibility has since early times been recognised as an exception to the rule that contracts are absolute. In Brewster V. Kitchell, (3)

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3) (1691) 1 Salk. 198

Lord Holt C.J. laid down the rule:

> Where H. Covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: So if H. Covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. (4)

Similarly, in Baily V. De Crespigny (5), Hannen J., in delivering the judgment of the court, pointed out:

> The substantial question... is whether the defendant is discharged from his covenant by the subsequent Act of Parliament which put it out of his power to perform it. We are of opinion that he is so discharged on the principle expressed in the maxim: Lex non cogit impossibilia. (6)

supervening illegality encompasses two separate situations: Alteration in the law and alteration in the operation of the law.

1-1- Alteration In The Law

A subsequent law may actually forbid performance of the contract, as when dealing in a particular commodity

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4) Cited in R.G.McElroy, Impossibility of Performance (Cambridge University Press, 1941) P. 33
5) (1869) 4 Q.B. 180
6) at P. 185. See also Atkinson V. Ritchie (1809) 10 East 530 at 534 -535

is prohibited by the law (7), or, where the particular subject - matter of contract is confiscated by an order of the relevant authorities (8). In such cases, a contract for sale or export of that commodity is avoided. The law may sometimes alter the conditions which are essential in the contracting parties, as when a new Act of Parliament increases the minimum age of employment, in which case, an existing contract of employment will come to an end if the employee is below the prescribed age. This is in line with an Islamic law rule which puts legal impossibility on a par with logical (or physical) impossibility : al-mamnū sharʿan kal-mamnū ʿaqlan.

There may be cases in which an alteration in the law affects only part of an existing contract. In such situations only that part will be avoided. If, for example, A rents three houses to B in accordance with one contract of lease, and a subsequent law prohibits the rent of two of them, the contract will be avoided in respect of the two houses, but remains valid in respect of the third, and the rent will be reduced

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7) See: Anglo Russian Merchant Traders and John Batt Co. Ltd. [1917] 2 K.B. 679

8) See: Bank Line Ltd. V. Capel (A.) & Co. [1919] A.C. 435. This can be contrasted with F.A. Tamplin Steamship Co. Ltd. V. Anglo Mexican Petroleum Products Co. Ltd. [1916] 2 AC 397, in which , the House of Lords held that the contract between the parties continued, as requisition of the ship at issue was not of sufficient duration to make it unreasonable for the parties to go on.

proportionately. The lessee, however, has a right of termination under Islamic law by using his option of discrepancy (9). Where the contract is not divisible, it will come to a complete end if performance of part of it becomes illegal. An example is when A undertakes to sell a house to B and a subsequent law prohibits any dealings in the land on which the house is located.

The notion of supervening illegality is closely related to the concept of tabaddul-e-ijtihād (meaning, alteration of legal opinion), which has been discussed by traditional Shi'i jurists. To understand this concept, one has to bear in mind the fact that a Muslim, in discharging his religious duties, such as daily prayers (salāt), fasting (sawm), pilgrimage to Mecca (hajj) etc. must follow the views of a competent jurist, (mujtahid) as to how these duties should be performed. Now suppose that A is a wealthy man who can afford the cost of a trip to Mecca (where the holiest Muslim shrine, the so-called House of God or Baitullāh, which is believed to have been built by Prophet Abraham, is located). Due to certain disability, he may not be able to perform his hajj and may, therefore, wish to delegate to B the duty of performing pilgrimage on his behalf. If,

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9) See Article 441 of the Civil Code, discussed earlier

after the conclusion of an agreement between A and B to this effect, the _mujtahid_ whom they follow prescribes new conditions for the validity of such an assignment, which the parties or either of them do not have, the agreement will be avoided and B shall be discharged of the duty to perform pilgrimage on A's behalf. A will, in turn, be discharged of the duty to pay the cost of the trip to B. For instance, the altered opinion (_ra'y_) of the _mujtahid_ may be that a person who has not already performed the pilgrimage for himself, is not allowed to undertake such an obligation on behalf of someone else. This shall result in the nullity of the agreement made between A and B if B does not meet the requirement.

Although the Civil Code (of Iran) does not contain a general provision regarding the effect of supervening illegality, an analysis of various provisions of the Code shows that such an event shall bring the contract to an end. Article 348, for example, declares the sale of prohibited commodities which may not lawfully constitute the object of a contract (such as public property or goods which offer no benefit, like vermin) to be null. This no doubt applies to cases of existing as well as subsequent illegality. Similarly, according to Article 551(4), a contract of dormant partnership (_muḍāraba_ or profit-sharing) is terminated _ipso facto_ if the trade

envisaged by the parties becomes " impossible ". This provision should also cover cases of " legal impossibility " which, under Islamic law, are on a par with " physical impossibility "(10). Another example is Article 131 of the Maritime Law of Iran which provides:

> If a ship cannot start her voyage due to an embargo on the trade with the destination port..., the charterparty shall be null and void, with the effect that neither party may claim any damages against the other.

The same approach has been adopted by the Iranian courts. In one case, in 1939, the Supreme Court, hearing an appeal from a decision of the Court of First Instance, concerning the status of an obligation to pay foreign currency in the light of subsequent legislation forbidding dealing in foreign currencies, held:

> If the obligation concerns payment of a certain amount in Lira (Pounds), and the court [of First Instance] in its judgment rules as follows: "non-performance of the obligation is due to the prohibition laid down by Foreign Exchange Act, and as long as the prohibition continues, the defendant's obligation in making payment in Pounds is unenforceable", such a judgment shall be legal and valid, because when the obligation is unenforceable, there will be no point in regarding it in existence.(11)

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10) See page 208 above
11) Judgment No: 1633 dated 1.10.1939 (1318.7.9 Iranian Calendar) First Division of the Supreme Court

It seems that when illegality is of a temporary nature,the contract will remain valid but suspended for a reasonable period of time. Thus Article 150 of the Maritime Law of Iran provides that if a ship cannot leave the port as a result of force majeure, the charterparty will remain valid for a reasonable period. Also Article 104 recognises a right of termination of the charterparty in case of an embargo on the trade with the destination port. Iranian lawyers believe that this Article, unlike Article 131 mentioned earlier, refers to cases where the embargo is expected to be of short duration.

1-2- Alteration In The Operation Of The Law

There may be cases in which the circumstances change in a way to make further performance of the contract illegal. The contract will then be avoided. For example, a jonob man (a man after seminal effusion and before taking full ablutions) or a menstruous woman (a woman during her menstrual cycle) is forbidden to enter into a mosque. Thus a contract of service concluded with a woman for her personal cleaning of a mosque on a certain date, will come to an automatic end if she happens to be in her period on that particular date. Similarly, should one of the parties to a contract of marriage become an idolator

(idol - worshipper) the marriage will be terminated by supervening prohibition, and the parties released of further duties towards each other. The reader must be reminded here that it is not at all irrelevant to speak of marriage in any work on the Islamic law of contract because, under Islamic law, marriage constitutes an ʿaqd or contract, manifested by the offer of the woman and acceptance of the man.

2- Impracticability or Economic Frustration

Every contract contains the risk of some event occurring which renders performance by one party more expensive or burdensome than he had contemplated. Many of these events are commonly foreseeable and in contemplation at the time the contract is made: Prices may rise or fall, a special currency may devaluate, insurance premiums may increase and general business depression may create financial difficulties. These ordinary business risks are thought to be insufficient grounds for excusing parties from performance of their obligations. In respect of these risks, losses simply lie where they fall. The contractor himself also understands that the risk of such difficulty and expense (even if

considerable) is for him to bear. However, after the formation of a contract, there may occur such unforeseeable events which disturb the very basis of the parties' contemplated estimates and, thereby, radically change the obligation. In such cases, although performance can hardly be said to have become impossible, it, nevertheless, would involve something materially different from what the parties originally contracted for: *Non haec foedera* veni: It was not this that I promised to do (12). In these situations, the theory of changed circumstances comes into play and the contract will be regarded as having been frustrated.

The doctrine of changed circumstances has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law. It is comparable to the clause rebus sic stantibus (13), which has found a widely recognised expression in Article 62 of the Vienna Convention on the Law of Treaties of 1969 (14), and has been defined by the International Law

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12) See the statement by Lord Radcliffe in Davis Contractors Ltd. V. Fareham UDA [1956] A.C. 696 at 729
13) The concept derives from the civilist maxim " *conventio omnis intelligitur rebus sic stantibus* " (Every contract is to be understood as being based on the assumption of things remaining as they were, that is, at the time of its conclusion).
14) Text of the Convention in: International Legal Materials, Vol. 8 at 679 et. seq.

Commission in the following way:

> When a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if (a) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty and (b) the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty. (15)

In fact , the post revolutionary government of Iran has, on several occasions, relied on this doctrine to justify its action in suspending or terminating contracts (particularly military contracts) concluded by the previous regime (16). The doctrine has also been occasionally invoked by the opposite parties for the same purpose. Examples can be found in the decisions of the Iran - U.S. Claims Tribunal set up in the Hague (composed of three chambers each having three arbitrators) following the hostage crisis in Tehran, and by virtue of an agreement made between the governments of Iran and the United States (The Claims Settlement

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15) International Law Commission of 1963, Yearbook of the I.L.C., 1963

16) See, for example, case number 7304 in the Arbitration Court of the International Chamber of Commerce, between Ministry of Defence of the Islamic Republic of Iran (as claimant) and the German Company Howaldtswerke-Deutsche werft AG (as respondent), concerning an agreement for manufacture and delivery of six submarines concluded in 1978. The present writer acted as a co-arbitrator in this case.

Declaration, known as the Algiers Declaration, 1981) to hear cases brought by one state or its nationals against the other. Article 5 of the Declaration refers to "change of circumstances", as one of the factors which must be taken into account by the Tribunal in making its decisions. According to the said Article:

> The Tribunal shall decide all cases on the basis of respect for Law, applying such choice of Law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and _changed circumstances_. (emphasis added)

One of the cases brought before the Tribunal was _Questech Inc_. V. _The Ministry of Defence of the Islamic Republic of Iran_ (17), which concerned a claim arising out of a contract that was part of a project (known as " IBEX ") to modernize and expand Iran's electronic intelligence gathering system. The claimant had to evaluate the planning and implementation of a training program. Iranian law was the law expressly chosen as applicable by the parties. The Tribunal, referring to Article 5 of the Claims Settlement Declaration, held:

> The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude

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17) Case No. 59, 9 Iran - United States Claims Tribunal Reports (Cambridge: Grotius Publications, 1985-II) P. 107

> of the new government and the new foreign policy especially towards the United States which had considerable support in large sections of the people, the drastically changed significance of highly sensitive military contracts as the present one, especially those to which United States companies were parties, are all factors that brought about such a change of circumstances as to give the respondent a right to terminate the contract... . The parties probably would not have entered into the contract had it been known that such fundamental changes would occur.(18)

As far as English law is concerned, there have been attempts to regard economic factors, such as inflation, devaluation, and price rises, as frustrating events. For example, in 1975, Lord Denning in Staffordshire Area Health Authority V. South Staffordshire Waterworks Co. (19), concerning supply of water by a waterworks company to a hospital at a fixed price specified in the contract made in 1919, held that the contract between the parties had been frustrated by inflation " outside the realm of their speculations altogether, or of any

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18) Award No: 191-59-1 at P. 123. See also: Sea Land Services, Inc. V. Iran (case No. 33, award No. 135-33-1, 20 June 1984, 6 Iran - U.S. C.T.R., 1984 - II, P. 149) particularly the dissenting opinion of H.M. Holtzmann at P. 177; Gould Marketing Inc. V. Ministry of Defence of the Islamic Republic of Iran (cases Nos. 136 -49/50-2, 6 Iran - U.s. C.T.R. 1984 - II, P. 273; Time Inc V. Iran case No. 166, award No. 139-166-2, 7 Iran-U.S. C.T.R. (1984-III) P. 9, the dissenting opinion by Shafeiei at P. 17

19) [1978] 3 All ER 769; [1978] 1 WLR. 1387

reasonable person sitting in their chairs " (20). The other members of the Court of Appeal, however, were reluctant to expand the doctrine in such a way.

In spite of these isolated attempts, the decisions of the English courts show that they are not prepared to hold a contract frustrated simply because the cost of performance to one party has risen sharply (21), unless this is related to an event which materially changes the "foundation" of a contract. The courts will always bear in mind that "the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains"(22). Thus in Tsakiroglu & Co. Ltd. V. Noblee Thorl GmbH (23), the House of Lords, considering the effect of the closure, in November 1956, of the Suez Canal on a contract, came to the conclusion that the contract was not frustrated, as shipment via the Cape of Good Hope was still possible: the freight, and perhaps insurance, would have been more expensive, but extra expense, in the eyes of the House, did not justify a finding of frustration, as long as shipment via the

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20) ER at 777, WLR at 1395
21) See: Wilson & Co. V. Tenants Ltd. [1917] 1. K.B. 208, cf. also Charlesworth V. Watson [1906] A.C. 14
22) Per Lord Roskill in Pioneer Shipping Ltd. V. BTP Tioxide Ltd. [1982] A.C. 724 at 752
23) [1962] A.C. 93

Cape was not commercially or fundamentally different from shipment via Suez. As per Lord Simonds: "an increase of expense is not a ground of frustration" (24). Similarly, in Davis Contractors Ltd. V. Fareham Urban District Council (25), concerning a contract to build seventy - eight houses in eight months, the House of Lords held that the contract was not frustrated and the contractor was not entitled to a sum in excess of the contract price, on a quantum meruit basis when , owing to unexpected circumstances, and through no fault of the parties, it turned out that it took twenty-two months to do the work. Although one member of the House (Lord Radcliffe) was prepared to show sympathy to the contractor, he added that " if that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable " (26). Also in the case of Amalgamated Investment and Property Co. Ltd. V. John Walker & Sons Ltd (27) it was held that the plaintiff developers, who had agreed to pay a considerable amount of money for an old warehouse, could not get out of their contract by the fact that the listing of the building, made a couple of days after the

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24) ibid. at P. 115
25) [1956] AC 696
26) ibid.
27) [1977] 1 WLR 164

conclusion of contract, had killed any redevelopment potential and caused substantial decrease in the market value of the property.

This approach is similar to the approach adopted by French civil courts. In one case, concerning a contract made in 1560 for irrigation of an orchard, the court held that, although over 300 years later the original price was so low that the company had to provide this service at a loss, this was nevertheless no ground for discharge of the promisor or adjustment of the contract terms. The court (*cour de cassation*) ruled:

> In no case, and however consonant with equity the decision might appear, are the courts empowered to take into consideration lapse of time or change of circumstances in order to modify a contract and to substitute new terms for terms which have been freely accepted by the contracting parties. (28)

Compared with French and English laws, the doctrine of frustration in German law is more liberal. The German courts, insisting on the requirement of good faith in

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28) De Gailittet V. Commune de Pelissane [1876] D.I. 193 Cited in A.D.M. Forte, " Economic Frustration of Commercial Contracts : A Comparative Analysis With Particular Reference to the United Kingdom ", The Juridical Review, 1986 PP. 1-24 at P.6; and Barry Nicholas, French Law of contract, op.cit., PP.202-203

contractual relations (29), and on equivalence of performance of contractual obligations, are prepared to regard contracts as frustrated following events such as inflation, price rises and, perhaps, even an increase in the cost of living. In 1923, the *Reichsgericht* held that payment by a mortgagor of the capital sum due plus interest in Deutch Marks was insufficient, and that the mortgagee had to be paid in a hard currency, as the value of mark had fallen considerably due to astronomical inflation after the First World War. (30)

In spite of the broad attitude of rejection of the idea of economic frustration by the English courts, it is possible to find a few cases supporting a view similar to that adopted in German law to the effect that unexpected difficulty or expense may approach such an extreme as to support a finding of frustration. For example, in the Davis Contractors case, cited earlier (31), in which the

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29) Article 242 of the German Civil Code, 1896 provides: " The debtor is obliged to perform in accordance with the requirements of good faith ". This is similar to Article 2 of the Swiss Civil Code, 1907 which requires a person to exercise his rights and fulfil his duties in accordance with the requirements of good faith. Similar provisions can be found in the laws of Greece, Japan, Turkey, Thailand, Venezuela, Lebanon and Portugal.

30) See: Forte, op. cit. PP. 8-9 and Rashba, " Debts in Collapsed Foreign Currencies ", 54 (1944) Yale Law Journal 1 (1944)

31) See P. 219 above

non-availability of labour and materials turned an eight months' contract into a tewnty two months' contract, although the House of Lords found no grounds for frustration, it, nevertheless, made it clear that if performance would involve something very different from what the parties contemplated, the contract might be frustrated. As per Lord Radcliffe:

> It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. (32)

Similarly, in British Movitonews Ltd. V. London and District Cinemas Ltd. (33), the House of Lords, after declaring the general rule that a turn of events which the parties did not at all anticipate, such as a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like does not in itself affect the bargain they have made, goes on to make it clear that "in a fundamentally different situation which has... unexpectedly emerged, the contract ceases to bind at that point because on its true construction it does not apply to the situation" (34). Also, in F.A. Tamplin Steamship Co.

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32) at P. 729
33) [1952] AC 166
34) ibid. at P. 168

Ltd. V. Anglo-Mexican Petroleum Co. Ltd. (35) it was held that the parties " should be excused if substantially the whole contract became impossible of performance, or in other words impracticable". (36)

However, there have been suggestions that economic factors cannot per se constitute frustration under English law. They will have to be linked to some primary frustrating event. An example of this is when the promisee's expenses greatly increase because of the collapse of a source of supply. (37)

In Islamic law, the contents of the theory of changed circumstances have been discussed under the title of negation of hardship (nafye ʿusr wa haraj) and its co-relative principle of "no unfair loss" (Lā ḍarara wa lā ḍirāra fil-Islam). ʿUsr or haraj means extreme harshness and ḍarar in this context means great loss. Accordingly, a contract may be avoided if its performance becomes extremely burdensome for the promisor. A famous jurist of Islamic law says : " a contract whose performance becomes so burdensome as to involve great loss may be terminated. "(38)

The negation of hardship rule is based upon various Quranic verses. For example Verse 6/V declares: " ... God

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35) [1916] 2 A.C. 397
36) ibid. per Lord Loreburn
37) See: G.H. Treitel; The Law of Contract (London: Stevens & sons, 8th ed., 1991) PP. 780-783
38) Ibn al-Hammam, Fath al-Qadir, (n.p., n.d.) vol. VII, P. 222

would not place a burden on you ... ". And Verse 78/XXII provides:" He hath chosen you and hath not laid upon you any hardship in religion... ". The principle of " no unfair loss " is derived from a decision of the Prophet in a famous case related from him in both Sunni and Shi'i laws with minor differences. The facts of the case, which happened in Medina, where the Prophet had established an Islamic government in the years A.D. 622-632, are as follows:

A man called Samorat ibn Jondab had a tree in a garden, the only entrance to which was through another's house. He frequently entered into the house, during day or night, without asking for permission, with the alleged purpose of going to the garden and irrigating his tree, and he ignored the objections of the owner. The man complained to Prophet Muhammad. The Prophet summoned Samora and recommended to him that he should ask for permission before entering into the house. Samora said objectionably: " How should I ask for permission, when I want to go to my own tree? " The Prophet even suggested that he may sell the tree at a higher price or exchange it for one or more trees somewhere else. The Prophet went as far as saying that if Samora was prepared to abandon the tree, he would instead be given a tree in Paradise,

as a reward for his good faith. When all these suggestions were rejected by the owner of the tree, the Prophet addressed him and said " you are a man who wants to cause loss " (innaka rajolun moḍārr), whereas " there shall be no unfair loss in Islam. " He then ordered for the tree to be taken out and given to Samora, so that he might put it wherever he wanted.(39)

The principle contained in this case is a corner - stone of Islamic law (40). It has frequently been invoked by traditional Muslim jurists to justify their views on unacceptability of causing undue losses or of abusing a right. Prohibition of hoarding (41), prohibition of causing a loss to another in order to avoid a loss to oneself, prohibition of building a house with a bathroom which causes such a great and unreasonable amount of smoke as to annoy the neighbours (42), prohibition of

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39) M.Y. Kulaini, Usul min al-Kafi (Tehran : Dar al-Kutub al-Islamiyya, 3rd ed., A.H. 1388) chapter on "loss", statement No.2; Ameli, Wasail al-Shi'a ila Tahsili Masail al-Shari'a (Beirut: Ihiaul-Tarath al-Arabi, A.H. 1388) Chapter XII, Section on " Cultivation of Waste Land".

40) The issue of ḍarar has also been referred to in some Quranic verses. See, for example, Verses 231/II, 234/II, 284/II, 2/IV and 7/LXV

41) See: Ibn Nujaim, al-Ashbah wal-Naza'ir, op. cit., P. 96

42) Zailai, Shrh Kanz al-Daqaiq, (n.p., n.d.) Vol. IV, P. 196; Abdurrahman Ibn al-Qasim, al-Mudawwanat al-Kobra, containing legal opinions of Mālik ibn Anas (Cairo: Afandi Publishers, A.H. 1323) Vol. XIV, P. 14

staying in public places, such as mosques or markets, for so long as to make it difficult for other potential users to enter, prohibition of taking ownership of pastures located around villages and used by the villagers to feed their animals (43), prohibition of someone with a contagious disease living among the healthy (44), prohibition of extravagent use of the water supply in a way that the right of other users is adversely affected (45), and prohibition of annoying the neighbours by placing odorous rubbish in one's property (46), are only a few examples reflecting the effect of the principle of " no unfair loss. "

The principle has also been reflected in the laws of Iran. According to Principle (Article) 40 of the 1979 Constitution of the Islamic Republic of Iran, " no one is entitled to exercise his rights in a way injurious to others or detrimental to public interests. " (47)

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43) Mirzaye Qumi, Jam'i al-Shatat (Tehran : Rizwan, n.d.) Chapter on " Cultivation of Waste Land ", the answer to question IV.
44) Fiqh us-Sunnah (Indianapolis: American Trust Publications, 1991) Vol. IV, P. 11
45) This is based on the judicial opinion (fatwā) of the late Ayatollah Khomeini published in the Persian daily *Ettelaat* on 9 October 1982
46) Majella, Article 1200
47) See also: Shahid al-Thani, Masalik al-Afham, op.cit., Vol. II, PP. 256-257 and Ibn Qudama, Mughni, op. cit., Vol. V, P. 453. This can be contrasted with Article 91 of Majella which provides that no one is responsible for losses that he may cause to others while exercising his rights. The same rule is contained in the Latin maxim: nemo damnum facit qui sui jure utitur

Similarly, Article 132 of the Civil Code provides : " A person cannot make use of his property in such a way as would necessarily involve a loss to the neighbour, except such use as is reasonable and is required to satisfy his needs or to prevent his loss "(48). This article limits the operation of the principle of taslit (absolute legal authority of an owner to deal with his property as he wishes), as contained in Article 30 of the Civil Code. In one case, the Higher Civil Court of Tehran (Dādgāh-e-Shahrestān) affirmed a judgment by the County Court (Dādgāh-e-Bakhsh) and held that the appellant was required to cover his small garden, since irrigation of the garden caused damage to the adjacent wall belonging to the neighbour, and since this was not counterbalanced by a greater interest, namely, satisfaction of the appellant's needs or the prevention of his loss, as required by the latter part of Article 132. (49)

Apart from the principle of " no unfair loss ", " the negation of hardship " rule has also been reflected in the laws of Iran. According to Article 1130 of the Civil Code (as amended in 1982) a wife may apply to the

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48) The principle of " no unfair loss " has also been reflected in some other articles of the Civil Code. See, for example, Articles 65,114,122,125,132,138, 139,159,591,592,594,600,833,944,945 and 1130

49) judgment 168/39. 27th Division of the Higher Civil Court of Tehran

court for divorce (talāq) if continuation of conjugal life causes " hardship ", beyond forbearance, for her. Also Article 9 of " The Landlord And Tenants Relations Act ", 1983 provides :

> If, due to shortage of housing, the court finds that evacuation of the leasehold property shall create hardship for the tenant, it may give a respite to him, unless it contrariwise causes the landlord's hardship.

Having considered the existence of the doctrine of changed circumstances in Islamic law and in the laws of Iran, we should proceed to discuss in more detail the consequences of subsequent hardship: Does it bring the contract to an end ipso facto, or does it only give a right of termination to the party who suffers loss as a result of change of circumstances?

To answer this question, one has to analyze the rule underlying the doctrine of changed circumstances in Islamic law. The judicial basis for this doctrine is the same requisite balance between the rights and duties of the parties, which motivates the option of lesion (the option of termination of the contract by an ignorant party when the two considerations are not equal in value, to the extent that it is not commonly ignorable). Thus, it is the same disturbance of economic equilibrium of the contract, or inadequacy of consideration, which brings

the doctrine of changed circumstances into play. In fact some jurists have discussed this subject under the title of " emerged lesion " (ghabn hādith). It follows that the same remedy available to the party who, as a result of inadequacy of consideration, has an "option of lesion" should be available to the party who suffers loss as a result of subsequent change of circumstances. Accordingly, he only has the right to avoid the contract, but he cannot ask for its re-adjustment (50). The other party, in turn, may not prevent the exercise of such a right by paying the differential price to the injured party (Article 421 of the Civil Code).

A corollary of basing the doctrine of changed circumstances on an " option of lesion " is that it may not be applied to contracts in which the option has no place, such as gratuitous contracts, for example, a donation with no return.

By what has been said so far, two main differences between the approaches of Islamic and English law towards

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50) Article 416 of the Civil Code, referring to the option of lesion, provides: " Either of the parties to a transaction if he suffered gross loss may, after being appraised of the loss, cancel the transaction". And Article 417 (amended in 1982) defines " gross loss " as a loss which is not ignorable according to common usage. Ibn Abidin limits the operation of this option to cases of fraud: Radd al-Mukhtar alal Durr al-Mukhtar (Cairo: Matbaa Bulaq, 3rd ed., A.H. 1286) Vol. IV PP. 188 & 208

the doctrine of changed circumstances are noticeable. Firstly, under English law, the application of the doctrine results in the coming to an end of a contract and, thereby, automatic discharge of the obligor. According to Islamic law, on the other hand, this is an unsuitable solution in these cases. Sometimes the promisor might prefer continuation rather than dissolution of the contract, notwithstanding even enormous difficulties. Hence, Islamic law gives him an option to cancel the contract if he so desires (51). The option should, however, be exercised promptly, by a contractor who was unaware of loss when he made the contract; otherwise, it will be extinguished under Article 420 of the Civil Code.

The difference between the two systems in this respect results from the fact that the judicial basis supporting the doctrine in each system is different from the other. In English law, material change of circumstances must destroy the " foundation " of a contract. When the foundation of a contract falls away, the contract falls away with it. Under Islamic law, on the other hand, a

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51) It is noteworthy that at least in one case a similar solution has been found in English law in holding that a contract made for an indefinite period [at all times hereafter] may have implied into it a power to end it on reasonable notice. See: the majority opinion in Staffordshire Area Health Authority V. South Staffordshire Waterworks Co. [1978] 3 All ER 769

contract remains valid even under changed circumstances because it has all the requirements of a valid contract (offer, acceptance, consideration or cause, intention to create legal relations etc.). The only problem with such a contract is the harshness of enforcing it in the new situation, in the sense that its performance may result in one party's enormous loss. So it is up to him to decide whether he wants to hold to the contract or to cancel it. In other words, he has the same option which is available to him in cases where the two considerations are not initially equal from the viewpoint of economic value.

It must be added that even by following the practice of certain Muslim jurists (52), in basing the doctrine on the " implied term " theory, one comes to the same conclusion that the party incurring loss has a right of termination. This is due to the fact that, under Islamic law, the party who benefits from an express or implied condition of the contract has a right of termination if the condition is not satisfied, as we saw in Chapter II above. (53)

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52) See, for example, Allameh Hilli, Tahrir al-Ahkam, (Mashhad: Toos Publishers, n.d.), Vol II, P. 50 and M. Faiz Kashani, Mafatih al-Sharai (Qum: A.H. 1401) Vol. II, P. 379

53) See chapter II, Section 9, on "Impossible Condition"

The second difference between the two systems is that Islamic law is more readily prepared to allow the application of the principle of changed circumstances. One should not, however, interpret this statement liberally and conclude that either contractor may revoke the contract because of a changing in his personal circumstances (54). It has even been suggested that " a contractor in a Muslim jurisdiction hired under a contract of service to dig a well may rescind the contract should he strike rock after the first few feet of digging " (55). One has to be cautious in accepting this statement unconditionally. In fact, Shaikh Tūsi, the famous Shi'i jurist, in his authoritative book of al-Mabsūt, gives the same example and comes to the opposite conclusion that such contractor is bound to perform his contract in spite of the emerged difficulty (56). Here it is worth emphasizing a general rule: One has to be careful in distinguishing between moral recommendations which may be contained in some of the traditions (statements) of the Prophet, on the one hand, and firm legal rules, on the other. The following narration from the Prophet by Mālik ibn Anas, the leader

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54) See, for example, the statement from N.J. Coulson quoted in chapter III, Section 6
55) S.E. Rayner, op. cit., P. 260
56) Shaikh Tūsi, Kitab al-Mabsūt, (Tehran: Heidari, n.d.) Vol III, P. 237

of the Māliki school, in the authoritative book of al-Muwatta, although containing a clear moral recommendation to the contrary, may be taken to show that mere proof of incurred loss or damage cannot affect the validity of a contract:

> Yahya related to me from Malik that Abur-Rijal Muhammad ibn Abd ar-Rahman heard his mother Amra bint abd ar - Rahman say, " A man bought the fruit of an enclosed orchard in the time of the Messenger of Allah, may Allah bless him and grant him peace, and he tended it while staying on the land. It became clear to him that there was going to be some loss. He asked the owner of the orchard to reduce the price for him or to revoke the sale, but the owner made an oath not to do so. The mother of the buyer went to the Messenger of Allah, may Allah bless him and grant him peace, and told him about it. The Messenger of Allah... said " By this oath he has sworn not to do good. " The owner of the orchard heard about that and went to the Messenger of Allah... and said, " Messenger of Allah, the choice is his." (57)

There is no doubt that in this case the Prophet only made a moral recommendation to the owner of the orchard to accept a proposal of iqāla (mutual cancellation) made to him by the other party, without questioning the validity of the contract or recognising a right of

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57) Mālik ibn Anas, Al-Muwatta, op. cit., P. 252

cancellation for the buyer, in spite of the fact that he had suffered a loss. Even when applying the maxim of " no unfair loss " (la darar), Muslim jurists are cautious to limit the meaning of the word darar to unfair and extra-ordinarily great losses (58). Usually, confrontation of rock while digging a well, does not meet such criteria. I would consider this event to be a quite likely event, rather than an unforeseen catastrophe. However, In the exceptional cases where such an event meets the aforesaid criteria, i.e., in cases where such a situation could not be anticipated beforehand, and may result in the disturbance of the economic equilibrium of the contract by causing great loss to the contractor, the latter will have a right of termination.

The decisions of certain Iranian courts also indicate that ordinary and anticipated losses, or losses merely judged on a subjective basis, do not affect the validity of a contract. In a relatively old case, the Higher Civil Court of Tehran (Dādgāh-e-Shahrestān) held that a contract for lease of a water -channel (qanāt) was not affected by the fact that the lessee was unable to gain the anticipated profit, due to the fact that the city had been pipelined after the formation of contract, and the

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58) See , for example, Article 1198 of Majella and the statement by Ibn al-Hammam (cited earlier at P. 223), both of which refer to " great loss ".

lessee had, as a result, lost most of his potential water-purchasers (59). In this respect reference may also be made to the statement quoted from Shaibāni, the famous Hanafi jurist, in Chapter III, to the effect that a tailor cannot terminate a contrat of employment made with his assistant, on the ground that he intends to change his profession.

2-1- Obligation to Pay Money

Islamic law concurs with English law in holding that a contract to pay money is always regarded as " absolute ". Thus revalorisation or devalorisation of a debt does not frustrate the contract or give the injured party any remedy. An agreement to the contrary would create the impression of paying usurious interest on money, which constitutes riba, and has been absolutely forbidden under

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59) Case No. 39-382, 27th Division of the Higher Civil Court of Tehran

Islamic law (60), in an attempt to fight the pre-Islamic practices of doubling and then redoubling the interest rates, thus, reducing the debtor to penury or even to enslavement for the period it took him to repay the outstanding debt (61). The same prohibition is believed to have existed in the ancient Egyptian, Babylonian, Greek and the Roman legislations, as well as in the Talmud and Bible. According to Bertrand Russell, "the law of nature was held to condemn usury" throughout the Middle Ages, but the ambit of the Christian and Jewish prohibitions declined in the Medieval era. (62)

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60) See: verses 275-6/II, 278-80/II and 130/III.Verse 275/II provides:" Those who devour usury will not stand except as he stands who has been driven to madness by the touch of Satan. That is because they say: trade is just like usury; whereas God has permitted trade and forbidden usury...". Verses 278-80/II provide:" O you who believe! Fear God and give up what remains (due to you) from usury if you are (true) believers. And if you do not, then take notice of war from God and His Apostle. If you repent, you shall have your principal (without interest). Deal not unjustly and you shall not be dealt with unjustly. And if the debtor is in difficulty, grant him time till it is easy for him to repay. But if you remit it by way of charity, that is best for you if only you knew ". Article 130/III provides: " O you who believe! Devour not usury, doubling and quadrupling (the sum lent), but fear god, that you may be successful. "

61) See: Hamurabi, Ss. 117,48, 115f., 118f. cited in Rayner, _op. cit._, P. 269

62) See: S.E. Rayner, _op_. _cit_., PP. 270-271, citing: T.P. McLaughlin, "The Teaching of the Canonists on Usury", I (1939) _Medieval Studies_, PP. 81-147 & III (1940) PP. 1-22; B.N. Nelson, _The Idea of Usury From Tribal Brotherhood to Universal Otherhood_ (Chicago: 1969); Betrand Russell, _History of Western Philosophy_, P. 601, and Talmud: Baba Mezi'â chpt.5, Exodus XXII: 25

As a result of the absolute prohibition of _ribā_ in Islamic law, Article (Principle) 49 of the post - Revolution Constitution of Iran refers to _riba_ as the prime example of unlawful means for gaining profit, and provides:

> The Government has the responsibility of confiscating all wealth originating from usury, usurpation, bribery, embezzlement, theft, gambling, misuse of endowments, misuse of government contracts and transactions, the sale of waste lands and other resources subject to public ownership, the operation of houses of ill-repute, and other illicit sources....

In the same direction, Article 650 of the Civil Code provides :"A debtor must return a thing similar to what he has received notwithstanding any subsequent appreciation or depreciation of value". Also, the Council of Guardians of the Constitution of the Islamic Republic of Iran (Composed of six Muslim jurists : _fuqahā_, and six lawyers, and created by virtue of Article (Principle) 91 of the 1979 Constitution, in order to examine the compatibility of the laws passed by the Consultative Assembly (_Majlis_) with the principles of Islamic law and provisions of the Constitution) declared on 25 October 1982 that late payment damages constitute _ribā_ and are inconsistent with principles of _Shari'a_ and may

not, therefore, be awarded by the courts. (63)

In line with Shari'a principles prohibiting ribā, the Iranian government started a process of Islamization of its banking system in 1980. This process resulted in the enactment of a law in 1983, entitled the " Non-Usurious Banking Transactions Act ". By virture of Article 21, the Iranian banks (which were all nationalised after the 1979 Revolution) are prohibited to enter into any transaction involving ribā. However, to encourage money depositors, the legal framework of muḍāraba is being used. Muḍāraba is a profit - sharing contract whereby one party provides the capital for the other party who trades with it and receives an agreed share of the profit. An important aspect of muḍāraba, as discussed in the classical treatises, is that it involves an element of risk. This applies to both the anticipated benefit and

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63) Published in the Official Gazzette No. 11316, dated 1st January 1984 (1362.10.11 Iranian Calendar). This can be contrasted with another opinion of the same Council in 1988, in which they declared that interest and late payment damages may be claimed from foreign companies or persons who do not regard payment of interest or late payment damages as unlawful under their own systems. See: The Official Gazzette No. 12515 dated 7 February 1988 (1366.11.18 Iranian calendar). See also Article 305 of the Kuwaiti Civil Code of 1980 which provides: " Any agreement providing for interest in respect of the use of an amount of money or delay in performance of an obligation shall be void ". Similarly, Article 110 of the Sudanese Civil Procedure Code of 1983 states: " under no circumstances shall the court give a judgment for the payment of interest."

the capital sum itself. Thus the loss of capital falls wholly upon the owner. This aspect could, of course, discourage potential investors. So the Iranian banks use the system of <u>shurūt</u> (special conditions) recognised in Islamic law, whereby the contracting parties may introduce agreed special terms as appendages to the nominate contract they are making. Using this device, they guarantee the return of the capital sum, as well as a fixed profit, which represents the minimum amount of return on investment. Any losses, therefore, are compensated by the bank, as the managing agent.

Before ending our discussion on <u>ribā</u> and Islamic banking, one last point must be noted. The establishment of Islamic banks, as alternatives to Western banking practices, does not start from Iran, but has a long history. Such banks come in various sizes and with different names, ranging from the tiny Dār al-Ulūm in the Northern India town of Deoband, through the " Nasser Social Bank " of Egypt, and the " Faisal Islamic Bank " of Sudan to the " Kuwait Finance House " and " the Islamic House of Funds ". This latter was registered in Bahamas in January 1981 with its operating headquarters

in Geneva (64). However, the use of "special conditions", or shurūt, as means to guarantee the capital sum and a minimum amount of profit,and thus encouraging the potential depositors to deposit their money in the bank, may be regarded as a contribution made by the Iranian banks to the notion of Islamic banking.

The only exception to the rule that a contract to pay money is always regarded as absolute is where a special currency collapses totally. Abu Hanifa, the leader of The Hanafi school, expresses the view that if, before payment is made, the money which is payable as consideration (thaman) in a contract of sale, becomes obsolete, due to circulation of new coins, the contract shall come to an end ipso facto. Two famous jurists of the same school (Abu Yusuf and Shaibani), however, believe that, in such cases, the contract will not come to an automatic end, but the seller will have a right of

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64) See: N.J. Coulson, Commercial Law. op. cit., PP.95-96 To this list, one must add the name of such bodies as the "Islamic Investment Company of the Gulf" in Egypt, and the "Free-Interest Funds" set up in various parts of Iran to give free-interest loans to the needy. These organisations, although not themselves Islamic banks, are based on the concept of prohibition of ribā. For this and many other details of Islamic banking see the two articles of Simon Procter: " Growing influence of Islamic Banks " and " How Islamic Banks Spread the Word " in the issues of October 19 and October 26, 1979 of *Financial Weekly* cited in Coulson, Commercial law, op.cit., P.95

rescission (65). The view held by Abu Hanifa seems more in line with general principles of shari'a that requires consideration to constitute mãl or property, i.e., something which can be held in use and be beneficial to the owner. An example of useless objects given by jurists is that of vermin (hasharāt). Another example can be an obsolete currency. Such contract must, therefore, fail as a result of failure of consideration. Moreover, because of the complete fruitlessness that emerges, collapse of legal money is analogous to destruction of the subject - matter of contract. It must, therefore, have the same effect which , as was seen in chapter II above, is to bring the contract to an end. Whereas, Abu Yusuf and Shaibani make an unjustifiable analogy between this situation and the cases in which the subject-matter of contract is defective and, as a result, come to the conclusion that the seller has a right to avoid the contract by exercising his " option of defect " (khiyār al-'aib).

2-2- Right of Adjustment

Before proceeding to the next section, a final

65) See. Wahbah Zuhaili, al-Fiqh al-Islami Wa Adillatih (Damascus: Dar al-Fikr, A.D. 1984) Vol. IV, P. 401; Wahbah Zuhaili, al-Fiqh al-Islami fi Uslubihil-Jadid (Damascus: Dar al-Fikr, n.d.) PP. 205 -206

question must be answered : Does the court have a power to intervene into a contract in an attempt to adjust it to the new circumstances, by imposing a just and reasonable solution? The House of Lords has rejected this in British Movitonews Ltd. V. London and District Cinemas Ltd (66). Thus English courts play a non-interventionist role with respect to contracts. They cannot modify an agreement by substituting new terms for those adopted by the parties. This attitude has been criticized for relegating the role of the courts to that of " the destroyer of bargains "; a role that they have always denied. It has been said that " By conceding a rule of economic frustration without admitting adjustment as an essential corollary, not only would one deny a basic tenet of... commercial law but also reject the reality of the market place as reflected in current business practice." (67)

In spite of lack of a general power of adjustment for the English courts, a limited power has been given to them for the adjustment of rights and liabilities of parties to frustrated contracts. According to S.1 (3) of The Law Reform (Frustrated Contracts) Act, 1943 either party can recover compensation for any valuable benefit

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66) [1952] A.C. 166
67) A.D.M. Forte, op. cit., P. 24

conferred upon the other party under the contract before the time of discharge, "as the court considers just, having regard to all the circumstances of the case." (68)

It is believed that Scots law is more readily prepared to recognise an absolving power for the court to impose a just and reasonable solution to the problem raised by the new circumstances. In this context reference has been made to the case of <u>Wilkie</u> V. <u>Bethune</u> (69) in which the court held that as a result of a dramatic rise in the price of potatoes, due to the failure of the crop in 1846, the servant was entitled to be paid not in potatoes (to which he was entitled according to the terms of his contract of employment), but to a sum which would purchase the equivalent of other food. (70)

Certain cases can be found in Islamic law supporting the idea of judicial adjustment. In one case, decided by Imam J'afar al-Sadiq, the sixth Shi'i Imam, over twelve centuries ago, a man had purchased a sick camel at 10 Dirhams (The name of the unit of silver currency of early Islam: <u>drachma</u>). Another man paid 2 Dirhams for its head and skin. When the camel improved in health and

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68) For more details see chapter V, Section 2-1
69) [1848] 11 D. 132
70) See, A.D.M Forte, <u>op. cit.</u>, P. 17 and W.W. McBryde, " Frustration of contract ", 1980 <u>Juridical Review</u> PP. 1-17 at P. 11. In German law also the principle of good faith (*Treu Und Glauben*) justifies adjustment of the contract terms in case of economic frustration. See A.D.M. Forte, <u>op. cit.</u>, P. 10

the owner decided not to slaughter it, the Imam ruled that in those " changed circumstances ", the other man was only entitled to a share in the animal, amounting to one fifth of its market price. He could not insist on having the animal slaughtered, as this would amount to unfair loss (ḍirār) to the other party. (71)

Similarly, the laws of Iran have, in particular cases, recognised a right of judicial adjustment for the court. For example, under Articles 272 and 652 of the Civil Code, the court can order a debt to be paid either at a date later than the original date, or by instalments. Another example is Article 4(2) of the " Civil Liability Act " 1960, which authorizes the court to reduce the amount of damages if it is satisfied that they have been incurred as a result of an ignorable negligence, and that full compensation would result in the obligor's severe hardship. According to some eminent Iranian lawyers, this provision also applies to contractual penalty clauses or specified liquidated damages which, according to Article 230 of the Civil Code (and as can be inferred from Articles 386 and 387 of the Commercial Code of Iran) may not, in normal circumstances, be interfered into by the

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71) Ameli, Wasāil al-Shi'a, op. cit., Chapter 12 on the " Sale of Animals "

court (72). (It must be added here that the distinction made by English law between " penalty " and " liquidated damages "(73), in the sense that only the latter is enforceable,has not been recognised in Islamic and Iranian law. It follows that under these latter systems, a penalty clause can be enforced in the same way as any other term of the contract)(74). Similarly, according to Article 9 of the " Landlord and Tenant Relations Act ", 1983 the court can award an extended time - limit to a lessee for evacuation of the leasehold property in certain circumstances. (75)

Whether it is possible to infer from these isolated cases a general power for the court to adjust commercial

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72) N.Katoozian, Huquq-e-Madani, op.cit., Vol III, P. 81. And for an opposite view see: R. Eskini, " Wajhe Eltzam dar Gharadadhaye Tejariye Beinolmelali ", Majalleye Huquqi No. 9, 1367, PP.43-88 at PP.68-69. Provisions of Article 230 of the Civil Code (of Iran) are similar to those of Article 1152 (al 1) of the French Civil Code which says: " when the agreement provides that the party who fails to perform shall pay a certain sum on account of damages, no larger or smaller sum can be awarded to the other party ".

73) For the differences between " penalty " and "liquidated damages" see the statement by Lord Dunedin in Dunlop Pneumatic Tyre Co., Ltd. V. New Garage and Motor Co. Ltd. [1915] A.C. 79. The prohibition on penalty clauses in English law is based on the principle of unjust enrichment: An innocent party should not be allowed to use another's breach as an opportunity for unfair enrichment.

74) French law also makes no distinction between *clause pénale* and liquidated damages. See Article 1152 mentioned in footnote 72 above. Similarly, Section 340 of the German Civil Code provides that, in case of non-performance, the creditor can ask for the " penalty " specified in the contrat.

75) See page 228 above

contracts under Islamic or Iranian law is extremely doubtful. Both the implied term theory and the option of lesion which, as was seen earlier in this chapter, may be regarded as the basis of the doctrine of changed circumstances in Islamic law, may only result in the creation of a right of termination for the injured party, and not a right to apply for the re-adjustment of contractual rights and duties.

In some cases, however, the court may interpret a contract in such a way as to arrive at a more equitable solution. In one Iranian case, a man sold a house and undertook to connect its electricity within one month from the date of contract. The contract contained an express penal clause which provided for payment of a penalty to the buyer if the obligation was not fulfilled. The seller duly applied to the relevant authorities for the connection of electricity, paid the required deposit and, in general, completed all the necessary formalities in time. Electricity, however, was only connected a few days later than the agreed date. The buyer applied to the court for a judgment in his favour for payment of the agreed penalty, which was so great as to approximate to the price paid for the house. A judgment in his favour would mean that he could keep the house and get back the price paid, as penalty! To avoid this undesirable

situation, which could result in unjust enrichment, the court interpreted the express obligation of the seller to " connect electricity " to mean an obligation to " apply for the connection of electricity ", and came to the conclusion that, as this obligation had been fulfilled in time, the buyer had to be denied a remedy. (76)

In the laws of some other Muslim countries, a much more active role is allotted to the courts to adjust the obligation to reasonable limits after taking into consideration the circumstances of each case, and the interests of both parties (77). This has been said to be a return to the type of equitable jurisdiction which judges enjoyed in the early years, as opposed to the later centuries, of Islam (78). However, for reasons

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76) Suit No. 106/35: 4th Division of Tehran County Court as affirmed in the Supreme Court. See also Suit No. 344/39 of the 27th Division of the Higher Civil Court of Tehran on appeal from Judgment No. 372 of the County Court dated 28.09.1960 (1339.06.06 Iranian Calendar)

77) See, for example, Article 146(2) of the Iraqi Civil Code, 1951; Article 147(2) of the Civil Code of Egypt, 1949; Article 148(2) of the Syrian Civil Code, 1949; Article 249 of the U.A.E Civil Code, 1987; Article 147(2) of the Libyan Civil Code, 1953; Article 198 of the Kuwaiti Civil Code, 1980 and Article 209 of the North Yemeni Civil Code, 1979. For non-Muslim countries see: Article 388 of the Greek Civil Code; Article 241 of the Hungarian Civil Code; Article 1487 of the Italian Civil Code and Article 6.5.3.11 of the Netherlands New Civil Code, 1838

78) N.J. Coulson, Commercial Law, op.cit., P. 92

outlined earlier, this may be a reflection of the influence of French law, particularly its théorie de l'imprevision, as developed by the Conseil d'Etat in cases involving administrative contracts (79), rather than a true representation of the classical Islamic law. It is for the same reason that Bahrain Contract Law of 1969, which has been subjected to the influence of English law, does not give the court the right to adjust contractual obligations. (80)

Apart from judicial adjustments, occasionally the legislature takes a hand in dealing with some particular problem. For example, in October 1979, a few months after the victory of the Islamic Revolution in Iran, " The Law on Reduction of the Rent of Residential Properties " was

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79) See, for example, Campagnie Générale Déclairage de Bordeaux V. Ville de Bordeaux, concerning a public utility contract made in 1904 to supply Bordeaux with gas and electricity, when the price of coal to the company almost quadrupled after the outbreak of the First World War in 1914. The *Conseil d'État* held that the increase in the price of coal had exceeded all reasonable expectations. The case was, therefore, remitted for assessment of an appropriate indemnity. See also the case mentioned in Chapter II, Section 3, regarding a long-term contract to take advertising space on an illuminated pillar. When the pillar had to be blacked out as a result of the outbreak of war in 1939, the *Cour d'appel* of Paris ordered a 20 Per cent reduction in the amount payable by the plaintiff. See: Barry Nicholas, French Law of Contract, op. cit, PP. 201 - 203 and A.D.M. Forte, " Economic frustration of Commercial Contracts ", op. cit., P.5

80) See Article 79 (b).Bahrain became a British Protected State in 1892 and continued to be a protected state until 15 August 1971.

passed, by virtue of which, the rent payable for such places under the contracts concluded between landlords and tenants was reduced twenty per cent. (cf. The French *Loi Failliot* of 1918 which was designed to provide relief from contracts made before the First World War, and the law of April 22, 1949 dealing with the situation after the Second World War). (81)

3- Frustration of Purpose

In certain cases, a contractor may not be able to attain the ultimate purpose for which he joins in the transaction, as a result of an unanticipated event. In such cases, performance is said to have been made impossible by the event, even though an analysis of the situation shows that performance has not really become impossible or even more difficult or expensive. To cases of this kind, the term " frustration of purpose " is commonly applied. The leading cases on this subject in English law are the series of cases arising out of the postponement of the coronation procession of

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81) See A.D.M. Forte, op. cit., P. 7

King Edward VII in June 1902 due to his illness (82). As a result of the cancellation, many arrangements to hire rooms and flats overlooking the announced route of the procession for the purpose of viewing it, came before the English courts. One of the most famous cases of the series was Krell V. Henry (83), in which the Court of Appeal took the view that the contract for letting a flat was subject to the unambiguous condition that procession would take place; a point reflected, *inter alia*, by the fact that the hire was for the days " but not for the nights " of 26 and 27 June 1902. Accordingly, the court came to the conclusion that the contract was frustrated. The basis for the decision was that the procession was "regarded by both contracting parties as the foundation of the contract " (84). The decision has also been justified on the ground that the contract was, on its true construction, not merely for the rent of the flat but to provide facilities for viewing the coronation processions. (85)

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82) Although the leading cases on the subject of frustration of purpose in English law are the coronation cases, it is believed, that the theory first appeared in 1874 in Jackson V. Union Marine Insurance Co. Ltd. [1874] L.R. 10 C.P. 125. See: Chitty on Contracts, op.cit., Vol. I, P. 1015
83) [1903] 2 K.B. 740
84) ibid. at P. 750
85) See: G.H. Treitel, The Law of Contract, op. cit., P. 784, citing Codelfa Construction Pty. Ltd. V. State Rail Authority of NSW (1982) 149 C.L.R. 337 , 358

As the decision of the court in Krell V. Henry shows, it is " disappearance of the foundation of the contract " which brings the doctrine of frustration into play. Thus in Herne Bay Steamship Co. V. Hutton (86), in which the plaintiff had let a ship to the defendant " for the purpose of viewing the naval review and for a day's cruise around the fleet ", the Court of Appeal refused to regard that contract as frustrated, as a result of the cancellation of the review, due to the king's illness. The basis of the judgment of the court was that the purpose of the charterer, " whether of seeing the naval review or of going round the fleet with a party of paying guests", did not lay the foundation of the contract within the authorities. (87)

Under Islamic law, frustration of a certain purpose does not affect the validity of contract if that purpose merely constituted the " motive " of one party in entering into the contract. Thus a contract for the purchase of a cage made by someone who intends to keep

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86) [1903] 2 K.B. 683

87) Per Vaughan Williams at P. 689. It is, of course, difficult to justify, on this basis, the difference between the decision in Herne Bay Steamship Co. V. Hutton with that of Krell V. Henry, because, in the former case, the purpose was expressly mentioned in the contract, while in Krell V. Henry it was only implied, whereas the court held the latter, but not the former, contract to have been frustrated. It is interesting to note that the same judges sat in both cases and that the judgments were given only eleven days apart. Yet neither case refers to the other.

his bird in it, shall be perfectly valid and binding even if, unknown to the purchaser, the bird escapes or dies before the contract is made (88). Frustration of a certain purpose avoids the contract only if this purpose was a "term" of the contract. It must be noted, however, that inferences drawn from surrounding circumstances, including previous course of dealing and the custom of a locality, or usage of a particular trade, may require that a term be "implied" into a contract. An implied term (called shart-e-binãei) has the same effect as an express term. Thus Article 225 of the Civil Code (of Iran), reflecting the view held by Muslim jurists (89), provides that a point which constitutes part of a contract according to custom and usage, shall be equivalent to an express term even if it is not expressly mentioned in the contract. Similarly, according to Article 220, the parties are not only bound by the express provisions of a contract but, also, by those consequences resulting from custom, usage or operation of law (90). Article 44 of the Ottoman Civil Code (Majella) also provides that a customary practice prevailing among businessmen is

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88) See: S.H. Emami, Huquq e Madani, op. cit., Vol. I, P. 200

89) See, for example, Ibn Qayyim al-Jawziya, Ilam al-Muwaqiin (Cairo: n.p., A.H. 1325) Vol. III, P. 2; M.H. Naeini Muniat al-Tālib (Tehran: Heidari, n.d.) Vol. I, P. 407

90) See also Articles 280, 332, 342, 344, 359, 521 and 632 of the Civil Code

treated on the same footing as an agreement between them (al-m'arūf bain al-tujjār kal-mashrūt bainahom).

The juridical basis for the validity of an implied term may be the " presumed " intention of the parties . Factors like the previous dealings between the parties can help showing this " presumed " intention. Mackinnon L.J. was referring to this kind of implied term when he said:

> Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, oh, of course! (91)

However , proof of presumed intention is not always necessary. Trade Usages implied by law are not incorporated into a contract on the assumption that they represent the wishes of the parties, in other words, that " the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages"(92). As Article 356 of the Civil Code (of Iran) provides,

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91) Shirlaw V. Southern Foundries (1926) Ltd. [1939]2 K.B. 206 at 227
92) Hutton V. Warren (1836) 1 M. & W. 466 at 475

anything which, according to custom and usage, forms part of the object sold, shall constitute part of the subject-matter of sale and belong to the purchaser, even if this has not been expressly mentioned in the contract, and <u>even if the parties are shown to have been unaware of the usage</u>. In such cases, therefore, implied terms do not depend on the actual or presumed intention of the parties , but on more general considerations, particularly, the legislature's desire to fill in gaps existing in some contracts. (93)

Under Islamic law, unlike English law, the effect of frustration of a purpose forming an express or implied term of the contract is not to bring the contract to an end, but to give the beneficiary a right of termination (94). Thus it has been suggested that if someone hires a camel for the purpose of going to Mecca to perform Pilgrimage (<u>hajj</u>) but, due to the closure of the roads, he is unable to travel, he can terminate the

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93) A provision like that of Article 356 of the Civil Code (of Iran) can be found, in more general terms, in Article 9 (2) of the UN Convention on Contracts for International Sale of Goods, 1980, which provides: " The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties know or *ought to have known* and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. "(italics added)

94) See chapter II, Section 9 on " impossible Condition "

contract (95). The same option is available to a person who hires an animal to take him to the holy city of Karbala (96) for the 15th of the lunar month of Sh'aban (the birthday of the Twelfth Shi'i Imam)(97), but it is later discovered that, for some reason, it is impossible for him to get to Karbala on the desired date. Such an option will only be available if the purpose is either expressly or impliedly mentioned in the contract. (98)

In the above cases, the purpose does not lay the foundation of the contract. The animal hired may well be used for other purposes. There are, however, cases in which the frustrated purpose forms the basis of the contract, in the sense that no other reasonable benefit

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95) M.T. Hakim, Mostamsak al-Urwat al-Wuthqa (Beirut: Ihya al-Tarath al-Arabi, 3rd ed: A.H. 1392) P. 58

96) Karbala is a city in Iraq where the tomb of Imam Hussain, the third Shi'i Imam , is located. Imam Hussain and his tiny army were involved in a conflict with Umayyad forces in the year A.D. 680. They were killed and became symbols of martyrdom in the cause of Islam. The Imam himself has been given the title Sayyid al-Shuhadā (The lord among martyrs) and the day of his martyrdom (the tenth day of the lunar month of Muharram, called 'Āshura) is a day of wide-spread mourning throughout the Shi'i world.

97) According to the belief held by the Twelver (Ithna 'Ashari) Shi'is, their twelfth and last Imam, Mahdi (lit. the Guided one) went into occultation (ghaybat) in A.D. 940 by Divine command. He has been living in the state of occultation ever since. One day he will rise up by the order of God and with him will descend Jesus (Isa Masih). He will then establish a world government and " will fill the Earth with justice and equity when it is full of oppression and wrong ". The Twelfth Imam's birthday is celebrated widely in the Shi'i world, particularly in Iran.

98) S.A. Khoei, Minhaj al-Sālihin (Beirut: Dar al-Zahra, 10th ed., n.d.) Vol. II, P. 87

can be expected from the contract. In such cases, Islamic law concurs with English law in holding that the contract comes to an end ipso facto upon frustration of its purpose, because when the foundation of a contract falls away, the contract falls away with it. Thus, a contract comes to an end if frustration extinguishes its mahall (or object). An example frequently given by traditional jurists concerns the case of a man who employs a dentist to remove his painful tooth, but the pain disappears after the formation of contract (99). Another example is where the substance of a contract of agency disappears, for instance by the fact that the principal or a third party performs the work that the principal had assigned to the agent to do (Article 683 of the Civil Code). Contracts of dormant partnership (i.e.,profit-sharing or muḍāraba) and agricultural partnership (muzāra'a: whereby one party provides the land for another to cultivate and share the profit) come to an end if the trade that both parties had in mind in muḍāraba or the cultivation of the land in muzāra'a becomes impossible (100). This is because the principle that a contract may be avoided by the destruction of a thing necessary to its performance(101), applies also to the cases where the thing, though not

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99) S.M.K. Tabatabaei Yazdi, Urwat al-Wuthqa, op. cit., PP. 270-271; M.J. Mughnia, Fiqh al-Imam Jafar al-Sadegh (Beirut: Dar al-Ilm, A.D. 1965) Vol. IV, P. 259

100) See Articles 481, 523 and 551(4) of the Civil Code

101) See chapter II, Section 5

actually destroyed, is accidentally rendered unsuited for the contractual purpose.

In one Iranian case, where the local municipality had prohibited the practice of the profession of cord - twisting in which the lessee was involved, and for which he had rented the property, the Supreme Court (Divān e Keshvar) confirmed the judgment of the Court of First Instance for dissolution of the lease contract, by putting the following argumentation:

> It is understood from Articles 471, 481 and 496 [of the Civil Code of Iran] and other articles likewise provided in respect of contracts of hire, agricultural partnership etc. that the thing hired must be capable of engendering profits for as long as the contract of lease lasts, and if it was originally capable of engendering profits, while during the lease period it became impossible to gain a benefit therefrom, the contract of lease is cancelled thereafter. (102)

Frustration of purpose has also been referred to in some of the cases put before the Iran-United States Claims Tribunal in the Hague. In Linen, Fortin Berry and Associates V. Iran (103), concerning a contract concluded in 1978 between a U.S. Company and the then Iranian Ministry of Information and Tourism to develop a public

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102) Suit No. 614, June 3, 1938 (1317.3.13 Iranian Calendar) 4th Division of the Supreme Court

103) Case No. 10513, award No. 372-10513-2, 19 Iran - United States Claims Tribunal Reports, 1988(II) P. 62

relations campaign which would promote Iran in the United States, the Tribunal held:

> It is clear that, in the circumstances of this particular case, given the nature of the services to be rendered by the claimant which were inextricably linked to the promotion of the public image in the United States of the Iran of the Pahlavi Dynasty, the success of the Islamic Revolution frustrated the original purpose of the contract. The Tribunal believes the contract should be considered to have terminated on or about 31 January 1979, which is midway between the departure of the Shah from Iran and the installation of the Islamic Republic. (104)

Similarly, in Rockwell International Systems, Inc. V. Iran (105) one of the arbitrators held that, in his opinion, the contracts in question, concerning the construction of a data gathering project, had lost their underlying purpose, in America's view, due to the fundamental changes in the conditions underlying the execution of those contracts (106). Also in Anacanda - Iran, Inc. V. Iran (107), it was held that the purpose of the subsidiary agreement in question was frustrated due to the fact that the *primary project* had come to a halt. The purpose in entering into the agreement at issue was to provide Iran with the necessary technical and

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104) ibid. at P. 70

105) Case No. 430, award No. 438-430-1, 23 Iran - U.S. C.T.R., P. 150

106) 24 Iran - U.S. C.T.R. (1990 - 1) P. 14, dissenting opinion of Asadollah Noori

107) Case No. 167, award No. ITL 65-167-3, 13 Iran - U.S. C.T.R., 1986 (IV) P. 199

scientific assistance in connection with the *primary* copper mining project. (108)

Another case was Queens Office Towers Associates V. Iran National Airlines Corp. (109), regarding the lease of a property in New York by Iran Air, an instrumentality all of whose shares are owned by the Government of Iran. The Tribunal held that, at least beginning 1 May 1980, the premises were no longer useful for the " General and Executive Offices for Tenant's business ", because Iran Air could no longer obtain licenses for the major part of its business due to Executive Order 12170 dated 14 November 1979 of the President of the United States (which followed the hostage crisis in Tehran and was, in turn, followed by Executive Order 12205 and Executive Order 12211, effective 1 may 1980) blocking " all property and interests in property of the Government of Iran, its instrumentalities and controlled entities " within the jurisdiction of the United States. The Tribunal, therefore, found that there was a frustration of purpose under New York law (which applies to rights and obligations arising out of a New York real estate transaction) at least as of 1 May 1980. (110)

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108) ibid at P. 248, dissenting opinion of Parviz Ansanri
109) Case No : 172, award No. 37-172-1, 2 Iran-U.S. C.T.R, 1983 (I) P. 247
110) See also INA Corporation V. Iran, case No 161, award No. 184-161-1, 8 Iran - U.S. C.T.R. 1985 (I) P. 373

The above-mentioned are only some of the cases brought before international tribunals after the 1979 Revolution, in which it was held that the victory of the Islamic Revolution in Iran caused such a fundamental change in the circumstances surrounding the formation of contract to frustrate the purpose known by both parties as the underlying basis of the contract. Our foregoing analysis shows that finding of frustration in such cases is justified under Islamic law, provided that the purpose known to the parties is such that it can be said to constitute an express or implied term of the contract.

CHAPTER V

LEGAL CONSEQUENCES OF IMPOSSIBILITY

Presuming that performance of a contract has become impossible, the next step is to examine the legal consequences of impossibility. As the starting point it must be made clear that the issue of discharge or termination of a contract is related to, but is distinct from, the issue of discharge of the parties' liabilities. For example, as we have seen earlier, a short illness does not bring the contract of employment to an end, although it will usually excuse absence from work (1). Similarly, it may not be possible to perform in one country a contract which is concluded in another country if its performance is deemed to be against the public

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1) See: Chapter II, Section 10 and Chapter III, Section 5

order of the place of performance (2). Thus, while the promisor is excused for his non-performance, the contract will remain valid and binding between the parties. On the other hand, an agreement to sell specified goods will certainly come to an end if the goods are deliberately destroyed by the seller before the passing of property. Such a "self-induced" impossibility will not, however, relieve the seller from liability.

So when discussing the legal consequences of impossibility, a distinction must be made between two issues: (1) the effect of impossibility on the contract, and (2) the effect of impossibility on the rights and liabilities of the parties. In this chapter we discuss these issues in two separate sub-sections.

1- The Effect of Impossibility on the Contract

The attitude of Islamic law on the effect of the impossibility of performance on contracts differs from

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2) Article 975 of the Civil Code (of Iran) provides in this respect: " The court cannot order the enforcement of foreign laws or private contracts which are against public morals or which may be considered to be contrary to public order by virtue of injuring the feelings of society or for other reasons, even though the enforcement of such laws may be permissible in principle ". See also similar provisions of Article 1295 regarding *documents* drawn up in foreign countries.

that of the English common law. While in the latter the occurrence of the frustrating event "brings the contract to an end forthwith, without more and automatically" (3), under Islamic law, impossibility of performance does not necessarily operate to discharge a contract. Automatic discharge, as we have seen in the preceding chapters, is only one of the effects that impossibility may have on contracts. What we have discussed so far in this thesis indicates that impossibility of performance may have one of the following effects on contracts under Islamic law:

1-1- Nullity (butlān)

In certain cases, impossibility has the effect of entailing the nullity of the contract ab initio. A void (bātil) contract does not start life at all, it confers no rights and imposes no liabilities on the parties. It is as though it has never been formed (ghayru muta'aqqid). Thus if, for example, a tenant occupies the property acquired under a void contract on the assumption that the contract is valid, the landlord may only claim remuneration on a quantum meruit (ujratul-mithl), as the obligation to pay the specified rent (ujratul-

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3) Hirji Mulji V. Cheong Yue Steamship Co. Ltd. [1926] AC 497 at 505, per Lord Sumner

musammā) cannot arise out of a void contract. (4)

It is worth mentioning that the distinction recognised mainly by the Hanafi School between void (bātil) and irregular (fāsid) contracts has not been recognised in the Shii/Iranian law. Under Hanafi law, a void contract is a contract which is unlawful in respect of its essence (like gambling). On the other hand, a defective or irregular contract is one which is lawful in respect of its essence, but "not with respect of its quality": mashrūʿun biaslihi lā biwasfih (5). An example is a contract of sale in which the price has not been fixed. Unlike a void contract, a defective contract may become valid and binding if its irregularity is removed at a later stage. There are of course similarities between this classification and the classification referred to earlier between void and inoperative (ghayr nāfidh) contracts recognised in the Shiʿi/Iranian law. (6)

Our discussion of the subject in the preceding chapters shows that the following kinds of impossibility shall make the contract void ab initio:

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4) See: S.A.H Esfahani, Wasilat al-Najah. op. cit., P. 202; S.M. Hakim, Mustamsak, op.cit., P. 65
5) M.H. Kashif al-Ghita, Tahrir al-Majalla (Tehran: Maktabat al-Najah, n.d.) Vol.I, P.124
6) See chapter I, Section 1-1 regarding contracts made under duress, and chapter III, Sections 1-1-1 and 1-1-3 regarding contracts made by discerning minors and prodigals respectively.

1-1-1- Non-Existence of the Subject - Matter

Non-existence of the specific goods forming the subject -matter of contract will make it null and void. The same shall apply in the exceptional case of destruction of an entire class of things where the contract calls for one or a portion of the class. (7)

1-1-2- Illegality

A contract which is in any way illegal or is against the public order shall be regarded as null and void, irrespective of whether or not the Parties are aware of illegality. (8)

1-1-3- Impossible Act

Under Islamic law, a contract shall be regarded as null and void if, at the time of its conclusion, the act forming its subject-matter is manifestly and objectively impossible to perform. It makes no difference whether the parties were or were not aware of such impossibility. Nullity, however, is caused by the operation of a

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7) For details, see Chapter II, Section 1
8) For details, see Chapter I, Section 2

different principle in each of the two situations. (9)

1-1-4- Interdiction

Under Islamic law, contracts entered into by certain types of interdicted persons, such as minors without discretion and lunatics, are null and void (10). The same rule applies in Iranian law to contracts made by a bankrupt (11). A contract made by a prodigal person (*safih*) will also be null and void if it concerns his financial affairs and is not ratified by his guardian. (12)

1-1-5- Impossible Delivery

We noticed earlier that under both Sunni and Shii laws, possibility of delivery is an essential factor for the validity of a contract. We also observed that in Shii law, unlike Sunni law, delivery need not be possible at the time the contract is made; it is sufficient if it becomes possible at the time it is due. Impossibility of delivery at the due time shall make the contract void *ab initio*. (13)

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9) For details, see Chapter II, Section 7
10) For details, see Chapter III, Section 1-1
11) For details, see Chapter III, Section 2
12) For details, see Chapter III, Section 1-1-3
13) For details, see Chapter II, Section 6

1-1-6- Subsequent Insolvency of a testator

A bequest creates a contractual relationship between the testator and the legatee. Total insolvency of the testator at the time of death breaks this contractual relationship and makes the bequest null and void. (14)

1-1-7- Refusal (imtina) (15)

If the obligor refuses to fulfil any part of his contractual obligation, and it is impossible to order compulsory performance or to have the obligation carried out by a third party at the expense of the obligor, the contract will become void ab initio. (16)

1-2- Automatic Termination (infisākh or inhilāl)

In this situation the contract is not nullified from the beginning, but is terminated as to the future only. It startstlife as a valid contract but comes to an automatic end upon the occurrence of the fortuitous

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14) For details, see Chapter III, Section 3
15) As to why " refusal" is being discussed in a thesis written on the subject of "impossibility of performance", see Chapter III, Section 7
16) For details, see Chapter III, Section 7

event. The cases falling within this category are the following:

1-2-1- Destruction of the Subject-Matter Before Delivery and After the Formation of Contract

It was noticed earlier that, under Islamic law, property and risk may not pass simultaneously. Thus the risk of destruction of goods (for example, the thing sold) before delivery shall remain with the person who owned them before the conclusion of contract (for example, the seller in a contract of sale). Such destruction will, therefore, have the effect of bringing the contract to an end. (17)

1-2-2- Destruction of the Subject - Matter after Delivery in Continuous Contracts

In contracts involving continuous performance, like a contract of hire (ijāra), delivery does not signify performance, but is only a pre-requisite for performance. Therefore, destruction of the subject-matter, even after delivery, will have the effect of bringing the contract to an end as from the date of destruction. (18)

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17) For details, See Chapter II, Section 2-1
18) For details, see Chapter II, Section 2-2

A minority of Shi'i jurists believe that in cases where the subject - matter is destroyed after part performance, the contract becomes void ab initio and the lessor will only be entitled to be paid on a quantum meruit. The majority view, reflected in Article 496 of the Civil Code, however, is that the contract will be terminated as to the future only, and the rent will be reduced proportionately. (19)

1-2-3- Subsequent Death or Interdiction of Either Party

Subsequent death or interdiction of either party to a revocable contract, and also subsequent death or interdiction of a promisor or promisee in all contracts based on their personal involvement, shall bring the contract to an end as from the date of such death or interdiction. (20)

1-2-4- Supervening Illegality

If further performance of a contract becomes illegal, either because of an alteration in the law or because of an alteration in the operation of the law (as

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19) For details, see Chapter II, Section 2-3
20) For details, see Chapter III, Section 1-2

was explained in Chapter IV above), the contract will come to an end as from the date of the emerged illegality. For example, a contract of lease of a particular house is discharged when a subsequent law forbids the lease. In such cases the rent shall be reduced proportionately. (21)

1-3- Right of Termination (faskh)

In this section we are concerned with cases in which impossibility of performance-in the wide sense it has been used in this thesis to include impracticability- gives a right of termination to one party. If the party who is entitled to termination exercises his right by making it clear that he refuses to be bound by the provisions of the contract, the contract will be terminated. Like voidable contracts in English law, a contract which is terminated is not a nullity from the beginning. Until it is terminated, it remains valid and binding and thus all the separable produce or income (namāʿāt monfasil) will remain the property of the person who owned them before termination.

The cases which fall within this category are the following:

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21) For details, see Chapter IV, Section 1

1-3-1- Impossible Condition

If the contract is subject to a condition, and the condition is later proved to be impossible to perform, the beneficiary will have a right of termination (Article 232 of the Civil Code). (22)

1-3-2- Insolvency (*iʿsar*)

In certain cases, insolvency of one of the contracting parties may give to the other party the right to terminate the contract. For example, a wife may terminate her contract of marriage, by making an application to the proper court to secure its approval for divorce if her husband becomes insolvent and, therefore, unable to maintain her. In such cases, the court must allow the divorce if insolvency is proved. This is based upon the premise that, under Islamic law, the duty of a husband to maintain his wife and children is an absolute one. This duty is not extinguished by his insolvency or even by the fact that the wife is wealthy and not in need of maintenance (*nafaqa*).

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22) For details, see Chapter II, Section 9

Another example is the right of the beneficiary, i.e., the creditor, in a contract of guarantee (daman) or assignment (hawala) to repudiate the contract if the guarantor or assignee, who assumes a debt by taking the place of a former debtor is proved to have been insolvent at the time of formation of the contract (Articles 690 and 729 of the Civil Code).(23)

1-3-3- Bankruptcy (iflās)

According to Article 380 of the Civil Code, if a buyer becomes bankrupt and, therefore, unable to pay the agreed price ,the unpaid seller will have a right to withhold delivery of the goods in spite of the fact that he may have previously agreed to deliver before payment (24). And, if the goods have already been delivered, he is entitled to restitution. (25)

English law recognises the right of an unpaid seller to retain possession of goods where the buyer becomes insolvent (26). The unpaid seller may also resume

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23) For details, see Chapter III, Section 3

24) If there is no such agreement, the unpaid seller is in all cases entitled, under Islamic law, to retain possession of the goods until payment of the price. See: Article 377 of the Civil Code (of Iran). For similar provisions, see: Section 41 (1)(a) of the Sale of Goods Act, 1979

25) For details, see Chapter III, Section 2

26) See: Section 41 (1)(c) of the Sale of Goods Act, 1979

possession of the goods as long as they are in course of transit (27). But he loses his lien when the buyer or his agent lawfully obtains possession of the goods. (28)

1-3-4- Hardship and Economic Frustration (*ta'assur*)

Under Islamic law, a promisor may terminate his contract if, due to unforeseeable events, performance becomes unreasonably, unexpectedly and extremely burdensome (29). Also, a wife may apply to the court for divorce if continuation of conjugal life causes hardship beyond forbearance for her (30). The outcome of such a case depends on the court's discretion only in so far as the existence of hardship must be proved. If this is done, a divorce order must follow.

1-3-5- Frustration of Purpose

Under Islamic law, frustration of the purpose to be attained from the contract may give to the beneficiary a

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27) See: Section 44 of the Sale of Goods Act, 1979
28) See: Section 43 (1)(b) of the Sale of Goods Act, 1979
29) For details, see Chapter IV, Section 2.
30) See: Article 1130 of the Civil Code (of Iran). Also Article 6 of the Egyptian Family Law of 1929 provides: " If a wife alleges that her husband ill-treats her in such a way as to make it impossible for people of their class to continue the marriage relationship, she may request the judge to separate them."

right to terminate the contract, provided that the intended purpose constitutes an express or implied term of the contract. Thus if cases concerning arrangements to hire rooms and flats on the route of the Coronation Procession (such as Krell V. Henry, discussed in Chapter IV above)(31) were to be decided according to Islamic law, the lessees could have demanded either the termination or the continuity of the contracts of lease as they wished (provided, of course, that the taking place of the Procession could be regarded as an express or implied term of the contract in question). Whereas, under English law, cancellation of the Coronation Procession constituted a frustrating event bringing the contracts to an automatic end. (32)

1-3-6- Partial Impossibility

If performance of only part of a contract becomes legally or physically impossible, for example, because of an alteration in the law, or by destruction of part of the subject-matter of contract, the party affected will have a right to terminate the remaining part of the contract using an option of discrepancy. The "impossible"

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31) Section 3
32) For details, see Chapter IV, Section 3

part will of course come to an end upon the occurrence of the frustrating event. (33)

1-3-7- Refusal (imtina)

The refusal of a promisor to fulfil his contractual obligations may be of such a character as to put an end to the contract. The refusal of a singer to sing on a wedding day is of such a nature. In other cases, however, such refusal may give a right of termination to the other party. For example, an employer may terminate a contract of employment if the employee refuses to go to work. (34)

1-4- Suspension (t'aliq)

In some instances, impossibility of performance is of a temporary nature. The contract will then be suspended but not terminated. Thus where performance by a particular date does not constitute the essence of the contract, any delay, caused by legal or physical impossibility, will not bring the contract to an automatic end, but will only suspend the contract and discharge the promisor to the extent of such delay. Thus

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33) For details, see Chapter II, Section 3
34) For details, see Chapter III, Section 7, See also Section 1-1-7 above

Article 150 of the Maritime Law of Iran Provides:

> If a ship cannot leave the port as a result of force majeure, the charterparty will remain valid for a reasonable period, and the damages resulting from the delay in departure cannot be claimed.

Similarly, the obligation of an insolvent man to maintain his family is suspended for as long as his insolvency lasts. The " negation of hardship " rule, however, entitles his wife to apply for divorce (Article 1129 of the Civil Code). (35)

1-5- extension (tamdid)

A contemporary Muslim jurist, Seyyed Mohsen Hakim, in his famous book Mustamsak mentions that if someone hires agricultural land for a specified period of time, within which a particular crop is expected to ripen, but some unusual weather conditions delay the reaping season, then, upon his request, the lease contract will be *extended* for a reasonable period of time, during which appropriate rent will be payable to the lessor (36). This is done in order to avoid undue loss to the lessee. This particular kind of impossibility in Islamic law is interesting, because it affects the contract in the

35) For details, see Chapter II, Section 10 and Chapter III, Section 3

36) S.M. Hakim, Mustamsak al-Urwat al-Wuthqa, op. cit., PP. 154-155

reverse order as compared to other cases of impossibility. Instead of putting an end to the contract, it *extends* it further at the request of one party.

To this consequence, I have given the title "extension of contract", and I have distinguished it from the previous category dealing with cases of "suspension of contract". The practical difference between the two is that in cases where the contract is " suspended " (for example the case of delay in the start of a ship's journey due to an embargo: Article 150 of the Maritime Law of Iran) no party will have any claims against the other for the period of delay: The loss simply lies where it falls. Neither party can ask for payment of any damages or remuneration. On the other hand, where the contract is " extended ", one party may be responsible towards the other. In the above-mentioned example of extension of a lease contract, for example, although the contract is extended for a reasonable period of time to avoid " undue loss " to the lessee, he is, however, responsible for payment of an appropriate rent for the "extended period". Moreover, extension of contract results from the operation of the " no undue loss " principle (37). The principle may not be applied in cases where its operation results in the lessor's hardship or loss. No one can cause loss to another in an attempt to avoid a loss to

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37) See Chapter IV, Section 2

himself. Such considerations, however, have no place in " suspension " cases, in which the contract is suspended automatically upon occurrence of the frustrating event.

Having recognised that the two above-mentioned categories have different results, the question remains: How does one decide on whether a particular case belongs to the first or to the second category? What is the difference between a delay in the start of a ship's journey, caused by unforeseeable events, and a delay in the reaping season, caused by unusual weather conditions? Muslim jurists offer no explanation. The only reasonable explanation seems to be that in the first example given above, the contract is a "result contract" (or obligation de résultat as it is called in French law). The obligation of the transporter is to carry the person or the goods safe to the destination in time. On the other hand, in the example given by Seyyed Mohsen Hakim, the lease is not qualified: The land is rented for a specified period of time, while the result, i.e., the reaping of the crop is not part of the contract. Thus the risk of the result not being achieved is not on the parties equally but on the lessee only. It follows that if, in this case, the land were rented, for example, " until the end of March *for growing of tomatoes* ", the risk of the result not being achieved, due to unusual weather conditions, would be on both parties. The

misfortune would affect both equally, giving a cause of action to neither. They each bore their own loss. The farmer could not have his tomatoes in time, and the lessor could not get back his land in time: the contract would be regarded as suspended for as long as bad weather continued, with no extra rent payable by the lessee.

Conversely, if the facts of the first case, regarding delay in the start of a ship's journey, were such that the ship were chartered " for a specified period ", for example one year, and not for " delivery of particular goods within a specified period ", the risk of the charterer not being able to achieve his desired purpose within the specified period, due to unforeseeable conditions, would be exclusively on him. In such a case the operation of " no undue loss " principle might of course require extension of the charterparty upon the request of the charterer for a reasonable period, but only after payment of the appropriate remuneration.

2- The effect of Impossibility on Rights and Liabilities of the Parties

When it is found that a contract has come to an end as a result of impossibility of performance, the other problem to be tackled is the effect of impossibility on rights and liabilities of the parties. To discuss this

issue a distinction must be made between accrued rights and liabilities, i.e., rights and liabilities relating to the period before impossibility arose, on the one hand, and future rights and liabilities of the parties, on the other.

2-1- Accrued Rights and Liabilities

Impossibility affects only future performance, while leaving intact any legal rights already accrued. Until 1943, the English law position on the effect of supervening impossibility was that the " loss lies where it falls "(38). So in the coronation cases, notably Chandler V. Webster (39), It was held that each party was required to fulfil his contractual obligations, so far as they had fallen due before the frustrating event. Thus

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38) It is believed that in Scots law the loss does not lie where it falls. This was justified by Lord President Inglis in 1871 (Watson & Co. V. Shankland 10 Macp. 142) and was confirmed by the Judicial Committee of the Privy Council in Contiare San Rocco S.A. V. Clyde Shipbuilding Co. [1924] AC 226. In this case, to which Scots law and not English law applied, an action for the recovery of the deposit paid under a frustrated contract was successful. See: Lord Cooper, " Frustration of Contract in Scots Law, in the Union of South Africa and in French Law ", 28 (1946) Journal of Comparative Legislation And International Law, PP. 1-25 at P. 3, and: W.W. Buckland, " *Casus* and Frustration in Roman and Common Law ", vol. 46 (1932-33) Harvard Law Review, PP. 1281-1300 at P. 1284

39) [1904] I K.B. 493

the amount of 100 Pounds already paid by the renter as advance payment could not be recovered and the balance of Pounds 41/15/- , which should have been paid before frustration but had not been paid, remained payable even after the frustrating event, i.e., the procession's cancellation on June 24, 1902. If the contract provided for payment by instalments, only those instalments which were due before frustration remained payable.

The maxim was much criticised for resulting in injustice. For example, Lord Shaw in Contiare San Rocco S.A. V. Clyde Shipbuilding Co. (40) observed:

> That maxim works well enough among tricksters, gamblers and thieves... under this application innocent loss may and must be endured by one party, and unearned aggrandisement may and must be secured at his expense to the other party. (41)

To reduce the severity of the above maxim, the House of Lords in Fibrosa Spolka Akcyjina V. Fairbairn Lowson Combe Barbour (42) overruled the decisions in Coronation cases. On the approach adopted in this case, the advance payment in Krell V. Henry might have been recovered and the rent due in Chandler V. Webster would have been discharged. The House arrived at its decision by using the concept of " total failure of consideration ",

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40) [1924] Ac 226
41) ibid at P. 259, See also the statement of Lord Dunedin at P. 248
42) [1943] AC 32

necessitating the return of the advance payment and non-payment of the overdue amount. (43)

The decision in the Fibrosa case was not perfect, not least because it applied only where the failure of consideration was " total ". There was no redress where there had been a " partial " failure of consideration. Thus a renter could not get any part of his advance payment back if he had occupied the rented room even for a very short period of time. The decision also gave no remedy to the party who had incurred costs in performing part of the contract.

To rectify the situation, the Law Reform (Frustrated Contracts) Act was passed in 1943 (44). The Act expressly provides in Section 1 (2) that the sums paid before frustration are recoverable and the sums payable but not paid before frustration cease to be so payable. The Act, however, provides for an equitable adjustment of the rights and liabilities of the parties, by authorizing the

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43) See the statement by Lord Russell at P.55

44) This Act was based on the 7th Interim Report of the Law Revision Committee (1939 Cmd. 6009). It has been adopted in several jurisdictions in the Commonwealth, such as New Zealand, the Australian State of Victoria and most of the common law provinces of Canada. Similar legislation is in force within the United States. See, For example, the "Report of Law Reform Commission of Saskatchewan to the Minister of Justice" in November 1988, and the " Seventy-First Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Doctrine of Frustration in the Law of Contract ", 1983

court to allow one party to retain or recover the whole or part of the sums paid or payable " not being an amount in excess of the expenses ... incurred "(45). Section 1 (3) of The Act also gives the court a wide discretion to award to the person who has conferred a benefit to the other party, any sums it thinks fit, " not exceeding the value of the said benefit "(46). The Act has been criticized because it relies heavily on the court's sense of justice. The uncertain exercise of judicial discretion is seen to be undesirable when dealing with commercial contracts. To remedy this deficiency, Glanville Williams suggests that net loss should be divided equally between the parties (47). The solution that he gives indicates that he in fact regards the contract as a "jointaventure" which has failed without either party's fault. In spite

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45) Section 1 (2)

46) Also the Restatement of Contracts (2nd Ss 377) Provides: " A party whose duty of performance does not arise or is discharged as a result of impracticability of performance or frustration of purpose, is entitled to restitution for any benefit that he has conferred on the other party ". In the I.C.C case 5195/1986 (Y.C.A. 1988, P. 69) the Arbitral Tribunal applied the Law Reform (Frustrated Contracts) Act, 1943 and concluded that " the contractor is prima facie entitled to be paid whatever (if anything) was owing to it for what it had done for expenses that it had incurred under the contract when it was discharged up to a ceiling figure equal to the value of the benefit conferred [on the other party]." (at P. 77)

47) Glanville Williams, Law Reform (Frustrated Contracts) Act, 1943 (London: Stevens & Sons Ltd.) P. 35

of the logic underlying this argument, it is doubtful whether it is always appropriate and just to apportion losses equally. Thus the court's discretion as to how it should apportion net losses between the parties seems appropriate.

Section 1(3) was applied in B.P. (Exploration) Libya Ltd. V. Hunt (48), regarding an agreement between B.P. and a Mr. Hunt, for the exploitation by B.P. of an oil concession in Libya belonging to Mr. Hunt. The contract was subsequently frustrated when the parties' interests in the concession was expropriated by the Libyan government in 1971. the court, in its discretion to assess the " just sum " payable to the plaintiff, determined the value of the total benefit obtained by Mr. Hunt, i.e., the net amount of oil he had received from the concession, plus the compensation paid to him by the Libyan Government, on the one hand, and the cost to B.P. of the work done for him, on the other.

Under Islamic law, advance payment made under a frustrated contract can be recovered. Mālik ibn Anas, the leader of the Māliki School, says:

> A man may say that he will pay someone in advance for the use of his camel on the hajj [pilgrimage], and the hajj is still sometime off, or he may say something similar to

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48) [1979] 1 W.L.R. 783, affirmed [1981] 1 W.L.R. 236, [1983] 2 A.C. 352

> that about... a house. When he does that, he only pays the money in advance on the understanding that if he finds the camel to be sound at the time the hire is due to begin, he will take it by virtue of what he has already paid. If an accident, or death, or something happens to the camel , then <u>he will get his money back and the money he paid in advance will be considered as a loan</u> (49). (emphasis added)

The adjustment of rights and liabilities of the parties to an impossible contract has also been recognised in Islamic law. The following statement from ibn Qudama, the famous Hanbali jurist, is noteworthy in this respect:

> ... In cases of rescission, the contractor [hired for the digging of a well] has a right to such part of the contract sum as is proportionate to the work done, while the hire price itself lapses both as regards the work remaining and the work actually done. It may be asked: What is the amount of the consideration for the work done and for the work that remains, in regard to both of which the stipulated consideration has lapsed? This cannot be calculated solely on the basis of the footage dug, because it is relatively easy to remove the earth from the higher part of the well and relatively difficult to remove it from the lower part. (50)

Although the statement refers to cases of rescission, it seems that in general the same approach should be

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49) Mālik ibn Anas, <u>Al-Muwatta</u>, op. cit., PP. 255-256
50) Ibn Qudama, <u>Mughni</u>, op.cit., Vol. V, P. 422, cited in Coulson, <u>Commercial Law</u>, op. cit., PP. 84-85

adopted in cases where the contract comes to an end, as a result of impossibility of performance, as this approach is supported by general principles of Islamic law relating to the prevention of undue loss and the requirement of a valid cause for every transaction. It follows that if someone is hired by another for ten days to dig a well, but, due to unforeseeable events, digging becomes impossible after the lapse of only five days, the contract of service will be divided into two separate contracts, the contractor will, therefore, be entitled to remuneration for five days of work, as Ibn Qudama indicates. The same principle applies to an attorney or agent who performs part of the contract before performance becomes impossible (51). The same approach may not, however, be adopted where the contract is an *obligation de résultat* (52), in which the promisor's obligation is to achieve the " result" which he has promised. The above-mentioned example of digging a well would be an *obligaton de resultat* if the contractor's obligation consists of " digging a well until it reaches the underground water". In such cases, the part performer may not be entitled to any payments. Similarly, one who

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51) S.H. Emami, Huquq e Madani, op. cit., Vol. II, PP. 243 - 244

52) There is no direct translation for *obligation de résultat* in English. " Guarantee Contract " might be the nearest equivalent.

contracts to make and " deliver " a pair of shoes to another person within a specified period of time, may not recover compensation in respect of either wasted expenditure or labour if continuation of performance becomes impossible after making only one shoe. It is not fair to expect the buyer in such cases to pay, for example, half of the amount agreed for a pair of shoes when only one shoe is delivered. In this situation, " part performance is no performance ". The contract is said to be unseverable or indivisible (basit) and, as a result, no claim may be made for partial performance under Islamic law. (53)

2-2- Future Rights and Liabilities

In the preceding sub-section we discussed the issue of past performance. As far as future performance is concerned, the main effect of impossibility is to discharge the parties from further performance of their contractual obligations. In the following sub-sections we discuss the two issues of discharge of the promisor and discharge of the other party separately.

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53) See: M.H. Kashif al-Ghita, Tahrir al-Majella, op. cit., Vol. II, P. 206

2-2-1- Discharge of the Promisor As a Result of Impossibility

Although Article 264 of the Civil Code does not refer to impossibility of performance as one of the methods by which contractual obligations are discharged, Iranian lawyers agree that the subject must inevitably be treated as one of such methods. (54)

In order for supervening impossibility to relieve a promisor from further performance of his contractual obligation, the fortuitous event must have certain conditions. First, it must not have been willfully brought by the contractor himself; otherwise, he will not be able to plead exemption from his contractual duty on the grounds of impossibility. In referring to Taylor V. Caldwell, discussed earlier, Lord Sterndale M.R. observed:

> I do not think any authority has ever gone so far as to decide that if the defendant had burned down the music hall himself, he would have been entitled to say the subject-matter was gone and the contract was frustrated. (55)

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54) See, for example, S.H. Emami, Huquq e Madani, op. cit., Vol.I. P. 313; M. Shahidi, Suqut e Taahhudat (Tehran: Shahid Beheshti University Press, 1370 Sh.= A.D. 1991), P. 2. Article 1234 of the Civil Code of Freance refers to "loss of the thing" as one way of " extinction of obligations".

55) Mertens V. Home Freeholds Co. [1964] 2QB 226

Thus in the Eugenia case (56), the charterers could not rely on the closure of the Suez Canal to escape from their contractual liability as they had breached a term of the charterparty by ordering the vessel to enter the Canal.

The English law rule that " reliance cannot be placed on a self-induced frustration " (57), has been expressed in Islamic / Iranian law as the requirement that impossibility should be attributable to an " external cause ". So while, for example, a general and unexpected exodus of people from a village in which a bath-house is rented can be regarded as an " external " cause enabling the person who rents the bath-house to get out of the contract (58), the intention of a tailor to change his profession does not, as we saw in chapter IV, give him a right to terminate the contract of employment made with his assistant. This latter event may, however, be regarded as " external " if the tailor is forced by the order of competent authorities to change his job.

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56) [1964] 2QB 226

57) Bank Line Ltd V. Arthur Copel & Co. [1919] Ac 435, Per Lord Sumner at P. 452. See also Cheall V. Association of Professional Executive Clerical and Computer Staff[1983] 2 A.C. 180, 188-189. Regarding the relationship between frustration and fault see the decision of the Court of Appeal in J. Lauritzen A.S. V. Wijsmuller B.V. (The Super Servant Two) [1990] 1 LLoyd's Rep.1. See also: Maritime National Fish Ltd. V. Ocean Trawlers Ltd. [1935] AC 524; Paal Wilson & Co. A/S V. Partenreederei Hannah Alumenthal [1983] 1 AC 854; Davis Contractors Ltd V. Fareham UDS [1956] AC 696 at 729

58) See: N.J. Coulson, Commercial Law, op. cit., P. 86

From what has been said above it is evident that while the position of English law on whether or not negligence debars reliance on frustration is not absolutely clear (59), the position held in Islamic / Iranian law is that fault includes intentional as well as negligent acts (60). So in neither case does supervening impossibility discharge a promisor. In both cases, however, there must be an element of " causation " between the act or omission of the promisor and the emerged impossibility. A strong intervening event may break the chain of causation. Thus, as we saw in chapter III above (61), imprisonment of a promisor does not debar him from relying on impossibility to escape from his contractual liability under Islamic law.

Like any other claim, the onus of proving that frustration was self-induced, and, in other words, was due to the promisor's own fault rests with the party raising such allegation: *ei incumbit probatio qui dicit non qui negat*(62). Also, following the general Principle, the burden of proving existence of impossibility itself rests with the party asserting it: al - bayyinatu alal muddaʿi.

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59) See Chapter III, Section 6
60) See Article 953 of the Civil Code
61) Section 6
62) See the decision of the House of Lords in Joseph Constantine Steamship Line Ltd. V. Imperial Smelting Corporation [1942] Ac 154 at 179, [1941] 2 All ER 165 at 175. For an opposite approach see Section 282 of the German Civil Code.

In addition to being " external ", the impediment must be unforeseeable (Article 1312 (4) of the Civil Code) and irresistible or unavoidable by the exercise of reasonable diligence and efficiency (63) (Article 229 of the Civil Code).(64) Thus in the Iranian case concerning the lease of a water - channel (discussed in chapter IV above)(65), one reason for the court's rejection of the claimant's plea that he should be exempted from the liability to pay rent, because he had lost all his potential water - purchasers following the pipelining of the city of Tehran, was the fact that the pipelining of Tehran was " foreseeable " at the time of the conclusion of the contract. Also in the English case of Davis Contractors Ltd. V. Fareham UDS (66), one reason for rejecting the shortage of labour as a frustrating event was that " the possibility of enough labour and materials not being available was before their [The contracting parties'] eyes and could have been the subject of

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63) According to the Force Majeure (Exemption) Clause of the International Chamber of Commerce (I.C.C. Publication No. 421): "A party is not liable for a failure to perform any of his obligations in so far as he proves:
That the failure was due to an impediment beyond his control, and
That he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform into account at the time of the conclusion of the contract, and
That he could not reasonably have avoided or overcome it or at least its effects."

64) See also Article 79 (b) of Bahrain Contracts Code, 1969

65) Section 2

66) [1956] Ac 696

special contractual stipulation "(67). The fact that it was not, was taken to mean that the parties agreed to bear the risk of the occurrence of the frustrating event.

The illustrations used in the traditional books of Islamic law (fiqh books) also indicate that since early times, when discussing the issue of responsibility, Muslim jurists distinguished between anticipated and unanticipated events. Comparing the case of a person who by putting an open jar in the sun causes deterioration of its contents, with that of a person who puts a container in open air causing its overturn by the wind, they conclude that the former person is responsible for payment of damages to the owner, whereas the latter is not. The reason mentioned for the difference is that the " rising of the sun is anticipated, but blowing of the wind is not " (inna tolūul-shams montazar wa hobūbul-riyāh ghayru montazar). (68)

There has been no detailed discussion regarding the extent of foresight required, though Muslim jurists

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67) at 731. See also Walton Harvey Ltd. V. Walker & Homfrays Ltd. [1931] 1Ch. 274, in which the compulsory acquisition of the defendants' hotel, on which an advertising sign was to be displayed by the plaintiffs, was not regarded as a frustrating event, because the court held that it was foreseeable by the defendants.

68) See: Allameh Hilli, Tadhkirat al-Fuqaha, op. cit., Vol.II, P. 372; M.H. Najafi, Jawahir al-Kalam, op. cit., Vol. XXXVII, PP. 60-62; Hilli, Sharai al-Islam, op. cit., P. 763. See also Articles 347-353 of the 1991 " Islamic Punishment Act " of Iran which refer to various " unforeseeable " events and declare that they do not create liability for the person involved.

(fuqahā) have made it clear that the test to be applied in this situation is an objective and not a subjective test (69). Thus what is important is that the event should not have been reasonably foreseeable. Whether the promisor actually anticipated it or not is of no relevance. It also seems clear that it is not necessary for the event to seem absolutely impossible. The mere fact that there was no reasonable evidence suggesting its occurrence would be sufficient. For example, the occurrence of an earthquake may not be absolutely impossible in scientific terms, but so long as there is no reasonable evidence suggesting its occurrence, it can constitute a frustrating event and discharge the promisor. The same rule is adopted in English law, in the sense that a low degree of foreseeability does not debar reliance on frustration. In fact in this sense it was "foreseeable" that King Edward VII (who was sixty years old at the time) might fall ill on the day of coronation. This low degree of foressability however, did not prevent the courts from declaring the contracts in

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69) M.H. Najafi, Jawahir al-Kalam, op. cit., Vol. XXXVII P. 61. See also Articles 352-353 of the " Islamic Punishment Act " of Iran which limit payment of compensation by the persons involved to cases where the event causing loss was " reasonably " foreseeable.

question to be frustrated. (70)

The Civil Code (of Iran)has not followed the practice adopted in the Civil Codes of some other Muslim countries who insist that the fortuitous event must be of a general nature affecting the relevant area or community at large, and not merely the contracting parties themselves (71). Thus the general character of the fortuitous event is not a necessary pre-condition for the operation of the doctrine of impossibility of performance under Iranian law.

When performance of a contract becomes impossible, while the above - mentioned conditions for discharge are not present, the promisor cannot of course be required to perform the impossible, but he may be required to pay damages in substitution for performance. In such cases, a claim for damages will lie, but a claim for performance

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70) In fact express provisions were made in some of the contracts for this possibility. Some provided that if the Procession were cancelled, the tickets bought for the purpose of viewing the Procession could be used on the day on which the Procession eventually took place. See: Clark V. Lindsay (1903) 19 T.L.R. 202 and Victoria Seats Agency V. Paget (1902) T.L.R.16. See also G.H. Treitel, The Law of Contract, op. cit., P. 800

71) See, for example, Articles 146(2) of the Iraqi Civil Code,249 of the U.A.E Civil Code, 198 of the Kuwaiti Civil Code, and 147 of the Egyptian Civil Code

will not. According to Article 221 of the Civil Code (of Iran) damages may be awarded in cases where they are either expressly provided for in the contract or are required to be paid by virtue of custom and usage or by provisions of the law. Damages, as the most common remedy in Iranian law, include incurred costs as well as lost profit.(72)

There are also other kinds of substituted performance. If a surety (kafil) cannot act according to his promise in presenting the principal (makfūl) at the required time and place, his obligation to present the makfūl will be substituted by an obligation to pay out his debt (73). Similarly, in case of refusal of an obligor to perform his obligation, the court may, in proper circumstances, arrange for the contract to be performed by another person at the expense of the promisor. In such a case, the promisor's obligation to perform will be " substituted " by an obligation to pay for the work carried out by the third party.

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72) See Article 728 of the Civil Procedure Code of Iran
73) See Article 740 of the Civil Code

2-2-2- Discharge of the Other Party

Unlike unilateral contracts (74), in the more important bilateral contracts each party has an obligation towards the other. The two obligations are interdependent in the sense that each obligation is the countervalue for the other. In a contract of sale, for example, the object which is being sold (mabī) is the countervalue or the consideration for the price (thaman), and vice versa. Similarly, in a contract of hire, the benefit to be obtained from the thing hired, is the countervalue for the rent paid by the renter (75). It follows that if one party is discharged as a result of impossibility, the other must also be discharged, in spite of the fact that his performance has not become literally impossible. The latter's discharge is a result

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74) A unilateral contract in Islamic law must be distinguished from a unilateral legal act (iqā). Although a unilateral contract (like a gift with no return or a contract of surety: kifāla) forms a contractual obligation on the part of only one party, it nevertheless requires two parties to create the legal relationship by offer and acceptance. A unilateral legal act (like the acquittance of a debtor or a promise of reward: joāla) on the other hand, is created by the operation of one will only. Thus such a contract is unilateral not merely in imposing obligations, but in its formation as well.

75) Thus Article 478 of Majella (the Ottoman Civil Code, 1876) provides : " If the benefit to be obtained from the thing hired is entirely lost, no rent is payable. "

of the operation of a different legal principle, which is based on " failure of consideration " in English law. Thus the statements which seem to base both parties' discharge on the same principle have been criticized. For example, R.G. McElroy in his book, Impossibility of Performance (76), criticizes a statement by Blackburn J. in Taylor V. Caldwell to the effect that " the Music Hall having ceased to exist without fault of either party, both parties are excused ." It is apparent from the statement that it bases both parties' discharge on the same fact, i.e., on the destruction of the Music Hall, which is, of course, not the correct approach.

In the Islamic/Iranian law, the English concept of " failure of consideration " has been translated into the concept of " cause ". Under Islamic law, a contract does not necessarily involve consideration. A gratuitous gift (hiba ghayr moawwad) or a bequest are, for example, recognised as valid contracts, in spite of lack of consideratin. However, there must be a licit cause in the obligation. The cause (illa) of each party's obligation is to be found in the obligation of the other. Thus the same result is achieved that if one party is released by impossibility, the other will also be released, as there

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76) op. cit., at P. 99

remains no " cause " for his obligation and because, otherwise, there would be an unjust enrichment: receiving an advantage without giving a countervalue " fadli māl bilā iwaḍ. (77)

In cases where the promisor's performance has only partly become impossible, the other party's discharge will also be partial and his duty to render consideration will, therefore, be proportionately reduced.(78)

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77) See Articles 160 of the Syrian Civil Code, 161 of the Libyan Civil Code, 179 of the Iraqi Civil Code, 159 of the Egyptian Civil Code and 217 of the Iranian Civil Code.

78) According to Section 323 (1) of the German Civil Code also in cases where impossibility is partial, the counter-performance is diminished.

CHAPTER VI

CRITICAL ANALYSIS

It is the purpose of this chapter to give a final overview and a critical analysis of the subject, and to identify certain areas and directions in which it may be possible and useful for this part of the law to develop in the future.

Our discussion of the subject in the preceding chapters reveals that the starting-point of English law is that contractual liability is in principle absolute. This has resulted in the existence of an inflexible doctrine of frustration in English law, in the sense that there are relatively fewer cases regarded as frustrating events affecting the validity of contract under English law, as opposed to some other systems. As the reason for

this it has been suggested that a doctrine of frustration is linked to a legal system's attitude towards the role of contract. Accordingly, it is claimed, a system which, like the English and French, regards contract law as designed to respect the autonomous wills of the contracting parties and not, like German law, as means for redistribution of wealth by the state, is less likely to adopt a generous theory of frustration (1). It is worth noting, however, that this is not a logical necessity. We saw in Chapter I that Islamic law attaches great importance to the idea of freedom of contract. Yet, in its application to the subject of impossibility, Islamic law possesses a high degree of flexibility and adaptability. But this flexibility is also justified on the bases of "intention" and "free will" of the parties. The parties should not be required to be bound by a contract which, due to the change of circumstances, is substantially different from the one they originally "envisaged", when the contract was "freely" concluded between them in the first place.

The more flexible approach of Islamic law has not only resulted in the existence of an increased number of cases

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1) See: Kronman, "Contract Law and Distributive Justice" 89 (1980) The Yale Law Journal, 472; A.D.M. Forte, " Economic Frustration of Commercial Contracts ", op.cit., P.8

in which impossibility of performance has been regarded as affecting the validity of contract, but it has also resulted in the fact that in Islamic law, unlike English law, the doctrine does not involve an all-or-nothing approach. The contract does not necessarily come to an end upon occurrence of the frustrating event. Automatic termination of the contract is only one of the alternative consequences of impossibility, in addition to other possible consequences discussed in Chapter V above.

The flexible approach adopted by Islamic law towards the subject is of course an advantage. It can be more compatible with the reality prevailing in the world of commerce which requires an attempt to keep contracts in line with the parties' original intention, and to keep them alive as far as possible. It will also result in a more equitable allocation of the cost of serious and unforeseen intervening events between the parties. This approach, however, has its own problems.

The main problem with the approach adopted in the medieval legal manuals of Islamic law is that it is not based on a consolidated doctrine. Unlike modern lawyers, the traditional Muslim jurists have rarely tried to elaborate a general and systematic doctrine of impossibility of performance. The doctrine is nowhere clearly expressed and the individual rulings assume many

different forms and are to be found scattered throughout the medieval legal manuals. Traditional jurists have been mostly looking for solutions rather than for principles and a researcher will often find himself faced with several contradictory solutions even within one school of jurisprudence. The disorderly arrangement of subjects, the failure to explain the process of reasoning of each decision, the old style of writing used (in some cases unchanged for over 1000 years), the tenuous examples given (which usually have an outmoded character), the variant opinions expounded for each subject discussed, the ambiguous and imprecise language of classical treatises, and even lack of a proper index in most cases, are all factors indicating the unclarity and the incomprehensiveness that characterized the writings of early jurists. These characteristics make it difficult for an inquirer to discover from these treatises the law relating to a specific topic. This is of course a deficiency bearing in mind the importance of classical treatises in Islamic law. The role of such treatises should not be compared with the role played by modern law books in various legal systems, like English law, which is only to explain and interpret the " existing " law. Islamic law, on the other hand, is a jurists' rather than a judges' law, and has been expressed in textbooks by

jurists and not in law reports by the judiciary. It was the jurists who were responsible for the development of Islamic law from its main sources. As the complexities of these sources make it difficult for non jurists to discover Islamic law from them, it follows that the unclarity of the textbooks, which tend to explain Islamic law, will necessarily result in the uncertainty of Islamic law itself. What is needed, therefore, is a " tightening up " process, whereby clear rules are established and firm solutions, based on general principles, are found for certain unsettled problems.

The " tightening up " process is necessary to ensure that " certainty ", which is a fundamental requirement for all laws,is secured for Islamic law, so that people may act confidently upon it and it may not be subject to abuse by judges and other law - enforcement officers exercising discretion. It must start from the manner in which classical treatises have so far been written. The unconsolidated manner of writing used by scholars, as explained earlier, together with the method adopted by them in not having general sections dealing with basic rules of contract law, and their discussion of these rules for each nominate contract separately has, as we saw in Chapter I above, caused the misunderstanding that Islam has no general law of contract but only law of

contracts. Bearing in mind the fact that the same legal principles should apply to law of contract as a whole, it is desirable to have, in the treatises, sections dealing with general principles of contract law, covering subjects like offer and acceptance, consideration, capacity of the parties, mistake, duress, necessity, impossibility of performance, remedies for breach etc. (which is the usual way the subject is discussed in modern books of contract law) and then to have special sections to deal with legal principles applying to each particular contract. Take as an example the issue of options or rights of termination (khiyārāt). The method adopted in the traditional legal manuals, even by those jurists who recognise the validity of contracts other than those expressly mentioned in the law, is to discuss each "option" in relation to every individual contract separately. This has necessitated a great amount of repetition and has frequently resulted in negligent omissions. The preferred approach would be to divide "options" into two categories: Those which are of general application and, therefore, apply to all contracts equally (like "the option of meeting place", whereby both parties to the contract may cancel it while still in the meeting place, or "the option of lesion", whereby a party can terminate a contract in case of great inadequacy

of consideration), and those which are of limited application confined to some particular contracts, most notably the contract of sale (like "the option of animals", whereby the purchaser of an animal can termiante the contract within three days, or " the option of delayed payment of the price ", whereby a seller can terminate the contract of sale if the price is not paid and goods are not delivered within three days). The first category can then be discussed in the section dealing with general principles of contract law, and the second category in the section discussing the contract of sale. Such a re-organization of the Islamic law treatises and the replacement of the present ad hoc pragmatic approach by a restatement of the law in consolidated works, would ensure that an inquirer would be able to discover the law relating to a specific subject without too much inconvenience. It thus makes him aware in advance of where he stands in law.

In this process of reorganizing the Islamic law treatises there are major issues relating to the law of impossibility of performance which, it seems to me, are not quite certain and call for consideration. These include such problems as: temporary impossibility, impracticability, frustration of a party's legitimate expectations, the court's right of adjustment, necessary conditions for the discharge of a promisor following an

emerged impossibility, the extent to which, and the time at which, anticipated impossibility (for example fear of death or serious injury) may bring a contract to an end, and many other problems with which we dealt in this thesis.

It is true that broad answers may be found for some of these questions in the classical treatises (fiqh books) but the fact remains that these answers often lack any degree of clarity and preciseness. For example, although there are dicta indicating that equitable adjustment of rights and duties of the parties to a frustrated contract may be permitted (2), doubt exists as to the general availability of this solution, as well as the extent of adjustment which may be made by the judge. In the case mentioned in Chapter IV, regarding an agreement to sell the head and skin of a sick camel who subsequently improved in health, it is not clear whether Imam J'afar's ruling that in those " changed circumstances " the buyer could not insist on having the animal slaughtered in order to get its head and skin but should only be given an appropriate share in the camel, was intended to be a general decision authorizing the exercise of a right of adjustment for all the judges, or whether it was only an ad hoc decision made by an infallible (m'asum) Imam,

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2) See Chapter IV, Section 2

with more extensive powers than ordinary judges. It appears to me that recognition of the idea of judicial adjustment within well-defined limits is consistent with both legal principle and commercial values. Commercial reality necessitates an attempt to hold contracts alive as far as possible. The idea is also in line with the overall subjective attitude of Islamic law to the issue of formation of contract because, by using his discretion, the judge tries to bring a frustrated contract in line with the parties' original "intention".

Another problem which calls for consideration is that of part performance. Although the fact that a part performer is entitled to appropriate remuneration, and also the difficulties involved in the calculation of the amount due to such person, are noted in the classical treatises (as in the case of part-finished well quoted in Chapter V from Mughni)(3), only broad comments are made on the manner in which such problems are to be solved in practice. It is in particular not clear whether the remuneration to which the part - performer is entitled must be calculated on the basis of the amount of costs that he has incurred in performing the partially frustrated contract, or on the basis of the benefit that his performance has conferred on the other party. An example will clarify the problem:

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3) See Chapter V, Section 2-1

A builder agrees for a lump sum to erect a warehouse for another. When he has completed a part of the work, further construction by the builder becomes impossible. Is he entitled to any remuneration for his uncompleted work? And, if so, what is the proper basis of recovery? There are two principal ways of making the calculation. One requires remuneration for costs actually incurred by the builder (in terms of labour and materials) for his part performance of the work, while the other requires remuneration for actual benefits conferred on the other party.

As was mentioned earlier, in dealing with the problem of remuneration payable to a part-performer, Muslim jurists only show the gap without providing a bridge themselves. A cursory survey of the subject may indicate that in such a case, application of the Islamic law principle of " no undue loss " necessitates payment of incurred costs to the builder. A more careful analysis will, however, show that the said principle cannot help here. If the costs incurred by the builder are required to be paid by the other party, the latter will suffer " undue loss "; whereas between the builder and the other party, it is the former, as opposed to the latter, who is in a better position to bear the loss. This is because the prima facie presumption must be that " the loss lies

where it falls ". If this presumption is to be rebutted and, in other words, the burden of bearing the loss is to be shifted from the party on whom it has actually fallen to the opposite party, this shall need a valid justification which cannot be found in the principle of "no undue loss". The principle which can be invoked here is the one requiring a valid " cause " or consideration for every obligation. This necessitates that the contractor be compensated to the extent of the "benefit" that his performance has actually conferred on the other party, irrespective of whether the said benefit exceeds or is less than the costs incurred by the contractor in part performance of the contract. Otherwise, the benefit conferred shall be without " cause ". The approach adopted by Islamic law when dealing with contracts which are cancelled by iqāla or mutual consent of the parties also indicates that it is the benefit conferred, and not the costs incurred, which is of prime importance in calculating the amount of remuneration which is payable by one party to the other. We saw in Chapter III (Section 1-2) that if the parties to a contract for the sale of a stone agree to terminate it, while the stone has been converted into a statue by the buyer, then, in adition to his money, the buyer shall also be entitled to receive from the seller *an amount representing the increase in value of the subject-matter of sale* (and not

an amount equal to the costs incurred by him in terms of labour and materials). So in cases of part performance also the key question should be the identification and measurement of the "benefit" rendered before the frustrating event. In my view, an important element here is the cost to the other party of completing the partly - performed work. If the contract price is 1000 Pounds, the cost incurred by the part-performer is 600 Pounds and the cost of completing the work is 800 Pounds, the net benefit rendered can be said to be only 200 Pounds. It is this last figure, therefore, which truly represents the amount payable to the contractor. If the contract cannot be completed by someone else, it would, in most cases, be best to find no benefit at all. In this respect it must be noticed that it is the benefit " created " by part - performance of the contract which must be taken into account, whether or not the person for whose benefit it was done " received " the said benefit. In our above - mentioned example, the amount of 200 Pounds must be payable to the contractor even if the other party decides not to complete the partly - performed work, but to demolish it altogether. It is also noteworthy that by basing recovery on the concept of " benefit ", there shall be no difference between the benefit relating to acts done before the time of discharge, and the benefit

arising from acts done after what the law regards as the time of discharge by a contractor who is unaware of the frustrating event. In both cases he shall be compensated to the extent of the benefit conferred on the other party. In no case, however, should his compensation exceed the contract price.

Let us now return to the issue of costs incurred by one party in performing the contract. We saw earlier that it is not possible to find a valid justification in Islamic law which can authorize the transfer of losses to the shoulders of the other party. In this respect it must be noticed that the apportioning, let alone equal division (4), of the parties' losses is also hardly justified under Islamic law. In other words, the transfer of " any " part of losses from where they have actually fallen to the shoulders of the opposite party is not justified in Islamic law except insofar as they result in a valuable benefit for the other party.

Another problem which needs to be more clearly dealt with in Islamic law relates to the conditions that a fortuitous event must have before it can discharge a promisor. The fact that the event must be unforeseeable

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4) Equal distribution of loss has been supported by some lawyers as a just solution. See: Glanville Williams, Law Reform (Frustrated Contracts) Act, 1943, op.cit., P. 35, cited in Chapter V, Section 2-1, P. 283

and irresistible has never been discussed by Muslim jurists in any direct way in relation to the subject of impossibility of performance. These conditions will have to be " inferred " from the jurists' rather unsystematic discussions about various aspects of civil liability in general. Also, when explaining that the event must be " external " before it can discharge a promisor, the word " external " has been used by contemporary Muslim jurists instead of the word " non self-induced " which is used in English law for describing the same thing. The Islamic law terminology (which is similar to what is used in French law: *cause étrangère*) is to be preferred in one sense. This term shows that an event cannot discharge a promisor if it is the result of his intentional "or negligent" act. Thus the discussions in English law as to whether or not negligence debars reliance on frustration have no place in Islamic law, since a negligent act of the promisor also makes the event " internal " in nature. This terminology has, however, its own problem. It may give the impression that events like an unforeseeable medical operation carried out on a contractor or a strike by his employees, even if not caused by his own encouragement, may not discharge a promisor, as they are not "outside" events. This view would, of course, be unfair to such a contractor.

Perhaps one can conclude this part by saying that rather more work is needed to clarify the uncertain

aspects of this part of Islamic law and to make it more certain. Without this clarity, extensive discretion inevitably needs to be given to the courts to work out for themselves the practicalities of each case. This shall bring Islamic law in the front line of confrontation with the old and serious problem of "judicial discretion" (5). A concept which, in addition to the opponents, has also its own supporters. While there are those who attack the extensive and unjust nature of judicial discretion in today's law (6), there are also people like Kenneth Culp Davis, a recognised commentator on discretion, who believe that " rules

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5) The term " discretion " has been used in the field of law for so long and in so many ways that in 1923 it was suggested by one writer that "the best disposition to be made of [the] word... is to drop it from the vocabulary of the law ". See: N. Isaacs, " The Limits of Judicial Discretion ", 32 (1923) The Yale Law Journal, PP. 339-352 at P. 340

6) To show the extent of judges' discretion, particularly in the field of criminal law, in which discretion is more dangerous, Rosemary Pattenden gives the following example: " Not so long ago an Oxford Crown Court judge is reported to have ordered that during luncheon breaks the accused were not to drink beer. He was tired of disruptions to afternoon sessions of the trial when the call of nature became too strong and one by one the accused disappeared form the dock to make use of the Crown Court conveniences ": Oxford Star No. 53, 30 June 1977. See: R. Pattenden, the Judge, Discretion and the Criminal Trial (Oxford: Clarendon Press, 1982) P.44. And to show haw unjustly some of these discretions may be used, Kenneth Clup Davis gives an example: "A fourteen year old throws a rock that breaks a windshield. A policeman, who knows A's prominent father, cautions A and lets him go. B, also fourteen, commits the same act, and the same policeman arrests B, who is then convicted and punished. B has no prominent father ".
See: K.C. Davis, Discretionary Justice In Europe And America (University of Illinois Press, 1969) P. 17

without discretion, cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases"(7). Also Ormrod L.J. Says, " Uncertain justice is preferable to certain injustice... certainty can be bought at too high a price "(8). And Lord Denning, the former Master of the Rolls, who is undoubtedly the most well-known supporter of flexibility of the law in England, while giving justifications for existence of a non - codified constitution in this country, says, " we think it would be unwise to put anything in writing, because it would then be too difficult to adapt to changing needs." (9)

There is little doubt, however, that although it is neither possible nor desirable to exclude discretion totally, it must, nevertheless, be kept within the boundary of well - defined rules, in order to achieve the advantages of flexibility while avoiding its disadvantages, the chief among such disadvantages being the uncertainty of the law and possible misuse and abuse

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7) K.C. Davis, Discretionary Justic. A Preliminary Inquiry (Louisiana State University Press, 1969), P.17
8) Firman V. Ellis [1978] Q.B. 886 at 911. Also Lord Guest in Selvey V. D.P.P. [1970] A.C. 304 at P. 352 says that we should not attempt to " shackle the judge's power within a straight jacket ".
9) A. Denning, the Independence of the Judges (Birmingham: Holdsworth Club, 1949) P.2. In another work he observes: " Beyond doubt the task of the lawyer-and of the judge-is to find out the intention of Parliament. In doing this, you must, of course, start with the words used in the statute: but not end with them-as some people seem to think. You must discover the meaning of the words." A. Denning, The Discipline of Law (London: Butterworths, 1979) P. 9.

of power by judges. (10) It is in this direction that

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10) It must be said that there are some for whom possible abuse or misuse of power by judges is not a major issue, causing concern. Lord Denning recommends: "Someone must be trusted. Let it be the judges": Misuse of Power (London: B.B.C., 1980) P. 19. In the traditional Islamic law also judges are decribed as " Trustees of God on the Earth", and are given wide discretionary powers. However, a person must possess the highest degree of moral probity before being eligible to be appointed as a judge or qāḍi. In fact the degree of moral probity required from a judge is so high, and the number of Prophetic traditions, explaining great responsibility in the hereafter for those judges who make an error in judgment, is so numerous, that many pious people, throughout the Muslim history, are reported to have committed the strangest behaviour to avoid an order of the caliph of the time to become a judge. These activities include: pretending to be insane or blind, escaping from the city of residence, and even preferring to be sent to prison by the ruler, or to be beheaded rather than to become a judge. So being appointed as qāḍi was rarely regarded as a privilege in the early history of Islam. It was viewed as a great responsibility which had to be borne by some unlucky people. Thus many tricks were used by candidates to avoid such a post. For example, a person by the name of Waki is reported to have told the Abbasid Caliph, Harun al-Rashid (died in the 8th century A.D.), who had appointed him as a judge, that one of his eyes could not see and the other was short- sighted. When the Caliph insisted that he must accept the post, he said: "O Commander of the Faithful [the title of the caliphs] if I am telling the truth, you have to excuse me from this duty, and if I am not, it is not desirable to appoint a liar as a judge!" By this reasoning he could escape the order. The story of Abu Hanifa, the leader of the Hanafi school, is also noteworthy in this respect. He refused an offer by Mansur, the Abbasid Caliph, to become a judge and this was regarded as disloyalty, resulting in his imprisonment until his death in A.D. 767. Acts like these are hardly surprising if one bears in mind only one of the many statements of the Prophet to the effect that "One who is appointed as a judge has his throat cut without a knife." See: M.Y. Kindi, Kitāb al-Wulāt Wa Kitāb al-Qudāt (Beirut: Matbaat al-Adab, A.D. 1908) P. 471; Abu Dawood, al-Sunan (n.p., Dar al-Fikr, n.d.) Vol. III, P. 298; S. Balaghi, Edalat Wa Qaza dar Eslam (Tehran: Amir Kabir, 1358 sh.), PP. 117-119

suggestions to clarify the Islamic law treatises have been made in this thesis.

So far we have been dealing with problems for which no certain solutions are offered in the classical treatises. There are also certain solutions offered in the medieval legal manuals which may occasionally bring about unjust results. These cases must also be identified and cured in the light of the existing principles of Islamic law, to make sure that " justice " and " certainty ", as the two most important features of all laws, is secured for Islamic law. For example, we saw earlier in Chapter II that under Islamic law the risk of destruction of goods sold but not delivered remains with the seller (11). We also saw that the rule is based on a statement of the Prophet and is justified by applying a presumption. The goods are " presumed " to have returned to the ownership of the seller shortly before destruction. So it is "his" property which is destroyed. It follows that the buyer remains the owner of the goods up to that moment and he can, therefore, keep all the separable produce or income arising out of the goods within that period. For example, the offspring of an animal sold shall remain in the ownership of the buyer if it is born within the said period. This is in spite of the fact that the buyer gets

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11) See: Chapter II, Section 2-1

all his money back. The fact that the buyer keeps all the separable produce and income without paying anything, while the seller loses the separable produce and, at the same time, bears the loss of destruction of the goods, is certainly unjust to the seller, who thus bears all the loss. A better apportioning of losses is therefore needed. Two avenues of approach are open to this problem. One, which is adopted by traditional Islamic law, is from the side of legal concepts. From this point of view, the separable produce or income remains in the ownership of the seller because, following the legal presumption, it is only the "destroyed" goods which return to the ownership of the seller and not the "existing" produce, which belongs and remains to belong to the buyer. This legal approach brings about the aforesaid result.

The other approach to this problem is from the risk side. Considerations as to who is in a better position to bear the loss and the reasonableness or unreasonableness of the solution adopted will be relevant to this approach. If we adopt this approach, we have to rule that the buyer is required to return the separable produce or income to the seller to redress at least part of his loss. It is noteworthy that this approach is not without legal justification. There is no "consideration" or, to speak in Islamic law terms, no " cause" (ʿilla) for the

buyer's keeping of the benefit. In other words, the same legal devise which enabled the English court in the Fibrosa case to decide in a way which would necessitate the return of the advance payment made under a frustrated contract (12), can enable the Muslim jurists to come to the conclusion that the separable produce or income of goods perished before delivery must be returned to the seller.

It is worth mentioning that English law has not felt it necessary to deal exceptionally with cases where sold goods are destroyed before delivery. This may be due to the fact that English law would tend to assume that there was most probably insurance in force to deal with this kind of risk. Such an assumption could not exist in the traditional Islamic law where it is well known jurisprudentially - even among those jurists who do not limit the number of valid contracts in Islamic law to nominate contracts - that the normal formula of insurance contract known to the West is void because of uncertainty or gharar. The insurer will not know, at the time of the conclusion of contract, whether he will be required to pay anything to the insured and also the exact amount of payment. This kind of contract is, therefore, effectively a gamble upon the occurrence of the accident insured against.

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12) See Chapter V, Section 2 - 1

It is upon the prohibition of _maysar_ in the Quran that the concept of insurance has been regarded as forbidden by Muslim jurists. However, there is nothing in the Quranic verse to indicate that _maysar_ may mean anything more than the name of a pre-Islamic gambling game. And the disapproval of gambling would appear to relate less to contract - law concerns than to the general perception of gambling as a practice belonging to the dregs of society. As Shāfiʿi says: "Play is not what Muslims do, it does not go with true manliness." (13) Also there is a clear distinction between the risks involved in gambling, which are deliberately sought out and constitute the very basis of the activity, on the one hand, and business risks, one the other. The Quran itself distinguishes between unnecessary risks taken for frivolous purposes and necessary risks faced in the course of business (14). It would certainly not be beneficial to the economy to prohibit such commercial activities which would necessarily involve an element of risk, for example when manufacturing new articles to be produced in the market for the first time. In fact it is difficult completely to exclude an element of uncertainty or risk even in ordinary transactions.

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13) Shāfiʿi, _al-ʿUmm_, op. cit., Vol. VI, P. 213
14) See: Verse 29/IV

Thus to validate the contract of insurance, as an essential part of today's commerce, which can guarantee the soundness and justice of economic transactions, we have to give a modern liberal interpretation to the concept of qharar, by holding that it does not tend to prohibit all kinds of risk-taking, but only to require that the rights and obligations of the contracting parties and the two " considerations " must be fully defined at the time the contract is entered into. In this respect it is important to note that the "consideration" which is received by the insured in a contract of insurance is the insurer's "undertaking" to compensate him in case of certain losses, and not the amount of money which may (or may not) eventually be paid to him. This very " undertaking " is of value to the insured, giving him the necessary peace of mind and enabling him to continue with his business or other work more actively. The Arabic word for insurance is t'amin (meaning security or peace of mind) which accurately reflects this inherent feature of the contract of insurance. It follows that, unlike what many Muslim jurists believe, if the contingency insured against and the premium payable by the insured are specified in the contract, and the contract is also cleared of the uncertainty in respect of its other essential elements,

like its period of validity, then the contract of insurance concluded between the parties should be regarded as valid and binding under Islamic law. This understanding is strengtheded if one bears in mind the fact that the concept of insurance is historically based on the notion " collective " responsibility, with which Islamic law is not unfamiliar. According to a rule of Islamic criminal law, the blood-money or compensation (diya) payable to the victim or his family in cases of involuntary homicide or bodily harms is not paid by the offender himself but by his relatives. Such relatives are called ʿāqila. The word comes from the root ʿaql which means " the binding of the folded legs of a camel to his thighs " (15), and thus refers to the " solidarity " which exists between the offender and his relatives in payment of diya. At first sight, the concept may seem contrary to the established principles of Islamic law supporting individual responsibility. A more careful analysis of the subject will, however, show that this kind of responsibility reflects a mutual insurance policy existing among the members of a family. The idea behind such policy is that those who benefit from each other (by ways like inheritance) should also share each other's losses. It is for this reason that the same priorities

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15) See: Raghib Isfahani, al-Mufradat fi Gharib al-Quran (Cairo: Maktabat al-Anjlu Misriya, A.D. 1970), Vol. II, P. 512; al-Faraid Arabic - English Dictionary (Beirut: Catholic Press, A.D. 1964), P. 488

which exist in the Islamic law of inheritance for ascertaining those heirs who inherit form the deceased also apply here. So, in fact, the relatives' potential shares in the individual's estate is regarded as an insurance premium in exchange for which they are required to insure the individual against his involuntary offences.

There is, however, one major difference between this kind of " insurance " and the ordinary third - party insurance policies. Here the policy does not operate as a result of a contract made between the insurer and the insured, but is, instead, imposed upon the parties by the law. It follows that the rule does not apply to those who are not subjected to Shari'a law. Thus the family of a non-Muslim living in a Muslim country (dhimmi, lit.: Protected) are not required to pay the diya of his involuntary offences, as they are not subjected to the shari'a family law. (16)

The other issue which calls for consideration under Islmaic law relates to obligations to pay money. It is questionable whether such obligations must still be regarded as " absolute " in the present economic

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16) If, however, the non-Muslim offender cannot afford to pay the diya, then the Public Treasury (Baitul-mal) must pay it, as a result of the rule that life must be protected and blood should not be shed with impunity. See: N.Hilli, Mukhtasar Nāfi', op. cit., P. 403

circumstances where paper moey, unlike the old gold or sliver coins (dinar-*denarius*-or dirham-*drachma*) has no inherent or real value, but only a " representative " value, reflected in the amount of goods that it can buy. Such value is, nowadays, continuously affected by inflation. Therefore, a creditor who receives an amount in excess of the face value of what he was originally owed, cannot be said to have received any benefit, let alone any usurious interest or ribā if, due to inflation, the purchase power of the money he receives is not more than that of the original amount. This justifies, and even necessitates, the award of late-payment damages by the courts, since it is in line with the requirements of justice which, according to the Quran, constitutes the ultimate object of prophethood (Verse 25/LVII). This view also finds support in other verses of the Quran where only exorbitant interest is condemned (Verse 131/III) and, thereby, a distinction is in fact made between legitimate interest and USURA VORAX in which, by exploiding a debtor's need, disproportionate pecuniary advantages are obtained, and the debtor is reduced to penury.

It is noteworthy, however, that the reforms suggested in this thesis, face an important preliminary obstacle. The religious character of Islamic law makes it more resistant to change. Social need or desirability is not

per se sufficient to justify reform, for the simple reason that Islamic law is not moulded by society. In the Islamic concept, it is the laws of God which , being founded on divine revelation, cover all aspects of human life and require complete surrender to the will of God, as in fact the literal meaning of the word Islam (meaning total surrender) indicates. So, before effecting a reform, one has to find a juristic basis to support it. Reforms without such juristic basis in the Muslim world, and most notably total abolition of *Shari'a* law in Turkey, reflected in the replacement of the *Shari'a* with codes of European inspiration (17) proved to be unsuccessful in securing the support of people, who regard their law as part of their religion and, therefore, protected from statutory interference. So the question is: what can be the juristic basis for reforms suggested in this work? The answer lies in the concept of *ijtihād*, or personal legal reasoning, which refers to the ability of deducing Islamic law from its main sources in the light of the new circumstances.

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17) In Turkey, the Civil Code and the Code of Obligation (1926) were based upon Swiss model; The Criminal Code (1926) was based upon the Italian Penal Code; the Code of Criminal Procedure (1929) was based upon the German code, and the Code of Civil Procedure (1927) was based upon the Swiss Code of the canton of Neuchatel.

Before explaining this concept in detail, it must be made clear at the outset that the divine origin of Islamic law does not mean that Muslims believe that their law dropped down direct from heaven similar to the way in which "Goddess Athene is depicted, in Greek mythology, as having sprung... from the mind of Zeus! " (18). Instead, Sharī'a is regarded by Muslims as both a divine law (since it is based on divine revelation) and a jurists' law (since it has been developed by many jurists over the years). It is the work of these jurists, carried out through the procedure of ijtihād, and in line with the requirements of the new world, that can fill the gaps, remove the uncertainties, and prove that Islamic law is not a rigid and static system, but "a living and developing system which, within the accepted limits imposed by the divine command, is conditioned by and grows out of the phenomena of social change." (19)

What facilitates this task is the way in which Quranic verses and traditions of the Prophet (which form the two main sources of Islamic law) have been expressed. As far as the Quran is concerned, a number of its verses are allegorical (Mutashābihāt , as opposed to

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18) J.N.D. Anderson, Law Reform in the Muslim World (London: Atlone Press, 1976) P.4

19) N.J. Coulson, Succession in the Muslim Family, op.cit., P.6

Ommahāt = Fundamentals) containing broad principles, and capable of various interpretations, in the light of the new circumstances (20). For example, Verse 188/II prohibiting consumption of property among the people in vanity (akl al-māl bilbātil) may be used as the juristic basis justifying legislation to prevent various kinds of unjust enrichment. Similarly, in Verse 275/II declaring that " God has permitted trade and forbidden usury or ribā ", the word " trade " is a general term and may be used to cover various commercial transactions of the modern world, which may have not been known at the outset of Islam, provided they are not against any fundamental principles of Shari'a. Also the Quranic Verse: " Honour your contracts " contains a fundamental principle showing the sanctity of all contracts, except " those which declare forbidden that which is allowed, or declare allowed that which is forbidden ". (21)

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20) Verse 7/III of the Quran depicts these two kinds of verses: "He it is who has revealed unto thee (Muhammad) the Scripture wherein are clear revelations - they are the substance of the Book- and others [which are] allegorical."

21) See: Ibn Taimiya, Fatawa, op. cit., Vol. III, P. 333

The Prophet refers to this feature of the Quran when he says:

> The appearance of this Book is beautiful and its contents deep and profound. It contains many stars each one of them having, in turn, further stars. The miracles of this Book are countless and its novelty never stales. (22)

The recommendation made by ʿAli ibn Abitalib, the first Shiʿi Imam and the fourth caliph of Islam, to one of his companions, Abdullah ibn Abbas, is also noteworthy in this respect. He recommends the latter not to argue with his opponents on the basis of the Quran because, he says, " the Quranic verses are susceptible to various interpretations." (23)

Such " generality " is an important feature of the Prophet's traditions too, many of which have been expressed in the form of broad principles. The statement by the Prophet prohibiting undue loss, which is tantamount to unjust enrichment, requires every damage or darar to be rectified and may, therefore, be used to justify legislation prohibiting the cause of any loss and requiring payment of compensation in all cases where

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22) M.Y. Kulaini, Usūl min al-Kafi (Tehran: Dar al-Kotob al-Islamiyya, 3rd ed. A.H. 1388), Vol. II, P.438

23) Nahjul Balagha (containing speeches and letters of Imam ʿAli ibn Abitalib), Letter No:77

loss is caused, in spite of the fact that the act or event causing loss may not have been the subject of any direct ruling in the Sharī'a. So, in the previously mentioned case of Samorat ibn Jondab, decided by the Prophet over 1350 years ago and forming the basis of the principle of " no undue loss ", instead of " a man who annoys his neighbour by entering into his house without permission, with the alleged purpose of irrigating his tree located in the adjacent garden ", we can easily read, " a driver who, by reckless driving, makes the road dangerous for other users. " Similarly, in the cases of fraud, instead of "a female animal whose teats have been tied up for some time in order to give the intending buyer a false impression of its normal milk - yield ", " a she-camel or ship whose unusual breeding gives her a swollen stomach denoting pregnancy ", or " a bride who inserts cotton balls in her mouth corners to plump up her face and thus improve her look ", we can read " a car which is sold with a forged certificate of road - worthiness." This is because it is the principle which is all - important, and not the outmoded examples or cases which are sometimes referred to. And the clear principle which can be inferred from all these cases is the prohibition of undue loss caused by deception.

Also, the principle of ibāha (tolerance or

permission), which is based on the Quranic Verse 119/VI declaring: " He hath explained unto you that which is forbidden unto you...", and is rooted in the Prophet's tradition too, requires that acts, dispositions and new legislation should be permissible (mubāh) unless they are expressly forbidden by the divine revelation or by the Sunna (precedent) of the Prophet. This, of course, makes the task of the reformers much easier than if the limits of legality were regarded as having been precisely determined by divine revelation.

It is noteworthy that the exercise of ijtihād has been approved and even encouraged by the Prophet himself. the following conversation which took place between the Prophet and Muāz ibn Jabal, whom he was to appoint as his judge to Yemen, signifies the Prophet's approval of ijtihād:

The Prophet is reported to have asked Muʻāz:
"According to what shall you base your legal decisions?"
"On the Quran", he replied.
"But if that contains nothing to the purpose?"
"Then upon your Traditions."
"But if that also fails you?"
"Then I will follow my own reasoning."

The Prophet is then reported to have said : " Praise be to God who has favoured the messenger of His Messenger

with what His Messenger is willing to approve." (24)

On other occasions, the Prophet is reported to have encouraged ijtihād by saying:" If a mujtahid [the person exercising ijtihād] is right, he receives two rewards; and if he is mistaken, he still receives one reward." (25) He is also reported as saying, " the differences of opinion among the learned men of my community are a sign of God's Grace", and, thereby, encouraging personal reasoning. (26) There is no doubt that ijtihād having been allowed during the life - time of the Prophet must, a fortiori, be allowed after his passing away, when direct guidance by God through revelation to the Prophet ceased.

The reformers' task is further facilitated in Shiʿi law in which, unlike Sunni law, the so-called gate (bāb) of ijtihād was never closed. From the end of the third century of the Muslim era (9th Century A.D.), i.e., after the death of Ahmad ibn Hanbal, the leader of the fourth Sunni school of jurisprudence, and the subsequent crystallisation of the main schools of Sunni law, the scholars of all Sunni schools felt that all essential issues had been properly discussed and finally settled.

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24) See: M. Ghazzali, al-Mustasfa (Cairo: Matbaʿat al - Amiriyya, A.H. 1324) Vol. II, P.355
25) ibid.,P.355
26) See: Suyuti, al-Jami al-Saghir fi Ahadith al-Bashir al-Nadhir (Cairo: Matbaa Mustafa al-Babi al-Halabi, 4th ed., A.H. 1373) P.247

From that time onwards, the Sunnis regarded the door of ijtihād as having been closed. All subsequent jurists then had to accept the views of their great predecessors who, ironically, were against the closure of the door of ijtihād themselves. It is interesting to note in this respect that even the founders of the four supervening orthodox schools of Sunni law forbade people to follow their views without ascertaining their sources. The following statements from the four leaders are noteworthy:

Abu Hanifa (d.A.D. 767) and his companion, Abu Yusuf, are reported to have said: "It is not legitimate for any one to follow our views until he has learned the source wherefrom we derived those views."

Mālik (d.A.D.796) is quoted as saying: "I am but a human being who is capable of right and error. Consider my views and accept only whatever is in conformity with the Quran and the Sunna, and set aside whatever is in conflict with the main two sources." It is on this basis that Mālik prevented the Abbasid Caliph, Hārun al-Rashid, from imposing the Māliki school on the people in the 8th century A.D.

Muzani, the author of the earliest handbook on Shāfiʿi law, declares at the beginning of his work: "I made this book an extract from the doctrine of Shāfiʿi [d.A.D.820]

and the implications of his opinions, for the benefit of those who may desire it, although Shāfi'i forbade anyone to follow him or anyone else." (27)

Finally, Ahmad ibn Hanbal (d.A.D.855) who, being a traditionalist, was very much a supporter of traditions and suspicious of ijtihād, still recommends: "Do not imitate me, Malik, Shafii, or Thawri, but learn from the source from which they learned."

Similar statements, condemning imitation and encouraging ijtihād, have been attributed to other great scholars of various schools. Shahrastani (d.A.D.548) in his famous book on Religions and Sects (Kitāb al-Milal wal-Nihal) mentions that ijtihād is essential because, "the texts are limited, while events have no limit. That which is unlimited can never be covered by that which is limited": (al-nusūs tantahi wal-waqāi'e la tantahi, wa mā lā yantahi lā yadbituhu mā yantahi).

Suyūti (d.A.D.1445) has a small book called "Rejecting Those who Corrupted the Earth and did not Realize that Personal Reasoning or ijtihād is Essential in Every Age": (Arraddu ala man afsadal-ard wa jahala annal-ijtihād fi kulli 'asrin fard).

Ibn Idris concludes his book, Sarāir al-Islam, by saying that the more recent jurists (mutaakhkhirin)

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27) Muzani, Mukhtasar (Cairo: Maktabat al-Kobra, A.H.1324) Vol. I, P.2

are superior to the predecessors (mutaqaddimin) " as knowledge increases with the increase of men and the progress of time." (28)

Unlike Sunni law, in Shi'i law, the concept of ijtihād always maintained its significance. The shi'is are, therefore, usually referred to as Ahl al-Ijtijād (supporters of personal legal reasoning). As Macdonald says, "the shiites still have Mujtahids [exercising ijtihad] who are not bound to the words of a Master, but can give decisions on their own responsibility." (29) One can sincerely hope that Shi'i jurists take advantage of this useful concept not only in the field of ritual practices of Islam, such as prayers (salāt), fasting

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28) For these objections the reader is referred to the following original sources:
Ibn Taimiya (A.D.1263-1328), Rafa al - Malam anil Aimmat al-A'alam (Beirut: al-Maktab al-Islami,3rd ed. A.H.1390), PP.175-184; M.Shahrastani, Kitāb al-Milal wal-Nihal(Cairo: Muassisat al-Halabi, A.D. 1968) Vol.II, P.4; M. Ibn Abidin, Radd al - Mukhtar alal - Durr al - Mukhtar, op. cit. Vol. I, P.63; Muzani, al-Mukhtasar, published with Shāfi'i's book al-Umm (Cairo: Maktabat al-Kobra, A.H.1324)Vol. I, P.2.
The following secondary sources may also be found interesting:
N.Calder, "The Structure of Authority in Imami Shii Jurisprudence" (unpublished Ph.D. thesis, London: S.O.A.S.,1980),P.227; Muhammasani, Falsafeye Ghanun Gozari dar Eslam (trans.E.Golestani) (Tehran: Amir Kabir, 1358 sh.)P.96; M. Musleheddin, Philosophy of Islamic Law and the Orientalists (Lahore: Islamic Publications Ltd.,n.d.)P.143; J. Schacht, The Origins of Muhammadan Jurisprudence (Oxford: Clarendon Press, 1950) P.6

29) Macodonald, Muslim Theology, P.116 cited in, Asfa A.A. Fyzee, An Introduction to the Study of Mohammadan Law (Oxford University Press, 1931)P.37

(sawm), alms giving (sadaqa) and pilgrimage (hajj), with which early scholars have been concerned first and foremost, but also in the field of contracts, with a view to refine, restate and codify the Sharī'a and to align the terms of Islamic law to the present needs of the Muslim society (30). It is only in this way that Islamic law can maintain the perpetual validity that it claims. It is a truism that there is no real law but only law in the making: " The law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other... it will become entirely consistent only when it ceases to grow "(31). There is no doubt that Islamic law cannot

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30) It is worth mentioning here that about four centuries ago a movement, called the Akhbāri Movement, started in the Shī'i world by Mulla Amin Astarabadi (d.A.H.1026) whose supporters rejected ijtihād altogether and limited themselves to the apparent meaning of words narrated from the Prophet and the Shī'i Imams. As an example of their rigid approach to the traditions, Wahid Behbahani, who was a great scholar of Shī'i school and a strong opponent of the Akhbāri movement, gives an interesting example. "if it could be discovered", he says, "that a sick man was recommended by one of the Imams to drink cold water, the Akhbaris would prescribe the same for every patient, whatever his illness." As a result of strong opposition of Shī'i jurists to this movement it could not survive and it now hardly has a supporter among the Shī'i Muslims. See: M. Mutahhari, "Asle ijtihad dar Eslam" in Dah Goftar (Tehran :Sadra Publishers, 1361 sh.), PP. 76-107 at P. 89

31) Per Mr. Justice Holmes, cited in D.H. Parry, The Sanctity of Contract in English Law (London: Sweet & Maxwell, 1986)P.77

and must not be an exception. Its continuous development must be secured through the useful procedure of ijtihād.

At the end of this chapter a few words must be mentioned about the laws of Iran, to which special reference was made throughout this thesis. There is no general and coherent doctrine of force majeure dealing with cases of impossibility of performance in Iranian law. The doctrine has been dealt with by various Acts, ranging from the Civil Code and the Civil Procedure Code to the Maritime Law and the Islamic Punishment Act! (32) Even these scattered articles lack detailed technical rules. As a result, much is left to judges and lawyers to cope with the complexities of various cases, causing the problem of discretion discussed earlier. Accordingly, it could be suggested that Iranian law should follow the lead set by law in England, and enact a Frustration Act. Such an Act should not, however, be limited to the issue of rights and liabilities of the parties to a frustrated contract. it must be much more comprehensive, covering all aspects of the subject of impossibility of performance.

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32) See, for example, Articles 227, 229, 240, 242, 243, 348 and 422 of the Civil Code ;Article 729 of the Civil Procedure Code ; Articles 104, 131 and 150 of the Maritime Law, Article 139 of the Discretionary Punishments Act and Article 50 of the Islamic Punishment Act.

Also in England itself a more certain law of frustration is needed. Lord Sumner in Bank Line Ltd. and Capel (33) rightly said that frustration is a doctrine " which, within its proper limits, serves a valuable purpose ". Although these limits have been clarified to some extent by the courts in some of their recent decisions (34), they need to be worked out in more detail than has hitherto been done to provide firm answers to such questions as, the extent to which something short of physical impossibility might be frustration, for example, the extent to which frustration of purpose is recognised, whether leases are really a special case, the meaning of fault of one party as a factor debarring reliance on frustration, whether partial or temporary impossibility is recognised, the remedies available following frustration and other questions which were dealt with in this work. For example English law never set out with any clarity the limits to the doctrine of "self -induced" frustration and the relationship between frustration and fault. If we accept the wide interpretation of Hobhouse J in J. Lauritzen A.S. V. Wijsmuller B.V. (The Dan

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33) [1919] AC 435

34) See, for example, the decision of the court of Appeal in J. Lauritzen A/S V. Wijsmuller B.V. (The Super Servant Two) [1990] 1 LLoyd's Rep. 1, regarding self-induced frustration and the decision in National carriers Ltd. V. Panalpina (Northern) Ltd. [1981] 1 All ER 161, regarding the application of the doctrine of frustration to leases.

King) (35) This would mean that a seller or supplier who, as a result of partial failure of supply, cannot perform all his contracts with all of his customers, is likely to be prohibited from invoking the doctrine of frustration. In this respect it may be argued that English law should follow the lead set in the United States and hold that such seller shall be discharged from liability if he proportionately rations the limited supply among his buyers (Restatement of the Law of Contracts, Ss 464 (1)).

The effect of negligence on the liability of a promisor also calls for consideration.Some day it must be fully determined whether or not negligence debars reliance on frustration and, therefore, whether or not a promisor who is "grievously injured in a road accident due to his own fault" or "a prima donna who thoughtlessly sits in a draught and loses her voice "(36) is excused from performance of the contract. Also, as far as frustration of purpose is concerned, the difference between the decision in Herne Bay Steamship Co. V. Hutton (37) with that of Krell V. Henry (38) made by the same judges eleven days later makes it difficult to understand what exactly the position of English law on this subject is. (39)

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35) (1988) LMLN 225; The Times, June 11, 1988
36) See: Chapter III, Section VI
37) [1903] 2 K.B. 683
38) [1903] 2 K.B. 740
39) Regarding the difference between these two decisions, see Chapter IV, Footnote 87

So it is clear that there is a considerable degree of uncertainty governing this part of English law. This deficiency must be remedied. In the changing world of today, the law of impossibility of performance forms an important part of the general law of contract and particularly attracts the attention of businessmen and their legal advisers. A more certain doctrine of frustration in English law would ensure that English law would retain its role as the leading law in the field of commerce and that businessmen throughout the world would continue to choose it as the governing law of their contracts.

The English law of frustration must also be more generous. The Law Reform (Frustrated Contracts) Act, 1943, did not add to the occasions on which a contract is discharged for impossibility of performance. The Act only alters the legal consequences of a discharge for impossibility of performance when that takes place by law independently of the Act. I do not of course argue that English law must easily regard a contract as frustrated, for example, in every case where the economic equilibrium of a contract is disturbed. I do, however, believe that there is much to be done to fully elaborate the reasonable scope of the principle of " sanctity of contract " in English law particularly in cases where the

parties' legitimate expectations are disappointed, and to modify the overall attitude of English law which regards contractual obligations as in principle absolute.

If English law intends to retain its role as a modern system of law capable of adapting itself to the needs of modern business, it must also avoid the all-or-nothing approach. Instead of regarding automatic termination as the only solution in all cases of frustration, it must occasionally be prepared to regard frustration as a "defence", enabling the party who is likely to suffer enormous loss in the changed circumstances to terminate the contract if he so desires. This is particularly useful in cases of frustration of purpose and economic frustration. In this latter case, it is also advisable to give a right of judicial adjustment to the judges to adjust the terms of the contract to the new circumstances when both parties intend to continue their contractual relationship in the changed circumstances. Of course by giving appropriate guidelines to the judges, such power should be kept within reasonable borders to avoid unbridled flexibility of the law, and to ensure that the necessary balance between flexibility and certainty is maintained.

It is to be noted that such reforms are not without a proper basis in the substantive English law. There are

dicta indicating that the doctrine of impossibility of performance is still developing in English law. In the two cases of Davis contractors (40) and British Movitonews (41) in the 1950's, the House of Lords, by expressing a view that a contract would cease to bind in a situation which was fundamentally different from what the parties originally contemplated, went a long way towards recognising economic frustration (42). Also, in 1981, by deciding that frustration could, in principle, apply to leases, the House of Lords seems to have overcome the reluctance which existed for a long time in English law for accepting the applicability of the doctrine to leases (43). A similar development in respect of other aspects of the English law of frustration is desirable.

It is, however, doubtful that the required degree of generosity and certainty can be properly achieved through the slow process of case-law. Therefore, the best way is for Parliament to take the initiative in this respect by enacting a conclusive frustration Act, to cover all

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40) [1956] A.C. 696
41) [1952] A.C. 166
42) For details of these two cases see Chapter IV, Section 2
43) Also the Supreme Court of Canada in Highway Proporties Ltd. V. Kelly, Douglas & Co. (1971) 17 DLR (3d) 710 held that for the purpose of applying the rules about breach, " it is no longer sensible to pretend that a commercial lease... is simply a conveyance and not also a contract. "

aspects of the subject and provide firm solutions for many unsettled problems.

Codification of this part of English law need not of course cause concerns like those expressed by Lord Denning who, as was seen earlier, believes that it will be unwise to put things in writing because the law will then be too inflexible and it will be difficult " to adapt to changing needs "; since, ironically, we are here faced with a situation where the English "common" law is certainly not more flexible than some of the " codified " European systems, like French law, and is notably less flexible than some others, like German law. Codification of this part of English law will not only give more clarity to it, but may also be used to ensure that, by making the appropriate reforms, English law is brought into harmony with the needs of today's commercial world, that requires a more flexible doctrine of impossibility of performance.

Perhaps one might conclude by summarizing what constitutes the main theme of this thesis. In this work an attempt was made to set out the elements of the Islamic law of impossibility of performance as they appear to someone familiar with modern law systems and, in particular, with English law. The findings of this research may be summarized by saying

that a proper analysis of the discussions carried out in the traditional legal manuals in relation to different aspects of the law of contract would make it possible to find answers based on Islamic law principles for almost the same questions which have been dealt with in more modern systems. This is of course interesting especially when dealing with systems as divergent as Islamic law and the more modern systems. The parallel should not, however, be drawn too far. Unlike modern lawyers, the traditional Muslim jurists have not tried to elaborate a general theory of impossibility of performance. So the most important service that this thesis sets out to render to the Islamic law of impossibility of performance is to try and remedy this deficiency by presenting this part of Islamic law in the form of a general doctrine based on Islamic law principles. Our foregoing discussions reveal that although the subject is based on admirable and firm rules of Islamic law, some of the edges are rough. To remedy this deficiency, one must use the useful concept of " ijtihād ", as recognised in Shiʿi law, in the light of new social conditions, to ensure that Islamic law is developed in a coherent manner. Certainly traditional shariʿa, as appearing in the medieval legal manuals, cannot be applied in today's Muslim societies without prior adaptation to the

requirements of present civilization, by invoking the concept of ijtihād. On the other hand, those who advocate total abolition of Islamic law in Muslim countries ignore the popular demand in these communities, which has caused a growing number of states launching Islamisation programmes in the final third of the twentieth century. These programmes start from such symbolic acts as emptying a can of beer in the River Nile, to show submission to the laws of Islam prohibiting alcoholic drinks (44), or announcing the ruler as the " Commander of the Faithful " (Amir ul-Muminin), to use the title given to the caliphs in the early periods of Islam; and extend to more fundamental programmes as reexamining the country's legal structure in the light of the requirements of Islamic law. The abolitionists not only ignore this Islamic Revivalism and the recent deepening of Islamic consciousness in Muslim countries, but they also ignore the simple fact that no one cuts down an entire tree because of some dead twigs.

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44) This was done on September 24,1983 by Jafar Numeiri, the former president of Sudan, follwing the "Islamic Legal Revolution" in that country. The total value of alcoholic drink hurled into the river on that day was estimated to be U.S.$ 5 million. See the article entitled "Numeiri of Sudan goes Islamic " in the Crescent International, Vol. 12, No. 15: 16-31 October 1983, PP. 1&11. See also: Afkar Inquiry, Vol.I, No. 7: December 1984, PP. 26-31, and Gordan, "The Islamic Legal Revolution: The Case of Sudan", 19 (1985) International Lawyer, P.801

GLOSSARY OF ARABIC TERMS

'ahd	covenant
ahl al - ijtihad	supporters of personal legal reasoning
ahliyya	capacity
ahliyya istifa	capacity to enforce rights
ahliyya tamatt'u	capacity to enjoy rights
ajir	hired worker
'ajz	inability
akl	consumption ; eating
'āmm	general
'aqd	contract
'āqil	sane
'aql	human intellect
arḍ	Earth
'āriya	loan of non-fungible things
arsh	compensation
asalat al-ibāha	principle of tolerance
asalat al-jawāz	principle of permissiveness
asālat al-luzūm	presumption of irrevocability
asālat al-sihha	presumption of validity
'Āshūra	the "tenth" day of the month of Muharram
ba'i	sale
bāi'e	seller
ba'i sarf	sale of coins for coins
baitullah	House of God
bāligh	mature
basit	indivisible

bātil	void
bid'a	heresy
bina e 'uqala	common sense
ḍarar	loss
ḍarura	necessity
ḍirār	undue loss
dirham	name of silver currency of early Islam : *drachma*
faḍli māl bilā 'iwaz	unjust enrichment
faqih (pl. fuqaha)	jurist
fāsid	defective; irregular
fāsiq	sinful
faskh	rescission
fatwa	judicial opinion
fiqh	Islamic jurisprudence
fisq	sinfulness
foḍūli	unauthorized (transaction)
fur'u	branches
ghabn	lesion
gharar	risk; hazard; uncertainty
ghaybat kobra	major occultation
ghaybat sughra	minor occultation
ghyr mumayyiz	indiscerning
ghayr nāfidh	inoperative
ghosl	full ablutions
hadd (pl. hudūd)	prescribed punishment
hadith	tradition or statement of the Prophet
hadith	subsequent
hāez	menstruous woman
hajj	prescribed pilgrimage to Mecca
hajr	interdiction
hakim	ruling authority ; judge

halāl	lawful; permitted
hashara	vermin
hawāla	assignment
hiāzat al-mubāhāt	accquisition of unclaimed property
hiba	donation
hijra	migration (of Prophet Muhammad from Mecca to Medina): the beginning of Islamic era
i'asār	insolvency
'ibāda (pl.'ibadat)	ritual practice;worship
ibāha	tolerance;permission
ibr'ā	accquittance of a debter
idhn	consent; permission
iḍtirār	necessity
iflās	bankruptcy
ihtikār	hoarding
ijāb	offer
ijāra	contract of employment
ijāra	lease;hire;rent
ijāza	ratification
ijbār	compulsion
ijtihād	endeavour:exerting onself in an attempt to discover Islamic law from its original sources
ikrāh	duress
ʻilla	cause
imḍā	ratification
imtina	refusal
infisakh	automatic termination
inhilāl	automatic termination
Isā	Jesus
ithnāʻashari	twelver
ʻitq	setting free (a slave)

jāiz	revocable
jihād	holy war
jo'āla	promise of reward
jonob	a man after seminal effusion and before taking full ablutions
jonūn	insanity
jonūn adwarī	periodical insanity
kafa'a	marriage equality
kafil	surety
khāss	special
khiyār (pl. khiyārāt)	option of rescission
khiyār al-'ayb	option of defect
khiyār heiwān	option of animals
khiyār majlis	option of meeting place
khiyār shart	stipulated option of rescission
khiyār taadhdhur taslim	option of impossiblity of delivery
khiyār taflis	option of bankrupcy
lā ḍarar	no undue loss
lāzim	irrevocable
mab'i	the thing sold
mahr	dower;nuptial gift
majhūl	unknown
Majlis	Assembly: Iranian Parliament
majlis	meeting place
makāsib	trades
makful	the principal in a contract of surety
makfulun lah	beneficiary in a contract of surety
māl	property
mala'at	solvency
malaka nafsāniyya	habit

m'alūm	known
maqduriyya	possibility
maraḍ al-mawt	death sickness
mardūd	rejected
m'atūh	simpleton
mithlee	replaceable
moḍāraba	dormant partnership; profit-sharing
moghārasa	contract for agricultural partership
m'omin	believer
mortahin	mortgagee; pledgee
mosāqāt	contract for the cultivation of land for the consideration of a share in the crops
moshtari	purchaser
moslem	Muslim
mota'ahhid	promisor
mota'ahhidun lah	promisee
mozāra'a	agricultural partnership
mubāh	permissible
mudda'i	plaintiff
muhābāt	transaction in which part of the consideration is waived
mujtahid	person excercising *ijtihad* to infer Islamic law from its original sources
mumayyiz	discerning
mutashābih	allegorical
nafaqa	maintenance
nama'at monfasil	separable produce or income
nama'at mottasil	attachments
nass (pl. nusus)	text
nikāh	marriage
ommahāt	fundamentals

qabḍ	possession
qabūl	acceptance
qāḍi	judge
qanāt	water-channel
qarḍ	loan
qasd	intention
qasdi inshāi 'aqd	intention to create legal relations
qawāid	rules
qimee	dissimilars
qisās	retaliation
radd	rejection
rāhin	mortgagor;pledgor
rahn	mortgage;pledge
rajol	man
rashid	prudent
r'ay	opinion
ribā	usury
riḍa	consent
riqq	slavery
rushd	prudence
sadaqa	alms
safah	prodigality
safih	prodigal;spendthrift
saghir	infant
salāt	prayer
sawm	fasting
sayyid al-shuhadā	the lord among martyrs
shams	sun
shar'e	Law-Giver (God)
shari'a	Islam;Islamic law

shart	condition;obligation
shart bina'i	implied term
shirka	partnership
sighar	infancy
siwāk	tooth-brush
solh	amicable settlement
sunna	precedent;tradition (of the Prophet and Shi'i Imams)
ta'assur	hardship
tabaddul	alteration
tadlis	fraudulent misrepresentation
tadlis al-mashshāta	beautician's fraud
taghrir al-qawli	fraudulent statement
tājir(pl. tujjar)	businessman
talaf	destruction
talāq	divorce
t'aligh	suspension
tamdid	extension
taslim	delivery
tasriyya	tying up the udders of female animals to give the intending purchaser an optimistic impression of the animal's normal milk yield
t'azir (pl. t'azirāt)	discretionary punishment
thaman	price; consideration
tol'ū	rising
ufu bil-'uqūd	honour contracts
ujrat al-mithl	*quantum meruit*
ujrat al-musamma	specific rent
'uqud e moayyana	nominate or specific contracts
'urf	custom and usage
'usr wa haraj	hardship
usūl	principles

wadi'a	deposit
wahdat matlūb	desirable combinations
waqai'e	events
waqf	pious endowment
wasf	description
wasiyya	bequest
wikala	agency
zāhir	outward appearance
zakāt	religious tax

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