Summer 6-15-2024

Rebalancing the Scales: A Comparative Study Between Egyptian Contract Law's Rules on Unequal Contracts and the American Unconscionability Doctrine

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A Thesis Submitted by

Yousef Elnemr

To the Department of Law

Spring 2024

in partial fulfillment of the requirements for the

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DEDICATION

To my wife

Noura

The American University in Cairo
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ABSTRACT

Traditionally, contracts were envisioned as pacts struck between equals. Their enforcement was considered a form of honoring the free will and autonomy of the parties. This theoretical imagination is no longer valid today; the concentration of wealth and power in the hands of some individuals or institutions means they can name their terms and force the other party between taking or leaving it. When the *need* to contract is pressing, the weaker party is forced to accept any imposed terms. Thus, strict enforcement of contractual terms helps the powerful further their interests at the expense of their helpless partners. Today, the law, including Egyptian law, recognizes this situation and intervenes in those unequal contracts to rebalance the scales tipped by inequality. This paper examines the Egyptian Civil Code's general rules designed to protect weaker contractual parties and suggests reforms to enhance their functionality. It begins by exploring contracts' source of obligatory power advocating the theory of "Equality in Exchange" which suggests that contract enforceability can only be morally grounded in the fairness of its terms. Next, it presents the relevant rules of the Civil Code and notes the mediocre results of their practical application. Then, an overview of the American doctrine of unconscionability is presented to showcase how the same issues are handled in the legal system of one of the most powerful modern economies. Finally, reforms are suggested to the Egyptian Civil Code to empower courts to protect weaker contractual parties.

KEY WORDS: Egyptian Law, The Egyptian Civil Code, Unequal Contracts, Equality in Exchange, Exploitation, Adhesion Contracts, Lesion, Unconscionability, Legal Reform

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> *Then Anu and Bel called by name me, Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak; so that I should rule over the black-headed people like Shamash, and enlighten the land, to further the well-being of mankind.*
>
> Excerpt from the Prologue - The Code of Hammurabi.[1]

I. Introduction

Why do we need laws? There are certainly no simple answers to that existential question. Nevertheless, one of its oldest and most recurring answers is undoubtedly the one offered in Hammurabi's code: to check the powers of the "strong" and protect the "weak" thus furthering the well-being of humankind.[2] To achieve those objectives, laws regulate social behavior and establish boundaries that members of society must respect in their mutual interactions. Human survival depends on the sustainability of exchanges. As the "state" replaced the "tribe" and "clan" model in organizing society, the connections that once bound parties in the community, and ensured contractual enforcement, were severed and contract law became essential to regulate exchanges by promising to utilize state coercion, instead of the older community-based sanctions, to enforce contractual obligations.[3] Even today, contract law's basic function is to guarantee that promises of exchange made in the market shall be honored. Its essence is just one rule and its exceptions: *pacta sunt servanda*. To contract law, the specifics of a contract are, usually, irrelevant; if a contract is made within the accepted legal parameters, the freedom of contract principle dictates that its parties are free to agree on any terms without interference from the legal system whose job is to enforce those terms rather than to contemplate their wisdom.

Freedom of contract may have been created with the best of intentions in mind: the promotion of liberty by empowering individuals to make their own decisions.[4] What its supporters failed to consider, however, was the folly of the "equal treatment of

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[1] The Avalon Project: Code of Hammurabi, Translation by Leonard William King, Retrieved from https://avalon.law.yale.edu/ancient/hamframe.asp (last visited Apr 5, 2023).

[2] The nature and objective of "law" is debatable, for an overview of the popular theories in that regard see BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW (2017).

[3] *See* KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 124-28 (2006) (discussing the importance of the legal system in enforcing long-term contracts in the modern setting).

[4] *See* Max Radin, *Contract Obligation and the Human Will Role of Consent in the System of Legal Relations, The*, 43 COLUM. L. REV. 575, 575-76 (1943) (noting that progress was understood in the nineteenth century to mean the achievement of 'legal self-determination' through a transition from status-based obligations to contract-based obligations).

unequals."[5] Because of the many practical differences between individuals, equality between them is far from reality. The situation, especially the economic one, a person may find herself in may sometimes *force* her into unfavorable bargains, the alternative might be starvation.[6] The disparity of power between people means that it would be naive to assume that equality *always* exists between contracting parties. The rising power of conglomerates, the proliferation of monopolistic practices, and the dominance of standard-form adhesion contracts are all tell-tale signs of how the scales of contractual equality are tipped.

Historically, judges were moved when faced with exceptionally unfair contracts, and their natural human disapproval of injustice kicked in. Lacking appropriate legal tools, courts attempted to correct the perceived unfairness using "covert tools"[7] in a bid to perform their basic function: the administration of justice.[8] As the popularity of the classical interpretations of freedom of contract waned, it became accepted that courts must have some room to evaluate the *substance* of contractual obligations before ordering their enforcement rather than just monitoring the validity of the contract's formation process. Today, most major legal systems have rules regulating unfairness in contracts' substance such as the *laesio enormis* rule applied in civil law countries or the unconscionability doctrine known in common law.

Since its drafting in 1948, the Egyptian Civil Code has held a special place at the heart of the Egyptian legal system.[9] Like most of its contemporaries, the Civil Code allows courts to intervene with unequal contractual obligations. It provides remedies that sometimes allow courts sweeping powers up to a complete redrafting of the unequal

[5] John Edward Murray Jr., *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1, 28 (1969).
[6] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCIENCE QUARTERLY 470, 473 (1923).
[7] The term "covert tools" was coined by the U.C.C. chief architect Karl Llewellyn. He used it to refer to the judicial practice of the use of established legal doctrine to refuse enforcement of contracts the court finds abusive despite the doctrine being inapplicable in that situation. This practice can be found in the US legal system as well as the Egyptian legal system, *see infra* pp. 29, 41, 42 and notes 131, 200, 203.
[8] Murray, *supra* note 5 at 2.
[9] *See* GUY BECHOR, THE SANHURI CODE, AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932 TO 1949), at 56-57 (Brill, 2007) ("Sanhūrī's New Civil Code is still the civil code in effect in present-day Egypt, and it has exerted a crucial influence throughout the Arab world, spawning an entire family of Arab civil codes. . . . It is impossible to relate to civil law in the Arab world without an acquaintance with the New Egyptian Civil Code and -this book would argue- without an appreciation of the wide-ranging transformation it generated in Egyptian civil law.").

obligation. While the Code, at its time, was certainly a huge step in the right direction,[10] it is beginning to show its age now that almost seventy years have passed since its adoption. Society has substantially progressed since the drafting of the Code; social and economic conditions and policies have changed, new methods for contracting have become commonplace, and the monolithic interpretations of the freedom of contract principle, which were already waning at the time of the code's drafting, have all but died out thus paving the road to increased judicial intervention with contracts. Moreover, due to its progressive nature, the Code was met with resistance from legislators during its preparation phase which led to some compromises that ultimately prevented the code from achieving its maximum potential.[11] A review of the code is long overdue to reembark on the path of progress.

In this article, I will argue that the Egyptian Civil Code's present treatment of unequal contractual obligations is too conservative and should evolve to accommodate the contemporary understanding of freedom of contract, provide a real opportunity for restoring balance to unbalanced contracts through judicial interference, and offer a wider safety net for those who find themselves at the inferior end of such a contract. Part II will focus on the philosophical side of contracts to try to answer the question of why contracts should be enforced in the first place. An overview of prominent contract theories will be presented to demonstrate that the equality of the exchange is an important philosophical prerequisite to contractual enforcement and that consent, absent equality, is insufficient to justify contractual enforcement. Part III will examine the Egyptian Civil Code's general rules relating to inequality between contractual obligations to provide an overview of the mechanics of Egyptian law and demonstrate the shortcomings of the current rules. Part IV will concentrate on the American doctrine of unconscionability to show how the same issue is handled in a common law setting and to try to learn from that comparative experience. Finally, in part V, I will propose reforms to Egyptian legal rules and attempt to demonstrate its desirability and necessity as well as defend it from expected criticisms.

[10] *See id.* at 147-48 (describing the older Egyptian civil codes as "individualistic codes, which might even be described as capitalist and bourgeois in character" that disfavors any interference in contracts)

[11] *See, e.g., id.* at 185-87 (detailing the difficulty of passing article 129 of the code dealing with exploitation).

II. The Source of a Contract's Power

The ancient Latin legal principle of *pacta sunt servanda* is one of the oldest rules known in legal history. Many versions of that maxim exist across various cultures and legal systems.[12] It is considered a universally accepted legal rule[13] as well as being one of the general principles of law recognized as a source of international law.[14] While it does seem *right* that one keeps their promise, the real question is why should the state enforce such promises going as far as using its coercive powers to force someone to do so? I believe that the pragmatic answer to that question is that the functioning of society requires such enforcement; the alternative to that would be either a breakdown of the exchange system necessary for human survival as people abstain from participating in the market altogether or, more likely, rampant chaos as people try to enforce their personal brands of justice on those who back out of their deals.[15] It is still useful, nevertheless, to find an answer built on moral foundations to echo our feelings of the righteousness of keeping promises. As we will discuss in this part, the freedom of contract principle offers a strong individual-flavored moral argument for enforcing contracts by pushing consent to the forefront of the contractual equation and marginalizing other considerations. However, consent alone is never enough to justify coercion; it needs more support, which the fairness of the deal, i.e., the equality of the exchange, could provide thus offering a stronger moral argument for contract enforcement.

A. Consent: The Inadequate Enforcer

Freedom of contract emerged from an overemphasis on liberty and individual autonomy that were characteristic of 19th-century Western thought. The rise of the laissez-faire economic theory accompanying the Industrial Revolution helped give contract freedom its modern shape. Contracts are generally assumed to be, as one writer

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[12] For an overview of the development history of the "pacta sunt servanda" principle see Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959).

[13] *See* Dietrich Maskow, *Hardship and Force Majeure Symposium: Contract Law in a Changing World: International Unification: The UNIDROIT Principles*, 40 AM. J. COMP. L. 657, 658 (1992) ("A basic and it seems universally accepted principle of contract law is 'pacta servanda sunt.' It reflects natural justice and economic requirements because it binds a person to its [sic] promises and protects the interests of the promisee.").

[14] HUGH THIRLWAY, *The sources of international law*, *in* INTERNATIONAL LAW 117-144, 132, (Malcolm D. Evans, Oxford Univ. Press 1st ed. 2003).

[15] *See* DAM, *supra* note 3, at 123-24 (noting how the lack of state enforcement of contracts does not stop the economy of exchange, businessmen simply turn to other means to secure contract enforcement such as "mafia-type enforcement").

put it, "consensually assumed obligations . . . within the confines set by the precepts of illegality and immorality".[16] As consent moved to the forefront to become the primary component of a contract, the law had a philosophical and moral ground from which it could invite the state to invoke its coercive powers against those who refused to voluntarily honor their agreements. The allure of that logic is undeniable; if all persons are equal and wish to be truly free and autonomous, it would be only fair that they take on the responsibilities that such equality, freedom, and autonomy entail.[17] And first upon those responsibilities is to respect their free choices and accept their consequences no matter how they may turn out to be. To put it in other words, "respect for consent means respect for our individualism and autonomy."[18] thus, respect for the autonomy of the parties should allow them to "specify their own distinctive regime of rules to govern their contractual relationship."[19]

But humans make agreements all the time. Some of those agreements are quite serious, such as agreements to exchange valuables. Other agreements, like a friendly agreement to meet over lunch, are not as significant. Since laws are concerned only with the first variety of agreements, a line had to be drawn to identify the serious agreements that justify state enforcement. To that end, the first and most important issue becomes the legal definition of a "contract" itself: what an agreement should look like to be considered an enforceable legal contract. Whether under common or civil law jurisdiction, not all agreements or promises are necessarily recognized as enforceable. Undoubtedly, the primary component of a contract in both legal traditions is the parties' "consent" or "agreement" to the same terms.[20]

For the purposes of contract formation, civil law systems generally ignore the economic or practical role of contracts and prefer instead to treat them as abstract legal instruments. In such systems, contracts are conceptualized as a "convergence of wills" and thus the main focus of civil law legal systems is the autonomous will of the

[16] K. M. Sharma, *From Sanctity to Fairness: An Uneasy Transition in the Law of Contracts*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 95–180, 98 (1998).
[17] *See* Radin, *supra* note 4 at 576 ("Why this [primacy of the will] seemed a desirable ideal is not difficult to discover. It flattered the sense of individual self-sufficiency which was so large a part of the sense of freedom, as the eighteenth century had understood it and as Manchester had sought to effectuate it in the nineteenth century.").
[18] Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 Case W. Res. L. Rev. 57–90, 65 (2012).
[19] Sharma, *supra* note 16.
[20] Rdhwan Shareef Salih, *The Concept of Offer in Different Legal Systems*, 101 J.L. Pol'y & Globalization 146–164, 147 (2020).

contracting party the presence of which is enough to create a contract.[21] On the other hand, common law systems tend to adopt a more utilitarian approach towards contracts by recognizing that the primary reason for their formation is the achievement of an economic end.[22] As a result of this philosophical view, the will alone, no matter how apparent or strong, is not considered sufficient under common law to create a legally binding contract. Common law systems distinguish between promises and contracts; when an offer meets an acceptance, a promise is born. However, such a promise cannot amount to a legal contract worthy of enforcement unless it was accompanied by a "consideration" that is, as stipulated in the second restatement of contracts, a performance or a return promise that was bargained for in exchange for the promise.[23] Thus common law systems generally require *both* a promise and suitable consideration to create a legally enforceable contract.

As voluntarily created obligations, contracts can always trace their origin and draw their legitimacy from the will of the parties whose consent created them. Consequently, all legal systems pay special attention to the legal requirements of valid consent. Every legal system generally sets its standard required to recognize the existence of valid consent. However, such consent usually boils down to the requirement of having three components; "an intentional act, knowledge, and voluntariness."[24] To satisfy those requirements, consent should be freely given by an informed person with sufficient legal capacity to conduct the contract in question.

Both major legal traditions recognize the possibility of the existence of defects in a contracting party's will and allow defenses that may be invoked to render a contract unenforceable or even completely invalid on the grounds of defective will. For civil law systems, legal codes dealing with contracts usually contain provisions describing the various forms of defects that may affect the validity of the consent and the legal ramifications of such defects.[25] The concept of defective consent is also recognized by courts of the common law heritage where several doctrines; like mistake, duress, and

[21] Oana-Bianca Cabulea, *Voluntary Sources of Obligations: Comparative Perspective: Common Law and Civil Law Systems*, 21 Annales Universitatis Apulensis Series Jurisprudentia 9–26, 10-11 (2018).
[22] *Id.* at 11-12.
[23] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).
[24] Nancy S. Kim, *Relative Consent and Contract Law*, 18 Nev. L.J. 165–220, 170 (2017).
[25] *See, e.g.*, Law No. 131 of 1948 (The Civil Code), Al-Waqa'i Al-Misriyah, vol. 108 bis (a), 29 July 1948, §§ 120-30, (Egypt) [hereinafter The Egyptian Civil Code].

fraud, allow a party with defective consent a remedy.[26] Despite the availability of these defenses, contract law arguably never goes far enough to address the more subtle consent flaws.[27]

With the party's agreement maintaining such a central role in the creation of contracts, it should come as no surprise that many legal thinkers consider it the moral ground for enforcing contracts. Viewed in light of the freedom of contract principle, the parties' agreement forms the basis of contract law theory for many writers. The exact choice of words differs between writers to include: consent, promise, choice, or autonomy, but the result remains the same; it's the voluntariness of the act of accepting the obligation that allows the law to enforce it. Anyway, it seems that a logical first step to justify any alteration to a voluntarily accepted obligation would have to touch upon the parties' agreement. This may be possible by either questioning the voluntariness of the agreement or challenging its legitimacy as the legal, and moral, source for contractual obligations. However, to set the stage for the analysis, it would be beneficial to first present a brief overview of the dominant theories available that offer a philosophical basis for the binding power of contracts.

There is no consensus on a single coherent theory that explains contract law and offers a justification for enforcing contractual obligations. Nevertheless, several theories attempt to do so. Randy E. Barnett identified five main theories used to explain the nature of contractual obligation: will, reliance, efficiency, fairness, and bargain theories.[28] Moreover, he contended that those five theories may be further grouped into three distinct types: party-based theories, which include will and reliance theories and "focus on protecting one particular party to a transaction;"[29] standard-based theories, which include efficiency and fairness theories and attempt to explain the enforceability of contracts by evaluating "the substance of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary;"[30] and finally, process-based theories which attribute the enforceability of a contract to the fact that it

[26] *See,* Leonhard, *supra* note 18, at 73 ("Contract law has long recognized some obvious defects with consent. It has attempted to deal with the defects by allowing certain defenses. These contract law defenses mark the outer boundaries of consent enforceable under contract law.").
[27] *Id*.
[28] Randy E. Barnett, *Consent Theory of Contract, A*, 86 Colum. L. Rev. 269–321, 271 (1986).
[29] *Id*.
[30] *Id.* at 277.

was created following a specific process. Barnett considered the bargain theory of consideration the primary example of such theories.[31]

Will theories draw the justification for contract enforcement from the will of the parties; since the party has voluntarily agreed to oblige herself, she should be forced to perform her obligation if she withheld voluntary performance. Barnett highlighted his dissatisfaction with those theories because of their inability to explain why a contract is sometimes enforced even if it can be shown that the content of the subjective will of one party differed from the objective manifestation of that will. In such circumstances, the subjective will should have taken precedence, and hence the theory as it stands does not properly explain contract law.[32]

Reliance theories propose that contractual obligations ought to be enforced if they generate reliance within the other contractual party. Barnett noted that such a theory could explain why a promisor is held to the objective meaning of her manifested assent even if it differed from her subjective will. Nevertheless, he considered the theory to be unable to provide a satisfactory answer because its logic is ultimately circular: promises are enforceable if they induce *justified* reliance, but reliance can only be justified if the promise is enforceable.[33]

Efficiency theories are not legal theories but rather economic ones. They attempt to show that contracts play an important role in achieving economic efficiency by ensuring that resources are allocated most efficiently. Barnett concludes that such analysis does not offer a theory that justifies contract law's enforcement of obligations however it could be considered as "one of many yardsticks for assessing competing legal theories."[34]

Substantive fairness theories consider the fairness of the contract as the legal justification for its enforcement. A prerequisite to adopting such a theory would be the assumption that there exists an objective way to measure the value of the exchanged obligations so that contracts containing equal obligations may be enforced and those with unequal obligations set aside. Barnett noted the unavailability of such an objective test and concluded that absent it, the fairness theory would be confined to addressing

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[31] *Id.* at 287.
[32] *Id.* at 272-74.
[33] *Id.* at 274-77.
[34] *Id.* at 277-82.

only the gravest of the unbalanced contracts. The alternative is to rely on a revision of the negotiation's process to decide whether any party had an "unequal bargaining power" thus defeating the theory's purpose by transforming it into a procedure-based theory.[35]

The bargain theory of consideration attempts to attribute the enforceability of contractual obligations to the fact that they were made according to the accepted procedure by offering consideration in return for them. Barnett notes the theory's inability to explain why certain obligations, though obtained as a bargain for consideration, are still not enforced.[36]

After considering those theories, Barnett suggested that any theory of contractual obligations should be understood as part of a greater "individual entitlements" theory which governs the allocation, use, and transfer of property rights between members of society. This would make contract law a branch of the entitlement theory specifically devoted to the issues of property rights transfer along with other branches like tort law (which governs the use of properties) and property law (which deals with the initial acquisition of entitlements).[37] Starting from this understanding, Barnett suggested that consent is the moral justification for enforcing contractual obligations and insisted that this "consent theory" has a fundamental difference from traditional will theories as discussed above: it is capable of explaining the objective-subjective approach that contract law adopts when it tries to identify the substance of the manifested consent\will of the contracting party.

Barnett argued that understanding contract law as a part of an entitlement system, which is devoted to drawing boundaries and thus needs to be as clear as possible lest it fails to do what it was created to do, not only makes it necessary but also justifies the need to maintain an objective approach when interpreting the meaning of the manifested assent. He maintains that an objective approach should be maintained *absent* compelling evidence that the subjective intention of the assent giver differed from those that can be objectively deduced *and* that the other party was in a position to comprehend that version of the assent. Thus, the theory also offers a valid explanation

[35] *Id.* at 283-86.
[36] *Id.* at 287-91.
[37] *Id.* at 292.

for contract law's deviation from the default objective approach in such cases.[38] Despite presenting us with a well-grounded theoretical framework for how contract theory functions, Barnett concedes that any legal system that adopts the consent theory as a basis for contract law will have in front of it the "hard work" of "determining what constitutes 'valid' title and what acts constitute 'consent.'"[39]

Other writers have also highlighted the practical difficulties arising from relying on "consent" as the moral justification for contract enforcement. While maintaining that her article "does not question the role of consent as the basis for a moral obligation to keep one's promise,"[40] Chunlin Leonhard raised some serious concerns as to the "lightness" of consent and from this questioned the moral base for the legal system's decision to interfere in a private relationship on behalf of one of its parties based mainly on consent. She noted that we now live in the "age of persuasion" where behavioral studies are undertaken to observe the mechanics by which humans make their decisions. She warns that it is exceedingly easy for powerful commercial actors to make use of their power and the available scientific data to influence the decisions of their clients and insist that contract law as it stands will gradually shift to favor the elites reasoning that:

> Because of the ease with which "consent" can be manipulated, contract law's consent focus will inevitably lead the courts to use the coercive power of the state to favor the more powerful party in an economic relationship. The party with more bargaining power, resources, and better access to information is in a better position to manipulate. [41]

She proposes that, instead of consent, courts should rely on the "totality of circumstances" test to determine whether to intervene in a contractual relationship and to whose side such an intervention should be.[42] She argues that such a test utilizes the court's "greatest strength" which is its fact-finding expertise.[43] She also notes that (American) courts already use such a test in various criminal and bankruptcy cases and that there is no reason that economic rights (contracts) should not be treated with the same logic.[44] Whether or not one would agree with her proposed test, Leonhard's findings show how the power disparity between powerful commercial actors and

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[38] *Id.* at 305-07.
[39] *Id.* at 307.
[40] Leonhard, *supra* note 18, at 59-60.
[41] *Id.* at 62.
[42] *Id.* at 85.
[43] *Id.* at 86.
[44] *Id.* at 86-89.

average individuals is truly frightening, to turn a blind eye to such disparity and continue to believe that any sort of equality exists between those parties will inevitably lead to the result that Leonhard warns us from: a contract law that is used to help the powerful in their endeavors to exploit the weak.

Another attempt was made by Nancy S. Kim to offer a framework that could enable us to define the exact meaning of "consent." She suggested that "consent is not merely a conclusion but a process and a dynamic that depends upon a variety of factors"[45] and thus it required three conditions to exist: "an intentional act or manifestation indicating consent, knowledge, and voluntariness."[46] Maintaining a stance that consent validity is relative to the circumstances of each case, Kim recognized that the manifestation of consent is a basic requirement for the creation of consent, but she insisted that the manifestation is only one of the requirements and thus cannot be examined in a vacuum.[47] Another requirement is knowledge which the author dubs "the most difficult condition to assess."[48] She drew attention to the research conducted by Amos Tversky and Daniel Kahneman on the cognitive biases of human beings which exposed the *astonishing* fact that humans are prone to commit "severe and systematic errors in decision-making."[49] She noted that a new scientific discipline on behavioral economics now challenges the notion of humans acting normally in a rational way thus rendering the classical economics notion of the "rational man" obsolete.[50] The final condition for the creation of consent is voluntariness which can only be gauged in context. Naturally, many external factors may affect the voluntariness of a consenting party ranging in effect between completely nullifying their free will as is the case in physical coercion, and simple nuisances that do not substantially diminish a person's ability to choose freely. The law only takes account of such pressures if they originated from the consent-seeker or the one benefiting from the consent.[51]

Kim's observations could be understood as an elaboration of the consent theory as posited by Barnett. Moreover, it draws attention to the same issue that Leonhard had raised in her article. Law is notoriously conservative; some believe that its main

[45] Kim, *supra* note 24, at 165.
[46] *Id.* at 169.
[47] *Id.* at 171.
[48] *Id.* at 172.
[49] *Id*.
[50] *Id*.
[51] *Id.* at 172-73.

function is to preserve the status quo in society.[52] Nevertheless, we cannot ignore the scientific findings that have provided us with the proof for what we have already, intuitively, known all along: that equality in contracts is merely an illusion, a fantasy created to support individualism and freedom that are core values of Western culture. The sad truth is that the principle of individual autonomy in contracts only works if the difference in power between the contracting parties is manageable. The moment the scales of equality tip, no choice can be called truly free. If contract law refuses to adapt to the, now scientifically proven, reality of human vulnerability, it would be unable to "capture the reality of contract"[53] and "end up siding with the more powerful parties in an economic relationship."[54]

B. Equality in Exchange and the Role of Fairness in Justifying Coercion

Consent can offer the moral argument necessary to justify enforcing the contracts it creates only if it is built on a strong foundation of equality between the parties. As has now become clear, consent is rarely built on such a foundation in practice, thus, it cannot, by itself, provide the required moral justification for contract enforcement. Consent needs a partner element to support it in its role of moral authority, James Gordley suggests that fairness could be just that. Equality of exchange was extensively discussed by Gordley who proposed a return to the old Aristotelian notion of justice in our attempts to address the issue of contract enforcement. He first noted that Aristotle differentiated between distributive justice, which is concerned with the initial allocation of resources between members of the society, and commutative justice which focuses on preserving that allocation by appealing to the principle that "no one should gain by another's loss."[55] He also noted that even though Aristotle differentiated between two types of commutative justice: voluntary (the equivalent of modern contracts) and involuntary (torts), both types are ultimately governed by the same principle that "no one should become richer on another's expense."[56] He then suggested

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[52] *See,* Richard Quinney, *The Ideology of Law: Notes for a Radical Alternative to Legal Oppression*, 7 ISSUES CRIMINOLOGY 1, 4 (1972) ("While law is to protect all citizens, it starts as a tool of the dominant class and ends by maintaining the dominance of that class. Law serves the powerful over the weak; it promotes the war of the powerful against the powerless. Moreover, law is used by the state (and its elitist government) to promote and protect itself. We are all bound by that law. We are indoctrinated with the ideology that it is our law, to be obeyed because we are all citizens of a single nation. Until law is the law of the people, law can be nothing other than official oppression.").

[53] *Id.* at 219.

[54] Leonhard, *supra* note 18, at 90.

[55] James Gordley, *Equality in Exchange*, 69 Calif. L. Rev. 1587–1656, 1589 (1981).

[56] *Id.* at 1590.

that equality in exchanges must be regarded as one of the principles of contract law otherwise there would be no logical explanation as to why contract law may offer remedies for some one-sided contracts such as cases invoking the American doctrine of unconscionability, the French principle of *lésion* and the German principle of *Wucher*.[57]

Gordley discussed the traditional criticisms made by 19th-century thinkers against the concept of equality of exchanges in contract law. He noted that there exists a line of arguments that could be made against the theory from a political philosophy point of view and opted to focus on the more legal or common-sense arguments instead.[58] One of the main arguments advanced against the theory was that the notion of value is too subjective and thus equality in exchange is virtually impossible.[59] In response, Gordley argues that market price plays an important role in maintaining market efficiency; even if market prices were unstable, it would still be as close as possible to achieving equality without risking the greater evil of disturbing the supply-demand balance and thus, market prices are relevant for any society that wishes to avoid random redistributions of wealth.[60] Moreover, he argued that the subjective benefits that anyone derives from a transaction should only concern that party, the other party has no claim to a share of the benefit derived from the exchange by their contractual partner.[61] He clarified that "commutative justice requires not that perfect equality be preserved, but that avoidable and needless inequalities be corrected."[62]

The other 19th-century argument was based on the principles of "freedom of contract" and "the binding force of contracts." It maintained that since value is a subjective matter, the courts would be violating the private autonomy of individuals and interfering with their freedom were they to substitute the court's judgment for the parties' own regarding the value of the exchange. This, according to the critics, would undermine the entire concept of contracts as enforceable private arrangements.[63] Gordley responded that we should differentiate between two types of decisions that any contracting party has to make: first, whether the exchange is beneficial for her, and

[57] *Id.* at 1625-37.
[58] *Id.* at 1590-92.
[59] *Id.* at 1592-99.
[60] *Id.* at 1611-13.
[61] *Id.* at 1615.
[62] *Id.* at 1611.
[63] *Id.* at 1599-1603.

second, whether to contract at the moment or to try to find a better deal or price whether by dickering, waiting, or going elsewhere.[64] He argued that the first type of decision depends entirely on the subjective views of the party and thus is best left to her wisdom.[65] As for the second type, since it does not concern a unique position that the party finds herself in, it would not be an infringement on her autonomy if a court required the parties to contract at the market price.[66] Taking into consideration that any party that decides to contract at a price other than the market price nearly always does so because of ignorance or necessity, we should consider whether the other party that took advantage of such circumstances is worthy of legal protection:

> Enforcing a contract at other than the market price protects the freedom of one party to profit from the ignorance or necessity of the other, but sacrifices the freedom the other party would enjoy in a normal well-functioning market. Contract law cannot protect freedom in the abstract; rather, it must determine what kind of freedom it will protect.[67]

Gordley pointed out that in the 19th century, a shift occurred that resulted in decoupling the concepts of freedom of contract and party autonomy from the goals of contract law thus allocating too much emphasis on consent and party autonomy at the expense of other considerations that would warrant just as much emphasis if we consider that the original goal of any contract is not to enrich a party at the expense of another but rather to enable both parties to fulfill their needs through a mutually beneficial exchange.[68]

In an article written almost forty years later,[69] Gordley, along with co-author Hao Jiang, further refined his original ideas into a fully-fledged contract law theory. They proposed that contracts are voluntary commutative justice, and it is for this reason that contracts should be enforced. According to the writers, contracts are binding not only because of their voluntariness (the consent of the parties) but also because they are economically fair. If a contract loses one of those elements, it should not be enforced:

> In principle, a contract of exchange should be enforced when it is both voluntary and economically fair. It is voluntary so long as a party puts a higher value on what he is to receive than on what he is to give. It is economically fair when the performance that each party makes is equivalent in economic value to the one that he receives. Performances are equivalent in economic value when each party is compensated for the risks that the contract places on him.[70]

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[64] *Id.* at 1617.
[65] *Id.*
[66] *Id.* at 1619.
[67] *Id.* at 1625.
[68] *Id.* at 1624-25.
[69] James Gordley & Hao Jiang, *Contract as Voluntary Commutative Justice*, 2020 Mich. St. L. Rev. 725–802 (2020).
[70] *Id.* at 741.

Economic fairness as explained then becomes a value that can be determined objectively. The present economic value of any asset should be the sum of the values it may have in the future discounted by the probability that such future values may occur;[71] it is a process that humans make intuitively to generate a market price. This explains why a "fair price" is not stable; it needs to be constantly adjusted to accommodate the changes in expected future value and the probability that those predicted values come true if it is to remain a fair price. Much like a fair market price, the value of contractual obligations should also be calculated in a manner that accommodates the predicted risks that taking the obligation could potentially entail and the probability that such a risk would occur. Gordley and Jiang drew an analogy between the situation of contracting under fair terms and placing a fair bet;[72] if each party of the contract was compensated for the risks that the contract placed on her at the time of the contract's formation, allowing one party to back out if the expected risk does occur would be unfair to the other party who had *paid* her to assume that risk.[73]

Economic fairness is not a fluctuating value, it is decided at the time of the contract's formation. If a contract was deemed to be economically fair at the time of its formation, it would remain so even if the market price or the value of the contractual obligations do change in the future; the reason being that the parties considered the possibility of such fluctuations and adjusted their price accordingly. Should, however, it become clear that an event was completely unexpected and hence the party that is asked to bear its cost was not compensated for the possibility of that event's occurrence, contract law should not enforce that obligation because it is unfair.

If one adopts the contract as a voluntary commutative justice theory, two element would be necessary to enforce a contract: consent and economic fairness. This would eliminate the need to sever the link between a party's consent and allegedly unfair contractual terms that a party wishes to avoid their enforcement. There would be no need to circumvent the issue or turn to unreliable covert tools; courts could refuse to enforce consented to unfair contractual terms simply because they are economically unfair and thus do not satisfy the second condition for enforcement. All of this, however, will have to wait until the theory can be tested against potential criticisms.

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[71] *Id.* at 741-42.
[72] *Id.* at 745,748,751.
[73] *Id.* at 746.

According to Barnett's classifications, the "contract as voluntary commutative justice" theory would be considered a mixed theory employing a portion of the "will theory" and another from the "substantive fairness theory." Being a hybrid theory, it could potentially be exposed to the criticisms of both will and substantive fairness theories. Will theories are usually criticized for their inability to explain the objective approach that courts adopt to determine the consent of a party and why their subjective intent may be disregarded when it differs from the objective meaning of the manifested consent.[74] Additional criticisms include the inability to explain the "consideration" rule, the reading of "implied-in-law" terms into contracts,[75] or the setting aside of contracts in some cases due to unconscionability or mistake.[76] On the other hand, fairness theories are always vulnerable to the criticism that value is always a subjective matter that cannot be objectively measured, and thus it is best left to the parties' discretion.[77] Moreover, Barnett offered another criticism that he claims to apply to any standard-based theory; that they "require constant interferences with individual preferences" because the real-life differences in abilities and circumstances between humans will always lead to inequality no matter how equal their starting position seems to be.[78]

As for the objective\subjective issue, the currently assessed theory tries to avoid this main criticism by reducing the role of will in the contract. It insists that all that it requires is for the exchange to be voluntary; there is no need to have the parties agree to, or even understand, all the contractual terms of the transaction. The theory proposes that an exchange is voluntary as long as each party puts a greater value on what she receives from the exchange than on that which she gives. Accordingly, nearly all transactions are voluntary since no person would enter a bargain knowing beforehand that they are receiving less than what they are giving. Gordley proposes that if a person changes their mind about the profitability of the bargain in their subjective evaluation of its value, the contract should not be enforced unless "releasing one party from the contract would be unfair to the other party."[79] In short, the theory tries to avoid the objective\subjective dilemma by reducing both the definition and the role of "will" to

[74] Barnett, *supra* note 28, at 272.
[75] *Id*.; *see also* Gordley & Jiang, *supra* note 69, at 730-31.
[76] *Id*.
[77] *See*, Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553–592, 581 (1932) (discussing the complexity of establishing the value of the exchange when no standard market value is available and concluding that "[t]he parties to the contract must themselves determine what is fair.").
[78] Barnett, *supra* note 28, at 286.
[79] Gordley & Jiang, *supra* note 69, at 776.

that of a "voluntariness" with an arguably low threshold. Any required theoretical heavy lifting is delegated to the "commutative justice" part of the theory.

As for the issue of consideration, I do not think it represents a real problem even for "pure" will theories. The fact is that consideration is a doctrine unique to common law systems with no equivalent in civil law systems.[80] Therefore, it should be treated as a peculiarity of the common law system that need not be explained by a universal contract law theory. A satisfactory explanation for it could be simply to consider this doctrine an arbitrary rule adopted to address the practical need to draw a line between which contracts are deemed worthy of enforcement and which are not. It is not uncommon for the law to require, and insist, on some formality to consider a contract valid and enforceable; for example, the law may require that a contract to create a corporation be put into writing and explicitly declares contracts that fail to abide by that rule null and void.[81] If a theory is to be accepted as a universal theory for contract law, it must show that there are no universal principles found in all contract law systems that are incompatible with it. It does not, however, need to account for the peculiarities of each system.

The issues of "implied-in-law" terms and an explanation of why courts may refuse to enforce unconscionable contracts were both addressed directly by Gordley and Jiang. Their answer to both was that courts had to do so because it was fair to do so. With "voluntariness" taking a step back as the legitimizer of the contract in favor of fairness, it becomes easy to see why courts are allowed to impose terms never explicitly agreed upon by the parties. The role of will ends as soon as the parties satisfy the threshold of "voluntariness" and from that point on, all contractual terms answer only to fairness. If the parties had not explicitly agreed to a specific term, the court could enforce it all the same if it is fair to do so. Conversely, even if the parties had explicitly agreed to a specific term, the court could refuse to enforce it anyway if such enforcement would be unfair.[82]

[80] Cabulea, *supra* note 21, at 16 ("Consideration does not have a perfect correspondent in civil law system.").
[81] The Egyptian Civil Code, *supra* note 25, § 507 (requiring all corporation contracts, and any amendments to such contracts, to be made in writing and voiding any contracts not made in such form).
[82] Gordley & Jiang, *supra* note 69, at 741.

As for the subjectivity of value criticism, Gordley deftly avoids it by conceding that the "value" of an exchanged asset or performance is indeed a subjective matter that differs from person to person. He specifically identifies voluntariness as the subjective view of a contractual party that what they receive from the exchange has more value than what they give. However, he argues that contract law does not concern itself with value and defers to the parties' judgment in that regard. What contract law does concern itself with is the *economic fairness* of the transaction which, Gordley argues, is a measurable objective value as previously discussed. Moreover, Gordley had already stated in his older article that the goal of commutative justice is not to preserve "perfect equality" but rather just to avoid the unnecessary.[83]

As for Barnett's suggestion that any standard-based contract theory would require constant adjustments and interference within contracts, that may indeed be the case, however, that should not discourage us from trying to correct apparent wrongs. Additionally, that proposition is built on the assumption that interference in "personal preferences" is an evil to be avoided and kept at a minimum when it is absolutely necessary. I would argue that such an assumption is closely linked to the concept of freedom of contract. While it is, supposedly, a good concept, it could, if left unchecked, create its own set of problems like monopolies and the promotion of social inequalities. Even liberal Western countries know better nowadays than to allow any phenomenon to go unregulated. Laws exist to prohibit monopolies, enforce minimum wages, and uphold a minimum level of consumers' rights. Recent economic downturns and the effects of the COVID pandemic ought to have forced us to recognize a fact: our law actively favors the powerful in times of prosperity, it does so even more in times of strife. Even as the majority of people around the world suffered economically at the height of the pandemic, the wealthiest men in that same world, seemingly invigorated by the disease, continued to amass their wealth at an increased level.[84] To enforce an arguably objective standard like "economic fairness" as suggested by Gordley is not that much different than imposing a limit on the freedom of contract principle for the sake of public good. Though, I admit, such a move would have a strong impact seeing as the principle incorporated will fit at the general theory and thus apply to *all* contracts.

[83] Gordley, *supra* note 55, at 1611.

[84] Ten richest men double their fortunes in pandemic while incomes of 99 percent of humanity fall, Oxfam International (2022), https://www.oxfam.org/en/press-releases/ten-richest-men-double-their-fortunes-pandemic-while-incomes-99-percent-humanity (last visited Dec. 3, 2023).

But what about the potential impact of such a theory on the predictability of contract law? I would argue that its impact, apart from realigning the legal system back to a neutral position when it attempts to resolve the disputes between litigants with a disparity in power, will be minimal. From a modern economist's point of view, economic fairness may indeed be an objective value; ascertaining it would merely require a collection of the relevant market data at the time that the contract was formed which should not be too difficult for a court with access to trained economic experts. Economic fairness is certainly more objective than consent and thus recognizing it as a necessary part to enforce a contractual obligation should increase the predictability of decisions in contract law cases rather than decrease it.

Having established that the equality of an exchange is a necessary requirement to morally justify its enforcement, the next part will transition to an analysis of the Egyptian contract law rules addressing the inequality of contractual obligations to ascertain if our analysis is mirrored in legal practice.

III. Overview of Egyptian Rules on Unequal Contractual obligations

When the New Egyptian Civil Code was adopted in 1948, jurists celebrated it as an incredibly important step towards modernization. In his grand work *al-Wasīṭ*,[85] Sanhuri noted how the new Civil Code remained faithful to its French law origins and acknowledged the role that French courts and jurists have played in shaping Egyptian legal thought.[86] He highlighted how contemporary legal thought was divided between the Latin-based school of thought (namely the French school) and the Germanic school of thought.[87] He maintained that the new code should not be considered "revolutionary" since it faithfully preserved its Latin-based traditions and noted that any apparent deviation from the classical Latin-based thought found in the Civil Code should not be attributed to Germanic influence on Egypt *per se* but rather to its influence on Latin-based thought in general which led to changes in all Latin-based systems including France itself.[88]

Sanhuri highlighted the major philosophical debates that accompanied the drafting of the code and suggested that the final draft reflected a moderate stance on many issues while simultaneously keeping the code firmly within the sphere of modern Latin-based systems. One of the major issues discussed at that time was the role that the "individual will" should have in creating legal obligations. The new Code abandoned the individualistic approach of the old Code and adopted a "paternalistic and altruistic approach to contract law."[89] It maintained a significant role for the individual will but on the other hand, it also imposed some limitations on it for the sake of public interest.[90] As a result, to this day, the default position on contractual obligations in Egypt is to consider them binding and enforceable in principle with some limited exceptions in place.

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[85] 1 ABDEL-RAZZAK AHMAD AL-SANHURI, al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd (Dār al-Nashr lil-Jāmi'āt al-Miṣrīyah ed. 1952).
[86] *Id*, at C,F.
[87] *Id.* § 4 at 75.
[88] *Id.* at 76.
[89] BECHOR, *supra* note 9, at 148.
[90] *See, Id.* at 149 ("The New Code acknowledged the principle of contractual freedom, noting that a contract was analogous to a law applying to the contracting parties . . . Immediately thereafter, however, the Code went on to introduce a series of doctrines of justice drawn from contemporary French law. These not only permitted the court -and hence society- to intervene in the contractual autonomy of the individual, but also extended moral influence over the entire spectrum of contract law."); See, SANHURI, *supra* note 85, at 77-81 (discussing the concept of "primacy of the will" in the context of the New Civil Code).

The first paragraph of Article 147 of the Civil Code marks the default position of Egyptian law towards contractual obligations by stating that[91] "The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by law."[92] Nevertheless, the second paragraph of the same article immediately addresses the issue of unforeseen general circumstances that may occur after the creation of the contract and declares that: "When, however, as a result of exceptional and unforeseen events of a general character, the performance of the contractual obligation, though not impossible, becomes excessively onerous in such way as to threaten the debtor with exorbitant loss, the judge may according to the circumstances, and after taking into consideration the interests of both parties, restore to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void."[93] This article summarizes the stance of the Civil Code; contractual obligations are typically enforced unless another legal rule precluding such enforcement is invoked.

The most direct way to stop contract enforcement is to question the existence of the contract itself. The Civil Code contains several articles dedicated to explaining the elements necessary to form a contract. In this regard, it does not differ from the standard view in civil law systems which consider those elements to be: (1) consent of the parties (2) an object for the contract (3) a legitimate cause. Due to its central role, consent has the lion's share of articles in the Code. Articles 89-130 explained how consent is created and stipulated specific rules addressing several issues that may affect the validity of the consent including the rules on consent defects of mistake (art. 120-124), fraud (art. 125-126), and duress (art. 127-128); the legality of actions taken by minors and others of limited capacity (art. 109-119); the definition of consent in adhesion contracts (art. 100) and the later stipulation of rules applicable to such contracts (art. 149, 151); as well as rules on exploitation that leads to lesion (articles 129-130).

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[91] I have consulted different English-translated versions of the Code including: 1 D.A.BASSIL, ENCYCLOPEDIA OF EGYPTIAN BUSINESS LAW: THE CIVIL CODE (B.T-EDITIONS-FRANCE ed. 1986/1987) and THE MIDDLE EAST LIBRARY FOR ECONOMIC SERVICES, THE CIVIL CODE (2006). As an Egyptian judge myself, I have had some reservations about the accuracy of the translations as they appeared in the works I consulted. Since words may have different meanings in different languages, and since the meaning of legal provision may drastically change if a single translated word does not accurately convey the original meaning, I have taken the liberty of revising the translations to more accurately represent the original Arabic text's meaning. For this reason, all translations of Arabic texts that appear in this paper should be regarded as free translations by this author.

[92] The Egyptian Civil Code, *supra* note 25, § 147 ¶ 1.

[93] The Egyptian Civil Code, *supra* note 25, § 147 ¶ 2.

While many of these articles provide legal defenses for those who seek to avoid the enforcement of their contractual obligation, the reasoning behind each of them is not always the same. In many cases, the logic is very clear such as in the cases of fraud or duress and some cases of mistake which is the lack of a mutual meeting of the minds. In those cases, a party is culpable in some way or another of taking advantage of the other party and thus has lost the sympathy of the law.[94] In other cases, the law simply acts for the greater good by enforcing a public policy that supports certain values that society deems more important than contractual stability, such as the protection of minors, by drawing an arbitrary line to preserve those values regardless of any misdoings from the parties. Yet in other cases, such as cases of exploitation or adhesion contracts, the issue becomes much more complicated; free consent is supposedly there yet the law allows a weaker, but nevertheless capable, party to avoid enforcement despite of the general principle "contract makes the law of the parties" or *pacta sunt servanda.*[95]

Traditionally, the tool of choice employed by the Egyptian legislators for protecting weaker parties and dealing with contractual inequality has been the promulgation of special laws that exclude certain types of contracts from the sphere of the general theory of contract law and regulate them in a specific way that promotes the legislator's preferred policy.[96] Nevertheless, the Civil Code includes some general articles that may be useful in rebalancing unequal contracts not governed by any special law. I believe that attempting to "fix" the problem of contractual inequality outside the realm of the general rules of contract law, through the use of special laws, implies an acceptance of the general rules' failure to offer adequate protection to weaker contractual parties. If that is indeed the case, then perhaps we should contemplate a change to the general rules of contract law instead of trying so hard to preserve it despite its obvious failure. Thus, the focus of this paper shall be *only* the general rules of contract law.

Moreover, I will not be discussing the legal rules applicable to cases where clear consent defects are present as this is beyond the scope of this research. Instead, I will

[94] *See*, Cornell *infra* note 244, at 1150 (suggesting that contract law is all about the validity of the complaint; a party may lose her "position to complain when the contract is breached because of her own bad conduct before the breach" and thus her complaint is denied by contract law).
[95] *See*, BECHOR *supra* note 9, at 153 (arguing that Sanhuri recognized the lack of equality in the polarized Egyptian society and opted to position the New Civil Code as a supervisor that attempt to "create balance among those who are not equal.").
[96] For example, rent control laws, labor laws, and consumer rights laws.

focus on the rules that allow judicial interference in contracts when there is no perceivable defect in the parties' consent. This chapter will explain how contract enforcement is considered the general rule on contracts (1) and the role that unforeseen events may play in softening that rule (2). It will then proceed to analyze some relevant exceptions to the general rule: exploitation (3), adhesion contracts (4), judicial oversight of damages fixed by agreement (5), the unlawful use of rights (6), and the role of good faith in contracts (7).

A) The General Rule

In a recurring *dictum*, the Court of Cassation declares that the general rule that considers contracts to make the law of the parties is merely a manifestation of the supremacy of will principle that still reigns supreme in contemporary legal thought.[97] The first paragraph of Article 147 in the Civil Code defines the default position of the law regarding contractual obligations; if a contract is formed within the bounds of the law, it shall bind its parties and may not be altered or revoked. Only two exceptions to this rule exist; if the parties themselves mutually agree to such alteration or revocation, or if the law specifically allows such action. This strictness means that the courts themselves are powerless to alter contracts or relieve a party of their contractual obligations unless a legal provision allows such interference.[98] If an obligation is clearly worded, the court is severely limited in its interpretative powers and may not try to identify the mutual assent by deviating from the clear words.[99]

The wording used in article 147, specifically the mention of contracts as the law of the parties, inspires some writers to draw a comparison between public laws and contracts declaring that contracts are essentially private laws created by the parties to govern their affairs.[100] As such, contracts, same as law, may only be revoked or altered by the

[97] *See, e.g.*, Case no. 11479/76/Court of Cassation, (Feb. 23, 2015); Case no. 2206/82/Court of Cassation, (June 21, 2021); Case no. 5554/71/Court of Cassation, (Jan. 5, 2023).

[98] EGYPTIAN MINISTRY OF JUSTICE, Mashrūʿ Tanqīḥ al-Qānūn al-Madanī: Muzakirah ʾīḍāḥyah § 213 (al-Maṭbaʿah al-ʾamīriyah, bi-l-Qāhirah, 1948) [hereinafter Explanatory Memo] (note the change of the article's number in the final version of the code). *See also* SANHURI, *supra* note 85, § 412 at 625; 3 ANWAR TOLBA, al-Muṭawal fī Sharḥ al-Qānūn al-Madanī 122 (Sharikat Nās lil- Tibāʿa ed. 2021). I have used two main Arabic sources for references in this chapter: Sanhuri's Wasīt, which is still regarded today as the top authority on the Egyptian Civil Code, and Tolba's Mutawal, a popular text on civil law among younger Egyptian judges. Where possible, I will attempt to provide authority citations from both of these sources to demonstrate how little has changed since the time of Sanhuri's Wasīt.

[99] The Egyptian Civil Code, *supra* note 25, § 150 ("If the wording of a contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties.").

[100] 3 ANWAR TOLBA, al-Muṭawal fī Sharḥ al-Qānūn al-Madanī 115 (Sharikat Nās lil- Tibāʿa ed. 2021).

same authority that created it i.e., the parties' mutual consent.[101] Similarly, such private laws (contracts) may not contradict public laws just like public laws may not contradict a higher tier law such as the constitution. In short, Egyptian contract law, like most other contract laws, is based on the concept of respecting contractual obligations and avoids interference in private matters except in specific cases stipulated in the law. Economic equality between contractual obligations is not usually of any concern to the law, it focuses instead on monitoring procedural legal equality between the parties at the time of the contract's formation. While there are a few cases where the law assesses the objective economic equality between the parties and may interfere with the contract if it detects significant inequality,[102] this is certainly the exception rather than the rule.

B) Unforeseen Events

One instance of the law considering the equality of contractual obligations is found in the second paragraph of Article 147. After declaring the sanctity of contracts principle in its first paragraph, the second paragraph of the same article immediately follows by providing an exception to the principle in cases of exceptional unforeseen general circumstances that substantially alter the economic equality of the contract so that a debtor, while still able to perform their obligation, is so burdened by the obligation that she would be faced with grave loss should she perform it. Examples offered for such events include wars, famine, earthquakes, plagues, or unusually drastic price changes.[103] In such cases, the legal remedy stipulated is restoring the burdensome obligation to a reasonable level. However, the law sometimes offers alternative remedies in specific contract types; for example, in contracting (work performance) contracts, the judge is instead allowed to increase the contractor's payment or to revoke the contract altogether.[104]

For an event to amount to the prescribed legal requirement to warrant judicial interference, it would have to be a rare and unexpected event.[105] Additionally, it must be a general event that affects a large group of people such as those in an entire

[101] *Id*.
[102] *See, e.g.*, The Egyptian Civil Code, *supra* note 25, §§ 425 (allowing sellers the right to claim an increase of the price if the object of the contract was an immovable property owned by a person of limited capacity), 498 (limiting the obligation of a person receiving a gift in exchange for consideration to only pay the equivalent of the gift's value if it turns out that the value of the gift was less than the agreed-upon consideration).
[103] SANHURI, *supra* note 85, § 420 at 643; 3 TOLBA, *supra* note 100, at 130.
[104] The Egyptian Civil Code, *supra* note 25, § 658.
[105] SANHURI, *supra* note 85, § 420 at 643-44; 3 TOLBA, *supra* note 100, at 130-31.

geographical area or an entire class of professionals rather than just the debtor.[106] Moreover, one of the primary conditions for invoking this exception is for the debtor's obligation to become so difficult that she risks a grave loss should she be forced to perform her obligation. A minor disturbance of the transaction's economics' is insufficient to invoke this article; the debtor must suffer the threat of grave loss to qualify for the stipulated remedy.[107] An important consideration here is that the judge is required to measure the loss of the party exclusively in the context of the contract in question without regard to the extra-contractual economic situation of the party or the overall size of their business or wealth; a transaction may be considered to generate a grave loss even if it would have a negligible effect on the party's overall situation due to their significant wealth or other successful transactions and conversely, the transaction may be deemed to *not* constitute grave loss despite it having a catastrophic effect on the debtor due to their vulnerable economic situation.[108]

When that provision is applicable, the law authorizes the judge to adjust the contract to return the obligations to a reasonable level. To reach that end, the judge may reduce the debtor's obligations, increase the creditor's obligations, or order the temporary suspension of the contract until the exceptional circumstances recede.[109] Despite such authorization, the judge is not authorized to revoke the contract altogether.[110] Moreover, they are limited to relieving the debtor of *some* of the effects of the exceptional event rather than all of it; the debtor is required to bear all the effects associated with expected events and, ideally, half of the effects associated with the exceptional one. On the other hand, the creditor should bear the other half of the effects associated with the exceptional event.[111]

The Egyptian law's position in this matter is a welcome departure from the formalism of *pacta sunt servanda*. It is difficult to justify enforcing the terms of the contract as agreed given the introduction of a new variable (the exceptional event) that was never taken into account at the time of the contract's creation. The most relevant characteristic of an exceptional event is its unpredictability. Since neither party could have or should have reasonably expected such an event to occur, their agreement terms never took that

[106] SANHURI, *supra* note 85, § 420 at 643-44; 3 TOLBA, *supra* note 100, at 130-31.
[107] SANHURI, *supra* note 85, § 420 at 645; 3 TOLBA, *supra* note 100, at 136.
[108] SANHURI, *supra* note 85, § 420 at 645-46; 3 TOLBA, *supra* note 100, at 136.
[109] SANHURI, *supra* note 85, § 420 at 646-48; 3 TOLBA, *supra* note 100, at 144.
[110] SANHURI, *supra* note 85, § 420 at 648; 3 TOLBA, *supra* note 100, at 146.
[111] SANHURI, *supra* note 85, § 420 at 647; 3 TOLBA, *supra* note 100, at 146.

event or its effects into account. This “unpredictability” characteristic immediately brings to mind Gordley and Jiang’s analogy between contracts and fair bets discussed in the previous chapter.[112] The parties never took the effects that the unpredictable event might have on their obligations and thus did not negotiate a fair price for the obligation in cases where the event would occur. Additionally, no party has agreed to bear the risk associated with the unforeseen event and no compensation was provided for the party that assumed such risk. Thus, enforcing the contract's provisions as they were without adjusting for the unforeseen circumstances would be substantially unfair. It seems that Egyptian law has managed, on this occasion, to strike an acceptable balance between contractual continuity and risk distribution.

C) Exploitation and Lesion

Article 129 of the Civil Code[113] supposedly offers a general theory of exploitation to complement the few exploitation-related articles scattered throughout the Civil Code as stipulated in Article 130.[114] Unfortunately, it serves as an excellent demonstration of the conservative approach that the code's drafters adopted regarding the sanctity of contracts. For starters, a technical limitation was imposed upon those making claims of exploitation; the case must be presented within one year of the date of the contract or it shall not be heard. Courts have vigilantly upheld that restriction.[115] This time limit is imposed for the sake of transactional stability and is not subject to interruptions or stoppages normally associated with terms of prescription.[116]

Furthermore, while the provision did provide some remedies for exploitation by allowing the annulment of the contract or a reduction to the exploited party's obligation,

[112] *See supra* p. 15 and notes 72,73.

[113] The Egyptian Civil Code, *supra* note 25, § 129 ("(1) If the obligations of one of the contracting parties are out of all proportion to the advantages that he obtains from the contract or to the obligations of the other contracting party, and it is established that the party who has suffered the prejudice entered into the contract only as a result of the other party exploiting his obvious levity of character or his unbridled passion, the judge may, at the request of the party so prejudiced, annul the contract or reduce the obligations of such party. (2) Proceedings instituted on such grounds shall be barred unless commenced within one year from the date of the contract. (3) In a contract entered into for valuable consideration, the other party may avoid annulment proceedings by making such an offer as the judge may consider adequate compensation to cover the lesion.".)

[114] For a list of those scattered articles see 2 TOLBA, *supra* note 100, at 858. They include the sale of properties owned by a person with limited capacity (art.425), partition agreements (art.845), agency contracts (art.709), corporation contracts (art.515), loan contracts if interest is agreed-upon (art.227), and damages fixed by agreement.

[115] *See, e.g.*, Case no. 7064/85/Court of Cassation, (Dec. 13, 2015); Case no. 1312/64/Court of Cassation, (July 2, 2018).

[116] SANHURI, *supra* note 85, § 209 at 371.

it restricted the scope of judicial intervention to reducing the exploited party's obligations stopping short from granting courts the power to modify the other party's obligations. This contradicts the liberal approach adopted to contract modification in cases of unforeseen circumstances which allows the modification of the creditor's obligations despite them not being at fault in such cases.[117] However, that restriction may be justified in light of the rule that allows a party wishing to avoid annulment to do so by offering to increase their corresponding obligations to cover the lesion. In any case, the technical limitations appearing in this rule stem from the drafters' desire to maintain order and transactional stability by favoring the continuation of the contract and minimizing the chance for judicial interference with contractual obligations. Unfortunately, in doing so, it severely limited the practical relevance of this legal rule.

Even if we were to look past those restrictions, the article still falls drastically short of offering adequate protection to those who find themselves exploited. First off, the article requires a certain degree of inequality to be present in a contract for it to qualify for the application of the stipulated remedy. While the article does not explicitly specify a process to measure the lesion, the use of the words "out of all proportion" suggests that having unequal obligations is not enough for judicial interference with the contract and that such interference should only be considered in the most extreme of cases.[118] Since the article did not specify the quality of the suffered lesion necessary to its application, it is left to the judge to determine in each case whether the inequality between the obligations and the advantages the injured party hopes to gain amounts to the degree that warrants their interference. In doing so, the subjective value of the transaction from the point of view of the parties is considered rather than just the objective value of the deal in the eyes of an outsider.[119]

Furthermore, it is not enough to have unequal contractual obligations, no matter how grave the inequality may be, for the contract to qualify for the remedies prescribed by Article 129. The Explanatory Memorandum for the Civil Code states that two elements are necessary to satisfy the criteria of exploitation-based lesion; the first one is a material or physical element which is the inequality between the obligations as discussed above and the second one, an internal or personal element, that is an

[117] *See supra* pp. 25 and note 109.
[118] SANHURI, *supra* note 85, § 206 at 363 (requiring a level of gross disproportionality between the obligation and the benefits "ʾikhtilāl fādiḥ").
[119] SANHURI, *supra* note 85, § 206 at 363; 2 TOLBA, *supra* note 100, at 847.

exploitation of the prejudiced party's state.[120] To complicate matters further, the provision explicitly requires the exploitation of an "obvious levity" or an "unbridled passion" to be the *only* reason for the prejudiced party's decision to contract. In defining those two conditions, classical examples used by scholars to demonstrate cases of exploitation include cases where an older man marries a younger woman and is so enamored by her that she exploits his condition to have him donate significant parts of his wealth to her and cases where a reckless young man who had recently inherited some wealth is exploited by others.[121] In any case, determining whether exploitation was the reason for concluding the agreement is considered a matter of fact and thus is up to the court to decide with no oversight on the matter from the Court of Cassation.[122]

In practice, a legal practitioner would be hard-pressed to find a precedent for a case where a plaintiff successfully argued the exploitation defense. The Egyptian Court of Cassation has not defined the meaning of "obvious levity" or "unbridled passion" but it has always maintained that the inequality between obligations is never enough on its own to be considered as a lesion according to Article 129 unless it is accompanied by exploitation of an "obvious levity" or "unbridled passion."[123] In one case, the Court of Cassation implied that exploitation may exist in a sale contract concluded between a frail dying person and a priest holding religious authority over them.[124] In another case, the Court of Cassation confirmed that the mere fact that a contract was formed between spouses from contrasting social backgrounds and a significant age gap does *not* constitute evidence of exploitation.[125] In another case, the court stated that a claim that the contracting party never read the contract before signing it is insufficient to prove the existence of exploitation.[126] In yet another case, the Court of Cassation stated that claims of exploiting the "need" or "inexperience" do not fall under the umbrella of Article 129.[127] Finally, the Court of Cassation does not accept the raising of a claim of exploitation for the first time at the cassation stage since such a claim would require an

[120] Explanatory Memo, *supra* note 98, § 179.
[121] SANHURI, *supra* note 85, § 207 at 366; 2 TOLBA, *supra* note 100, at 848-49.
[122] *E.g.*, Case no. 45/34/Court of Cassation, (May 11, 1967); Case no. 1862/59/Court of Cassation, (Feb. 17, 1994).
[123] *See, e.g.*, Case no. 910/49/Court of Cassation, (Mar. 22, 1983); Case no. 1862/59/Court of Cassation, (Feb. 17, 1994); Case no. 10468/86/Court of Cassation, (Mar. 16, 2021).
[124] *See*, Case no. 78/33/Court of Cassation, (Feb. 23, 1967) (rejecting a claim of exploitation of religious authority on the grounds of failure to present evidence rather than the inconceivability of the proposition).
[125] Case no. 45/34/Court of Cassation, (May 11, 1967).
[126] Case no. 8423/84/Court of Cassation, (July 2, 2022).
[127] Case no. 713/48/Court of Cassation, (Dec. 31, 1981).

investigation of the facts which goes beyond the oversight of the Court of Cassation as a court of pure law.[128]

Even at the Civil Code's time of drafting, Sanhuri himself highlighted the limited scope of the final version of Article 129. He noted how the original proposals for the article were much more inclusive as they made the prescribed remedy available to cases where the prejudiced party's need, levity, inexperience, or poor perception was exploited and that the original proposal for the article went as far as including all cases where consent was a result of insufficient choice.[129] He remarked that although the proposed versions were in line with contemporary legal rules in various European legal systems, the senate committee considered removing the provision altogether to preserve contractual stability but eventually opted to implement it conservatively and decided to adopt a strict criterion for exploitation by excluding all but the most obvious levity and the most unbridled of passion from the scope of application of that rule.[130]

Sanhuri's remarks on the judicial solutions employed by Egyptian courts before the introduction of this provision are of particular interest to this paper; he had noted that courts had no legal provisions to aid in solving the problems involving exploitation and were thus forced either to stretch other provisions addressing other flaws of the will to employ them to address issues they were not meant to address, or to resort to the application of the rules of justice where no predefined rules exist and thus risk instability.[131] The Egyptian judiciary's behavior on these matters was remarkably similar to the behavior of American courts when it addressed the same problem before the adoption of the UCC. Interestingly, Karl Llewellyn, the chief drafter of the American UCC, had noted similar behavior in the US courts and lamented the judicial use of "covert tools" to address contractual inequality. This was one of the primary reasons behind the adoption of the unconscionability doctrine in the UCC; to allow courts to immediately direct their attention to the core of the issue, which is contractual inequality, rather than having to beat around the bushes by distorting unrelated legal rules to show that another problem, other than inequality, existed and thus judicial interference was justified.[132] While American legislators eventually adopted the open-

[128] *See*, Case no. 6559/79/Court of Cassation, (Nov. 20, 2016).
[129] SANHURI, *supra* note 85, § 204 at 360 n.1.
[130] *Id.*
[131] *Id.* § 207 at 366-67.
[132] See *infra* pp. 41-51 for a detailed discussion of unconscionability.

ended unconscionability doctrine as a solution to contractual inequality, Egyptian legislators preferred the conservative approach and adopted exploitation as a very limited concept. Now, almost 75 years later, the conservative approach has become an ultra-conservative one and the practical value of article 129 remains nonexistent.

D) Adhesion Contracts

While it may not be necessary that *all* adhesion contracts contain unequal contractual obligations,[133] they should, nevertheless, be included in this study since they represent the pinnacle of procedural inequality, regardless of whether this inequality is reflected in the contract in the form of unequal obligations, and thus it would be interesting to see how the Civil Code decided to deal with contractual obligations created under such extreme circumstance.

The Egyptian Civil Code specifically acknowledges contracts of adhesion as valid contracts according to Article 100 of the code.[134] Before the promulgation of the Code, there had been a scholarly debate about the nature of such agreements with one group arguing that the conditions contained within such contracts were more akin to laws or regulations since they are forced on the weaker party of the contract by the other powerful contractor who usually holds a monopoly over a vital product or service and as such their interpretation and application should be strict and should consider the public interest before the interests of the parties.[135] The Civil Code, however, adopted the opposing point of view and accepted such agreements as contracts rooted primarily in the will of the parties. Nevertheless, it acknowledged the unique way in which such contracts are created and prescribed a unique legal rule that handles the interpretation of clauses in such contracts as stated in article 151 of the code which requires the interpretation of obscure clauses in adhesion contracts to be in favor of the adhering party.[136] Additionally, Article 149 permits the judge to interfere in cases of abusive

[133] *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1259 (2003) ("The fact that a contract is offered on an adhesive basis does not suggest that its terms are particularly likely to be inefficient and thus bad for buyers as a class.").

[134] The Egyptian Civil Code, *supra* note 25, § 100 ("Acceptance in contracts of adhesion is limited to the submission to standard conditions which are drawn up by the offeror and which are not subject to discussion.").

[135] SANHURI, *supra* note 85, § 117 at 231-32.

[136] The Egyptian Civil Code, *supra* note 25, § 151 ("In cases of doubt the construction shall be in favor of the debtor. The construction, however, of obscure clauses in a contract of adhesion must not be detrimental to the adhering party.").

conditions[137] and the Code detailed specific legal rules for some of the most common contracts of adhesion such as insurance contracts, labor contracts, and public works contracts.[138]

Discussing the details of the rules stipulated for specific contract types is beyond the scope of this paper. The main concern of this section is to illustrate the general rules applicable to contracts of adhesion to determine the effectiveness of those general rules in restoring balance to unequal obligations. To that end, it is necessary to first understand the definition of an "adhesion" contract. The concept of adhesion was used in practice by the Egyptian courts even before the drafting of the Civil Code.[139] The courts had considered a contract as an adhesion contract if those three conditions were met: 1) the contract involves a vital product or service that is considered essential for the public, 2) the offeror holds a legal or practical monopoly on the product or service or controls it in such a way that limits competition, 3) the offeror continuously offers the product or service to the public under the same conditions usually on boilerplate terms. While the Civil Code never stated a definition for adhesion, the explanatory memorandum accompanying the Civil Code used the same properties as detailed above to define adhesion contracts and cited contracts concluded with electricity, water, gas, telephone, insurance, and railroad companies as examples.[140] The Egyptian Court of Cassation has been very consistent as well in defining adhesion contracts in a way that mirrors the explanatory memorandum.[141]

As a result of defining adhesion in this limiting way, adhesion contracts are to this day limited in practice to the examples offered by the explanatory memorandum. The Court of Cassation has considered a contractual clause relieving telephone companies from any liabilities in cases of malfunctions of the telephone line to be an abusive clause.[142] In another case, the court considered a subscriber's declaration that he is liable for

[137] The Egyptian Civil Code, *supra* note 25, § 149 ("When a contract of adhesion contains leonine conditions, the judge may modify these conditions or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of equity. Any agreement to the contrary is void.").

[138] Articles 668-673 discuss public works contracts, articles 674-698 discuss labor contracts, and articles 747-771 discuss insurance contracts.

[139] SANHURI, *supra* note 85, § 118 at 232-33.

[140] Explanatory Memo, *supra* note 98, § 145.

[141] *See, e.g.*, Case no. 396/37/Court of Cassation, (Mar. 12, 1974); Case no. 10122/65/Court of Cassation, (Feb. 24, 2020) (stating the characteristics of adhesion contracts exactly as they appeared in the Explanatory Memorandum).

[142] Case no. 1556/56/Court of Cassation, (Mar. 26, 1989); Case no. 388/57/Court of Cassation, (Dec. 12, 1989).

paying the phone bills accumulated on his father as a condition to install a telephone for himself to constitute abuse on the part of the company.[143] Another case saw the court declare that water is an essential commodity and that if a contract was drawn to supply it in an area where the supplier is the only company operating, the contract is considered to be an adhesion contract.[144]

In the previous cases, the court confirmed some examples of commodities and services that are necessary for the public. In other cases, it gave examples of what is *not* considered a primary necessity for the public. In a case involving a car manufacturing company that was the only maker of this model of cars, the court identified "essential commodities" as those commodities that peoples' affairs are not in order without, and thus, they find themselves forced to accept any abusive conditions necessary to obtain them. In that case, the court ruled that whether a monopoly exists is irrelevant since cars are not considered a primary necessity for the public and thus refused to consider agreements to buy one as a contract of adhesion.[145] There are many other cases where the court stressed that a contract cannot be considered an adhesion contract if its subject is a nonessential commodity. The Court of Cassation refused to consider a contract for the sale of a housing unit within one of the Egyptian North Coast's resorts pointing out the fact that ownership of such a unit is not a necessity of life in addition to the lack of monopoly on such a commodity in the vast North Coast.[146] It refused to consider contracts for the sale of a residential unit in one of the subsidized housing projects offered by the local governorate as contracts of adhesion.[147] The court did not consider a loan contract conducted as part of the government's plan to stimulate the economy between the local governorate and a fresh graduate as an adhesion contract.[148] It did not consider a public works contract negotiated through tender as an adhesion contract since the bidder was free to decide the details of their bid and whether or not to make a bid in the first place.[149]

[143] Case no. 11912/79/Court of Cassation, (Apr. 1, 2017).
[144] *See*, Case no. 14903/75/Court of Cassation, (Jan. 4, 2015) (overturning a decision for failure to investigate a defense claiming that a water supplying contract was made in adhesion).
[145] Case no. 396-398/37/Court of Cassation, (Mar. 12, 1974).
[146] Case no. 4163/66/Court of Cassation, (Nov. 5, 2018).
[147] *See*, Case no. 2083/70/Court of Cassation, (May 8, 2012) (stating that the buyers knew the conditions of the sale beforehand and had the option to decline it).
[148] Case no. 3826/70/Court of Cassation, (May 22, 2021).
[149] Case no. 208/21/Court of Cassation, (Apr. 22, 1954).

In cases where the court does determine that a contract is an adhesion contract, it will have to apply the specific rules stipulated in the Civil Code by interpreting vague contractual clauses in favor of the adhering party regardless of whether they were the debtor or the creditor in this situation; the general rules of interpretation would have required the interpretation to be in favor of the debtor. Additionally, the court would be permitted to interfere if it found any clause to be abusive to the adhering party. In such cases, the court may, as justice would require, amend the clause or relieve the adhering party of it. The power of the court in this regard is a matter of public policy and as such agreements to forbid judicial interference in such cases are considered null and void.[150]

As was the case with the rules on exploitation, the limitations of the rules on contracts of adhesion do not stem from the scope of the powers or remedies available to the court. The problem resides in the definition of adhesion contract. Although the Civil Code did not contain a strict definition for adhesion contracts, Egyptian courts continue to restrict themselves to their pre-code definition of adhesion contracts and intervene only in the most extreme of cases.

E) Damages Fixed by Agreement

The Egyptian legal system perceives compensation as a remedy intended to rectify the harm inflicted because of a contractual breach or an unlawful act. The function of compensation is to relieve the damaged party as much as possible from all the direct harmful effects of the breach or the illegal act. Consequently, the optimum compensation awarded to a plaintiff is an amount that is enough to cover all the harm that they had sustained no more and no less.[151] The Egyptian legal system does not recognize some form of damages awarded in other legal systems like punitive damages since granting such awards would contradict the accepted role of damages within the system and would amount to an enrichment without just cause. In most cases, the judge decides the appropriate amount of compensation awarded to remedy the harm. However, it is not uncommon for contracting parties to agree in advance to set the compensation due in cases of breach. In Article 223, the Civil Code does recognize

[150] The Egyptian Civil Code, *supra* note 25, § 149; SANHURI, *supra* note 85, § 118 at 234.
[151] SANHURI, *supra* note 85, § 648 at 973-74.

such agreements as valid and binds judges to the amount agreed upon by the parties[152] with some restrictions stipulated in Articles 224 and 225.

The first restriction stems from the function of compensation mentioned in the previous paragraph. If the liable party is successful in proving that no harm has befallen the creditor, no compensation shall be granted even if a breach does exist despite the existing agreement to set in advance the damages due in cases of breach.[153] The second restriction is that the judge may reduce the compensation if the liable party shows that the agreed-upon amount was highly exaggerated or that the original obligation was partially performed.[154] By placing those two restrictions, the Civil Code has favored the debtor in cases of damages fixed by agreement and offered her an opportunity to avoid paying the full agreed-upon amount. Those two restrictions are considered public policy and as such agreements that contradict them are void.[155] Article 225 takes things one more step by prohibiting the collection of any amount of compensation over the amount fixed by the agreement even if that amount was insufficient to cover all the harm incurred.[156] Exceptions are allowed only if the debtor has committed fraud or gross negligence[157] making this a simple iteration of the rule *fraus omnia corrumpit.*

Parallel to the mentioned articles that deal with breaches in non-monetary obligations, article 226 of the code deals with the issue of compensation in cases where the object of the breach is a monetary obligation; an obligation to pay a determined sum of money. For those cases, the code stipulates the payment of a fixed interest rate of 4% per annum for civil obligations and 5% per annum for commercial obligations as legal interest.[158] This "legal interest" is considered sufficient compensation for damages resulting from

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[152] The Egyptian Civil Code, *supra* note 25, § 223 ("The parties may fix in advance the amount of damages due either in the contract itself or in a subsequent agreement, subject to provisions of Articles 215 to 220.").

[153] The Egyptian Civil Code, *supra* note 25, § 224 ¶ 1 ("Damages fixed by agreement are not due if the debtor establishes that the creditor has not suffered any loss.").

[154] *Id*. ¶ 2 ("The judge may reduce the amount of the damages if the debtor establishes that the amount fixed was grossly exaggerated or that the principal obligation has been partially performed.").

[155] *Id*. ¶ 3 ("Any agreement contrary to the provisions of the two preceding paragraphs is void.").

[156] The Egyptian Civil Code, *supra* note 25, § 225 ("If the loss sustained exceeds the amount of damages fixed by agreement, the creditor cannot claim any increases to the agreed-upon amount, unless he is able to prove that the debtor has committed fraud or gross negligence.").

[157] *Id.*

[158] The Egyptian Civil Code, *supra* note 25, § 226 ("If the object of an obligation is the payment of a sum of money and the amount of which was known at the time the claim was made, the debtor shall be bound, in case of delay in payment, to pay to the creditor, as damages for the delay, interest at the rate of four percent in civil matters and five percent in commercial matters. Such interest shall run from the date of the claim in court unless the contract or commercial usage fixes another date. This Article shall apply unless otherwise provided in law.").

failure to pay the debt in time and no compensation may be awarded in excess of it unless the creditor can prove that a harm greater than the remedy provided by the legal interest has befallen them and that the debtor has caused that harm in bad faith.[159] Alternatively, article 227 allows the parties to agree in advance to set their own interest rate in such cases provided that the agreed-upon rate does not exceed 7% per annum.[160] This hard limit is a matter of public policy in Egypt and as such, any agreement to interest over the prescribed limit is automatically voided and set to the maximum legal rate of 7%.[161] Moreover, to avoid any attempts to circumvent this rule, it is stipulated that any obligation placed on the debtor to pay a commission or benefit may be considered as disguised interest if it was proven that no actual benefit or service was rendered in exchange for it. The court would then add such commissions to the agreed-upon interest rate and reduce both to the legal limit.[162]

The rules, exceptions, and restrictions that the Civil Code places on agreed-upon damages are interesting because they reveal the philosophy behind the code; while it respects and enforces private agreements, it maintains a watchful eye on said agreements to ensure they are not used to undermine public policy considerations such as to enable usury, exploitation, or to allow a party to benefit from their fraud or misconduct. In such cases, the law immediately interferes by altering the agreement or simply refusing to enforce it. In this case, an agreement to set the damages due in case of breach is only interpreted in the grand context of "damages" in the Egyptian legal system which focuses on the correlation between harm and compensation. A private agreement to set the compensation is not in itself the source of the obligation; the breach and the resulting harm remain the source of that obligation.[163] Consequently, an

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[159] The Egyptian Civil Code, *supra* note 25, § 231 ("A creditor may claim supplementary damages in addition to interest if he establishes that a loss greater than the interest was inflicted *mala fide* by the debtor.").

[160] The Egyptian Civil Code, *supra* note 25, § 227 ¶ 1 ("The parties may agree upon another interest rate either in the event of delay in effecting payment or in any other case in which interest may be stipulated, provided that it does not exceed seven percent. If the parties agree to a rate exceeding seven percent, the rate shall be reduced to seven percent and any surplus that has been paid shall be refunded.").

[161] 4 TOLBA, *supra* note 100, at 838-39.

[162] The Egyptian Civil Code, *supra* note 25, § 227 ¶ 2 ("Any commission or other consideration of whatsoever nature stipulated by the creditor which, together with the agreed interest, exceeds the maximum limits of interest set out above, shall be considered as disguised interest and shall be subject to reduction, unless it is established that this commission or this consideration is in respect of a service actually rendered by the creditor or of a lawful consideration.").

[163] *See* Explanatory Memo, *supra* note 98, § 223 ("A penalty clause is, in essence, nothing more than a consensual agreement about the amount of due compensation. It is not, in itself, the source of obligation, rather the source may be a contract in some cases or a tortious act in others. Entitlement

agreement to set the compensation may not be used as a pretext to force a debtor to pay an exorbitant amount of compensation when little or no actual damage had occurred. On the other hand, the rule limiting awarded compensation to the agreed-upon amount even if it was proven that said amount was insufficient to cover all the damage may seem to contradict the rationale of the first two restrictions. However, the explanatory memorandum suggests that this rule is merely a reiteration of the general rule allowing parties to agree to limit the liability of debtors in cases of simple contractual beach, stipulated in article 217,[164] and it does not apply in cases of fraud or gross negligence.[165]

F) Unlawful Use of Right

In its first chapter, the Civil Code includes a general rule that no person shall be held liable for any harm resulting from a legitimate use of their rights.[166] However, it immediately follows to describe the cases where the use of a right is deemed unlawful. Starting from a presupposition that rights exist to improve the lives of all those who live in a society and regulate their relationships, it would be logical to suggest that a reasonable holder of a right should only ever use her rights to gain a benefit for herself and not to harm others; the law does not exist to serve malicious interests but rather to promote the wellbeing of the society at large. Article 5 of the Civil Code acts to prevent the abusive use of rights by declaring such use unlawful.[167] The idea that a person may be acting wrongfully despite using a legal right is not a new concept; it has been around since the times of the Romans.[168] It was later incorporated into the Islamic *Sharia* and the French legal system.[169] While the idea had receded during the height of the French

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of the stipulated compensation [stipulated in a penalty clause] requires the fulfillment of all the conditions necessary to generally award a compensation: a wrong, a harm, and giving notice.").

[164] The Egyptian Civil Code, *supra* note 25, § 217 ("(1) The debtor may by agreement accept liability for unexpected accidents and force majeure. (2) The debtor may by agreement be discharged from all liability for his failure to perform the contractual obligation, with the exception of liability arising from his fraud or gross negligence. The debtor may, nevertheless, stipulate that he shall not be liable for fraud or gross negligence committed by persons whom he employs for the performance of his obligation. (3) Any clause discharging a person from responsibility for unlawful acts, is void.")

[165] *See* Explanatory Memo, *supra* note 98, § 225 ("A penalty clause, in cases of simple fault, is a form of liability waiver. Needless to say, such agreements [waivers] are valid in cases involving simple contractual fault but are voided when fraud or gross negligence is involved. The same rule applies when an excessively nominal compensation is stipulated to mask a liability waiver clause.").

[166] The Egyptian Civil Code, *supra* note 25, § 4 ("A person legitimately exercising his rights is not responsible for prejudice resulting thereby.").

[167] *Id.* § 5 ("The exercise of a right is considered unlawful in the following cases: a) if the sole aim thereof is to harm another person; b) if the intended benefit is insignificant in a way that is out of proportion to the harm caused thereby to another person; c) if the intended benefit is unlawful.").

[168] SANHURI, *supra* note 85, § 553-54 at 835.

[169] *Id.* § 554 at 836.

Revolution and the accompanying wave of individualism,[170] it reemerged during the early 20th century and is now an established doctrine in many European legal systems.[171]

Article 5 was fashioned from a fine merger between contemporary European thought and established Islamic *fiqh* regarding the abuse of rights.[172] It provides three cases where the exercise of a right is deemed unlawful. The first and third cases both relate to the subjective intent of the holder; in the former, the holder seeks only to harm another person through the exercise of the right. In the latter, the ultimate benefit that the holder seeks to obtain is in itself unlawful. Examples of the first case include intentional false accusations of committing a crime,[173] frivolous litigation,[174] or building a chimney in a way that is specifically intended to harm a neighbor when other equally viable options exist.[175] The explanatory memorandum for the Civil Code offers the example of a government's decision to terminate the employment of an employee for political or personal reasons as an example for the third case.[176] Other examples include a landlord using his rights to harass his tenants to force their evacuation and an employer prohibiting his employees from joining a labor union under penalty of termination.[177]

What is of more relevance to this paper, however, is the second case as it appears to have an objective approach based on the relative inequality between harm and benefit to determine whether the exercise of a right is lawful. In this case, an exercise of a right is deemed unlawful if the benefits that the holder expects to gain from the use of the right are so insignificant that it pales in comparison to the severe harm that would befall another person if the right was exercised. The wording of the article suggests that a significant level of disproportionality between the harm and the benefit is required to deem the use of the right unlawful. This suggests that it is not enough for the harm to be greater than the benefit, but rather the harm must be so great that the benefit seems

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170 *Id.* § 555 at 836.
171 *Id.* § 556 at 836-39.
172 *See* Explanatory Memo, *supra* note 98, § 6 (noting that the German Civil Code has pioneered the concept of "abuse of right in Western law and that the three standards adopted for abuse in the Code were inspired by Islamic traditions).
173 1 TOLBA, *supra* note 100, at 401, 408-09.
174 *Id.* at 421.
175 SANHURI, *supra* note 85, § 567 at 853-54.
176 Explanatory Memo, *supra* note 98, § 6.
177 1 TOLBA, *supra* note 100, at 458.

trivial in comparison.[178] A closer inspection of that case reveals that it is not that much different from the first case; the law merely draws a conclusive legal presumption to the malicious intent of the holder from the fact that the benefit he expects to gain is so insignificant which would suggest that he is either a self-serving person oblivious to the plights of others or that the infliction of the harm was his secret intention all along. In both cases, the right's holder is deemed to be acting in an unjustified manner and is thus unworthy of legal protection.[179]

The Court of Cassation has remarked that the rules on the unlawful use of rights exist to prevent the use of legal rights as a pretext to inflict harm on others and that the common element between the various forms of unlawful use of rights is the existence of an "intention to harm" either actively by taking an action that inflicts harm for no apparent gain or passively through the flagrant disregard of the severe harm inflicted on others which renders the use of the right akin to a luxury that amounts to intentional harm.[180] The courts further noted that the criteria for applying the rule of unlawful use of right in its second form is an objective test of measuring the difference between harm and gain regardless of the personal economic circumstances of the parties. The court reasons that this legal rule does not stem from considerations of pity but rather from considerations of justice which demands a balance between right and duty.[181]

Courts are generally free to determine whether abuse exists in light of the circumstances of the case. As long as the court can provide a logical sequence that leads to its conclusion, the Cassation Court does not interfere in that matter as it considers it a question of fact rather than law.[182] In practice, the Court of Cassation has supported the decision to refuse a landlord's request to build a small room on the garden of a lot rented to a tenant despite the request being in apparent accordance with rent control laws that permitted landlords to increase the number of residential units in rented buildings through expansions; the tenant had maintained that the request amounts to an abuse of right since the benefits the landlord stands to gain were insignificant in comparison to

[178] *But see*, MOHAMMED SHAWQĪ AL-SAYED, al-Taʿasuf fi ʾIstiʿmāl al-ḥaq 274-76 (al-Hayʾah al-Miṣriyah al-ʿāmah -l-ilkitāb, 1979) (suggesting that the proportionality between the harm and benefit is irrelevant; if the harm is greater than the benefit, the use of right is unlawful regardless of how great the difference is).
[179] SANHURI, *supra* note 85, § 561 at 845.
[180] Case no. 108/45/Court of Cassation, (Jan. 26, 1980).
[181] *Id*.
[182] *See, e.g.*, Case no. 9529/87/Court of Cassation, (Mar. 26, 2019).

the harm that would befall him and the court, after consulting an expert, agreed.[183] In another case, the Court of Cassation overturned a decision by lower courts to enforce an expressed rescinding condition in a rent agreement. The contract included a provision that automatically rescinds the agreement if the tenant was late in their payments. The lower court applied that provision citing the *pacta sunt servanda* rule and disregarded the tenant's defense that the landlord's request amounts to an abuse of rights because the benefit gained was insignificant to the harm inflicted on them. While the Court of Cassation did not directly respond to the tenant's defense, it overturned the decision stating that the lower court had failed to address it thus rendering it flawed.[184]

G) Good Faith and Contracts

Good faith is mentioned in Article 148 of the code in the context of contract performance and to discourage the ultra-literal interpretation of contracts.[185] Naturally, Egyptian contract law expects parties to perform their obligations bona fide and requires courts to hold the parties to that standard. Deviation from acting in good faith constitutes wrongful conduct that may hold the deviating party liable for damages. Sanhuri noted that the Civil Code rewarded debtor's good faith by allowing the court to grant them a grace period to perform their obligation if their failure to perform in time was in good faith.[186] Conversely, the code punishes fraudulent debtors by holding them liable to compensate for unexpected damages resulting from their conduct.[187] There appears to be a degree of overlap between the obligation to act in good faith and the obligation to refrain from the abuse of rights; abuse of contractual rights can usually be interpreted as acting in bad faith and the wrongful party may be held liable under either of those rules.[188]

While insisting on acting in good faith with regards to contracts is certainly built on a strong moral foundation, Egyptian contract law imposes a significant limitation on that principle. Article 148 is intended to govern contractual performance and interpretation

[183] Case no. 22/46/Court of Cassation, (Apr. 25, 1981).
[184] Case no. 2803/71/Court of Cassation, (Mar. 10, 2003).
[185] The Egyptian Civil Code, *supra* note 25, § 148 ("(1) A contract must be performed in accordance with its contents and in compliance with the requirements of good faith. (2) A contract binds the contracting party not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity, is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract.")
[186] SANHURI, *supra* note 85, § 413 at 627.
[187] *Id.* at 627-628.
[188] *Id.* at 629.

after the contract is created. It does not concern the contract creation stage, nor does it impose any obligations on the parties during the negotiations stage. All stages prior to the contract's creation remain firmly in the domain of the "freedom to contract" principle with only the default rules on torts and the abuse of rights to protect the parties. The Court of Cassation has declared on more than one occasion that negotiations are mere physical acts that do not have legal effects and thus parties are free to withdraw from it, are not required to provide a reason for such withdrawal, and no liability may arise from such action unless it can be shown that the legal elements for tort liability were present.[189]

Because of this limitation, the rules on good faith may not be invoked to interfere with the negotiation stage and the substance of the final agreement that the parties reached. It would be unreasonable to condemn a party for being a harsh negotiator or for insisting on attaining the maximum possible benefits for himself during the negotiations preceding the agreement. This should not, however, dissuade us from insisting on a minimum level of equality between contractual obligations because maintaining a degree of contractual balance is an important social consideration that is of no less importance than a private party's right to enrich himself.[190]

After concluding this brief overview of Egyptian contract laws touching upon unequal contractual obligations, I will now move on to present another brief overview of American unconscionability, a seemingly indeterminate doctrine that aims to prevent exploitation.

[189] *See, e.g.*, Case no. 167/33/Court of Cassation, (Jan. 9, 1967); Case no. 559/74/Court of Cassation, (Mar. 20, 2007).

[190] As French law had a significant influence on the Egyptian legal system, it is interesting to note that the French *Code Civil* was recently amended to impose an obligation to initiate, conduct, and break off negotiations in good faith. Additionally, an obligation to disclose crucial information was introduced in the same amendment. *See* Peter Rosher, *French Contract Law Reform*, 17 Bus. L. Int'l 59, 69-72 (2016).

IV. The American Doctrine of Unconscionability

A) Development and History of Unconscionability

While the modern doctrine of unconscionability was only recently adopted in 1952 when it was included in the Uniform Commercial Code (UCC) in section 2-302, it can trace its origins to a much older time. Brian McCall dates the philosophical roots of unconscionability to ancient Greece and the work of Aristotle.[191] One of the functions of law was identified at that time to be the correction of the redistribution of wealth that results from an unfair exchange.[192] Aristotle's teachings seeped into the Roman legal system and a basic principle prohibiting enrichment at the expense of another's loss or injury was documented in the *Corpus Juris Civilis*.[193] Along with that principle, the *laesio enormis* rule was established in Roman law, though the principle was limited to the sale of land when the price offered was less than half of its true value.[194] The concerns for equality in exchanges persisted well into the medieval era and led to the expansion of the *laesio enormis* rule to cover any one-sided contract.[195] The prominent medieval thinker Thomas Aquinas maintained that any divergence from the just price no matter how small is unacceptable in the eyes of the divine law.[196] Nevertheless, he conceded that human laws are only capable of intervening when the transaction is made "with knowledge that the price is unjust or when the variation from the common estimation of the just price is great (*nimius excessus*) regardless of knowledge."[197]

By the 18th century, philosophical skepticism about the objective nature of value had reached a point where the existence of unequal contracts in principle came under question.[198] The legal world began to drift away from the notion of judicial oversight on contracts' substance particularly in common law systems.[199] Nevertheless, even when courts could not provide a remedy for unconscionable contracts, they would still refuse to enforce such contracts.[200] As the world entered the "age of will theories"[201] in

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[191] Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 Vill. L. Rev. 773, 778-79 (2020).
[192] *Id.* at 779.
[193] Gordley, *supra* note 55, at 1590.
[194] *Id.* at 1638. *See also* McCall, *supra* note 191, at 780.
[195] *Id.* at 1639.
[196] McCall, *supra* note 191, at 782-83.
[197] *Id.* at 781.
[198] *Id.* at 785.
[199] *Id.* at 784-85.
[200] *Id.* at 785.
[201] Gordley & Jiang, *supra* note 69, at 755.

the nineteenth century, freedom of contract forced most ideas of judicial oversight on contracts' substance to their lowest point. However, that did not stop courts from intervening in unfair contracts albeit using a different rationale; rather than being the cause for judicial intervention, harsh terms were considered merely evidence for the existence of fraud which would become the declared reason for the courts' refusal to enforce the contract.[202] Thus, freedom of contract failed to eliminate judicial oversight of contracts' substance, courts continued to monitor substance through the use of readily available covert tools.[203]

For the American legal system, the doctrine of unconscionability developed in the courts of equity as was the case in England.[204] US courts had the power to "set aside" unconscionable contracts as early as 1816.[205] As courts continued to confront unconscionable contracts, a need developed to "formalize the unconscionability doctrine" to limit the unconventional use of other legal doctrine that courts resorted to in order to circumvent unconscionable terms.[206] A milestone achievement for the unconscionability doctrine was its adoption into the UCC in 1952. Though controversial from its inception[207], unconscionability managed to pass its rough drafting process[208] and has now established itself as an official doctrine in American courts. Despite its initial adoption in a commercial code, unconscionability is not limited to commercial cases but is considered a general doctrine that applies to all contracts.[209] This is evident from its inclusion in the restatement (second) of contracts thus establishing its availability for all contracts not just commercial ones.[210]

B) Unconscionability Explained

Unconscionability is a notoriously difficult concept to define. Professor Ellinghaus argues that unconscionability's lack of a clear definition is a result of its nature. He suggests that unconscionability is not a rule or principle but a *standard* comparable to

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[202] *Id*.
[203] Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 Ala. L. Rev. 73, 83-84 (2006).
[204] Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 Md. L. Rev. 46, 52 (2021).
[205] M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 Mich. St. L. Rev. 211, 216 (2013).
[206] Schmitz, *supra* note 203, at 83.
[207] Browne & Biksacky, *supra* note 205, at 224.
[208] For an overview of the drafting history of article 2-302 of the UCC *see generally* Arthur Allen Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1966).
[209] Browne & Biksacky, *supra* note 205, at 218-19.
[210] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 208, 211(3) (1981).

other equally hard-to-define legal standards, such as "good faith," "reasonableness," or "due care."[211] He notes that such standards are often employed by laws to allow them the necessary flexibility to deal with a diverse set of cases.[212] Regardless, a logical starting point for any attempt to understand unconscionability ought to be the wordings of article 2-302 of the UCC which states that:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.[213]

As many writers have noted, article 2-302 does very little to define unconscionability and resorts instead to a vague and circular definition that places the burden of deciding what exactly an unconscionable contractual term is on the conscience courts.[214] Apart from making the clear statement that unconscionability is a matter of law not of fact, the first subsection of article 2-302 is primarily concerned with listing the remedies available to the court when it has already decided that the contract or term in question is unconscionable. The first subsection does not offer any criteria to aid courts in reaching that decision. The second subsection, on the other hand, suggests that whether a particular contract or term is unconscionable is a subjective matter as the decision must be made on a case-by-case basis in light of the "commercial setting, purpose, and effect" of the contract or clause in question. The subsection instructs courts to offer the parties the chance to present evidence of those circumstances before making their final decision.

With article 2-302 being that brief, one may be tempted to turn to the official comments accompanying the UCC to help illuminate the meaning or scope of unconscionability.

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[211] M. Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 757, 759 (1968).
[212] *Id.* at 759-60.
[213] U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 1952).
[214] For example, Professor Leff notes that "[i]f reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative." Leff, *supra* note 208, at 487. Professor Murray refers to the "Delphic nature of the concept or any codification thereof" and admits that it "may be impossible to state the outer limits of unconscionability at this time." Murray, *supra* note 5, at 2. Even staunch supporters of unconscionability concede that section 2-302 does not offer a formula for its application. *See*, Schmitz, *supra* note 203, at 84-85.

Unfortunately, the comments do not offer much help for a seeker of an exact definition of unconscionability. The first comment goes on to declare that:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise … and not of disturbance of allocation of risks because of superior bargaining power.[215]

As can be seen in the comment, a test is suggested to determine if a clause is unconscionable. Unfortunately, that test is no more than a repetition of the same language; a clause is deemed unconscionable if, in light of the circumstances, it is "so one sided as to be unconscionable" at the time of the contract. At the very least, this comment clears up one issue: unconscionable terms are born unconscionable at the time of their creation; a normal "conscionable" term cannot later become "unconscionable" due to a change in the circumstances surrounding the transaction. Moreover, Professor Murray notes how the comment's assertion that unconscionability is not intended to disturb the "allocation of risks" resulting from "superior bargaining power" but rather to prevent "oppression and unfair surprise" offers a "superficial dilemma" since any interference from the court will undoubtedly disturb the allocation of risks.[216] He suggested that the addition of the word "simply" to the sentence would make it much clearer so that it would read: ". . . and not of disturbance of allocation of risks [simply] because of superior bargaining power."[217] Thus, Murray suggests that unconscionability is linked to "oppression" and "unfair surprise" rather than "disparity in bargaining power" and that the presence of some of those phenomena does not necessarily indicate the presence of others.[218] He elaborates that if a party possessing superior bargaining power does not surprise or otherwise oppress those that she contracts with, the unconscionability principle would be inapplicable to their dealings.[219] Conversely, a party with no significant bargaining power may attempt to

[215] U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1952).
[216] Murray, *supra* note 5, at 40.
[217] *Id*.
[218] *Id.* at 41.
[219] *Id*.

unfairly surprise the other party by inconspicuously including the desired clause in the contract.[220] Finally, even a conspicuous apparently assented to contractual term may be oppressive if no genuine choice existed. This may be the case if the subject of the contract is necessary for the well-being of the buyer, the seller attempted to shift risks normally allocated to themselves, and the buyer had no reasonable alternatives to satisfy their necessary needs.[221]

Despite its limited contributions to the definitional front, the first comment still offers important insight into the rationale and motives behind the vagueness surrounding the unconscionability doctrine. Article 2-302 reflects the philosophical views of Karl Llewellyn, the chief drafter of the UCC. As a legal realist, Llewellyn was less than enthusiastic about the formalistic methods and "covert tools" that courts employed to strike down unfair contracts.[222] He had long maintained that "covert tools are never reliable tools"[223] and thus drafted article 2-302 in a way that reflected his realist stance on that matter; courts should be able to "pass directly on the unconscionability of the contract" without having to distort established legal principles in a formalist attempt to reach a just result. Professor Spanogle noted that for unconscionability to be able to play its intended role, it necessarily needed to be amorphous.[224] Since unconscionability is intended to inhibit contract drafters from "automatically asserting all conceivable rights in all transactions," limiting the doctrine with an exact definition would have defeated its purpose; contract drafters would simply "draft to the threshold of unconscionability" and continue to oppress their contractual partners.[225]

Thus, the ambiguity of article 2-302 is not a result of poor draftsmanship but rather an excellent one. Professor Murray defended Llewellyn's vision and argued that section 2-302 can only be understood by understanding the purpose its author had intended for it.[226] He supported Llewellyn's view on the workings of the common law system and argued that the courts were best suited to develop the "machinery" that would be the unconscionability. The role of the statute (the code) is not to build the system but rather to force courts to face the problem and come up with a solution that does not rely on

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[220] *Id*.
[221] *Id*.
[222] Schmitz, *supra* note 203, at 85-88.
[223] Leff, *supra* note 208, at 559, quoting Llewellyn, THE COMMON LAW TRADITION 365 (1960).
[224] John A. Jr. Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931, 940 (1968).
[225] *Id.* at 940-41.
[226] Murray, *supra* note 5, at 36.

the misuse of "covert" legal tools.[227] He insisted that had the code included any clearer definition for unconscionability, it would have impeded the development of the doctrine as courts move on from grappling with the "covert tools" to contending with the "semantics of statutory language" to the detriment of the legal system.[228]

Another important source for understanding unconscionability and determining its rules is the relevant case law. One of the earliest modern cases that saw the application of the unconscionability doctrine was *Williams v. Walker-Thomas Furniture Co.*[229] decided in 1965.[230] In that case, an improvised MS. Williams, who lived on a 218$ monthly stipend from the government and supported herself along with seven children, had bought several items from a furniture store paying in installments during the period from 1957 to 1962. The contracts signed by Williams were standard form contracts prepared by the seller and included a cross-collateral clause stipulating that any payment made by the purchaser is to be distributed on a pro-rata basis on all debts arising from previously purchased items thus ensuring that the store would retain ownership, along with repossession rights, of all items sold until the entire debt is paid off. Williams had an outstanding balance of 164$ when she made her last purchase of a 514$ stereo thus raising her overall balance to 678$. When she defaulted, the store moved to repossess all items previously sold to her since December 1957. The case was brought before the US Court of Appeals for the District of Columbia Circuit and while its ultimate decision was to remand the case to the trial court for further investigations, the court did affirm that unconscionability was a valid defense in cases such as this.

The court defined unconscionability as having two main elements: the absence of meaningful choice along with the presence of unreasonable terms favoring the drafting party. The court affirmed that gross disparity of bargaining power may affect the "meaningfulness of the choice." It also acknowledged the importance of the role that the personal circumstances of the parties, such as their education or lack of, may play in their understanding of the contractual terms and thus their choice to accept it. The

[227] *Id.* at 36-37.
[228] *Id.* at 38.
[229] 350 F.2d 445 (D.C. Cir. 1965).
[230] McCall, *supra* note 191, at 787.

court thus declared that the rule that one is bound by what one signs is not unlimited, the majority opinion maintained that:

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[231]

The *Williams* opinion laid the groundwork for Professor Leff's popular categorization of unconscionability into two types: procedural and substantive.[232] According to such categorization, courts ought to check two different aspects of an agreement before deciding if it is unconscionable. First, it should check whether the agreement is substantively unconscionable; if the overall agreement or some of its clauses are so onerous that the terms "unreasonably favor the stronger party."[233] Examples of such terms include unfair disclaimers, waiver of defenses, and the repossession of goods without prior hearings.[234] This is the core of unconscionability; indeed, there would be no need for any further discussions on the matter if it is established that the agreement was not substantively unconscionable.[235] If, however, the inquiry concluded that there does exist a degree of substantive unconscionability within the agreement, a further check into the procedural aspect of the agreement and how it was created would be necessary before deciding to apply the unconscionability rule.

A check on the procedural integrity of the agreement, or what Professor Leff referred to as "bargaining naughtiness",[236] would require the court to examine the circumstances of the bargaining process that preceded the contract's conclusion and how the written agreement was presented by its drafter. If the court finds that the inclusion of the unconscionable terms was only a result of the drafter's abuse of the bargaining process, it may deem the term to be unconscionable. Some of the signs that may indicate the presence of procedural unconscionability include: the lack of meaningful choice on the part of the exploited party, the vast discrepancy between the bargaining powers of the

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[231] *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).
[232] Boliek, *supra* note 204, at 54-58.
[233] Browne & Biksacky, *supra* note 205, at 220-21.
[234] *Id*.
[235] Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 Wm. & Mary L. Rev. 445, 490 (1993).
[236] Leff, *supra* note 208, at 539.

contracting parties, the usage of unfair surprise, and the presenting of the contract as an adhesion contract.[237]

But even with the two unconscionability prongs in place, the question of how to implement them remained. One approach would require the court to find a minimum level of both types, another would find it sufficient to find substantial evidence of one type, and the middle ground would require the use of a "sliding scale approach" where finding substantial evidence of one type of unconscionability would lower the required level of the other type.[238] In practice, however, there does not seem to be a consensus among US courts about the correct approach. A recent study showed that the courts had required both types of unconscionability in fewer than half of the cases included in the study and that in almost a quarter of cases, only one type was required.[239] Moreover, in almost a third of the cases, the court did not articulate the unconscionability requirements.[240] This would suggest that unconscionability remains an amorphous concept that can only be defined by the conscience of the court on a case-by-case basis.

C) Evaluation of the Unconscionability Doctrine

The unconscionability doctrine may have established itself in common law, but that does not mean that it does not still have its opponents. As we have shown, unconscionability is an amorphous concept, and this is one of the main criticisms leveraged against it. The lack of an exact definition for unconscionability along with its open-ended and indeterminate nature unsurprisingly frustrates legal professionals who prefer to work in controlled environments where all results are predictable. Professor Arthur Allen Leff had criticized section 2-302's draftsmanship as far back as 1966 pointing out that the level of abstraction it contained rendered it an "emotionally satisfying incantation" that merely subsumes the problem rather than solve it.[241] Many others have followed Leff's footsteps in criticizing unconscionability's lack of clarity and pointed out that it would create a level of uncertainty that does more harm than

[237] Browne & Biksacky, *supra* note 205, at 222.
[238] Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 Fla. St. U. L. Rev. 1067, 1072-75 (2006).
[239] McCall, *supra* note 191, at 810-16.
[240] *Id.*
[241] Leff, *supra* note 208, at 558-59.

good.[242] Some writers went as far as expressing concerns that "liberal use [of unconscionability] could swallow all of contract law."[243]

Other writers accuse unconscionability of being a form of paternalism that violates individual autonomy; if the court refuses to enforce a contract because it deemed it unfair, it would be supplementing the contracting party's judgment for its own which entails a lack of respect for that former's free decision to accept the obligation.[244] Another argument put forward by critics of unconscionability is that its existence and application impede market efficiency. Such critics maintain their faith in the market and believe that the most efficient terms will eventually dominate. They worry that merchants, alarmed by the unconscionability doctrine, would refuse to engage in dealings with those whom they suspect are likely to raise unconscionability issues in the future or would be inclined to raise prices to account for the increased dispute resolution costs which would lead to a counter-efficiency result.[245]

Along with those who believe that unconscionability goes too far, others believe that it does not go far enough. Such writers suggest that unconscionability is playing an important role in regulating social injustices and wish to see it expanded to widen its effectiveness. For example, Harrison believes that unconscionability could have an instrumental role in combating social injustice by providing an educative effect that leads to adjusting the sense of entitlement of those who are usually exploited. To achieve this end, he proposes three changes: that the procedural\substantive dichotomy be dropped and that courts should focus solely on substantive unfairness, that unconscionability be recognized as a question of fact rather than law thus allowing the adoption of a jury question approach in such cases, and finally, to make an obligatory public notice when a case of unconscionability is successful.[246] Other writers suggest that enforcing unconscionability requires the expansion of the available remedies by

[242] McCall, *supra* note 191, at 776.
[243] Colleen McCullough, *Unconscionability as a Coherent Legal Concept Comment*, 164 U. Pa. L. Rev. 779, 782 (2015).
[244] Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. Pa. L. Rev. 1131, 1146-47 (2015).
[245] Schmitz, *supra* note 203, at 97-98.
[246] Harrison, *supra* note 235, at 492-93.

introducing the possibility of compensation rather than the current system that limits unconscionability to a defense that only precludes the enforcement of the contract.[247]

In practice, the unconscionability doctrine seems to have a much less radical effect on contract law in general. In a recent study covering 463 cases heard by US federal and state courts, McCall found that a claim of unconscionability was successful in only about 25% of the cases.[248] In those cases, the court rewrote the objectionable contractual clause in less than 10% of the cases and merely refused to enforce it in the rest of them.[249] McCall also found that the most common characteristic shared between cases was that the party claiming unconscionability was a natural person, as opposed to a legal entity, which accounted for more than 75% of all cases.[250] It was also the most common characteristic of successful cases accounting for about 85% of them.[251] The second most common characteristic was that the party claiming unconscionability was described as vulnerable which accounted for about one-fifth of overall cases[252] and was present in about 40% of successful cases.[253] As for the contract's form, it was found that the preprinted format was the predominant form of contract appearing in unconscionability cases accounting for about 47% of the cases.[254] 58% of the successful cases involved a contract in the preprinted form.[255] The study also included an analysis of the most commonly disputed clauses. It was found that the most disputed clauses were agreements to arbitrate (about 60% of cases),[256] price or value-related clauses (about 14%),[257] and forum selection clauses (about 5%).[258] As for their success rate, agreements to arbitrate were found to be unconscionable in about 25% of the cases challenging them,[259] price clauses challenges were successful in about 37% of cases,[260] and forum selection clauses were successfully challenged in about 36% of cases.[261] In

[247] Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine Contract Law Present and Future: A Symposium to Honor Professor Charles L. Knapp on Fifty Years of Teaching Law*, 66 Hastings L.J. 1011, 1034-39 (2014).
[248] McCall, *supra* note 191, at 794.
[249] *Id*.
[250] *Id.* at 801.
[251] *Id.* at 803.
[252] *Id.* at 801.
[253] *Id.* at 803.
[254] *Id.* at 802.
[255] *Id.* at 804.
[256] *Id.* at 807.
[257] *Id.* at 808.
[258] *Id*.
[259] *Id.* at 807.
[260] *Id.* at 808.
[261] *Id*.

conclusion, McCall refuted what he referred to as the "myth" of unconscionability being a burly and unpredictable beast that threatens to consume the entirety of contract law:

> The unconscionability doctrine, rather than expanding to swallow all contract law, seems to be declining not only due to a declining number of claims being brought but also as measured by a declining Success Rate of claims.[262]

The above study suggests that despite the open-ended nature of unconscionability, its use by American courts has been very conservative and the *pacta sunt servanda* principle remains alive and well. Almost two-thirds of the cases discussed in the study revolved around some technical legal clause that governs dispute resolution such as an arbitration clause or a forum selection clause and did not concern the substance of the agreement. The pleading party in Most cases were natural persons entering into a pre-drafted contract, yet the overall success rate was limited to about 25% of the cases which suggests that the courts are not quick to assume exploitative behavior and only grant relief when it deems to be most necessary. The vulnerability of the contracting party does seem to be one of the major indicators that the courts consider when deciding the case as it was referenced in about 40% of the successful cases. This suggests that unconscionability is playing its intended purpose of alleviating oppression from those who are most vulnerable to it.

Having presented an overview of American unconscionability, the next chapter focuses on analyzing the Egyptian legal rules and suggests reforms that try to make use of what we have learned from the Egyptian as well as the American experience.

[262] *Id.* at 823-24.

V. The Proposed Reforms

One of the major goals of the New Civil Code was to address some of the glaring afflictions that contemporary Egyptian society suffered from including the polarization of society between the haves and the have-nots, the lack of social solidarity, and the absence of social justice.[263] While the Code did introduce many reforms to the Egyptian legal system, the political and social situation of Egyptian society at the time of the Code's drafting undoubtedly influenced the extent of the possible reforms. As the situation and reigning ideologies change, new opportunities present themselves. I believe it is high time to reevaluate the Civil Code and perhaps reembark on the road of reform to honor Sanhuri's legacy. To that end, we will first need to identify the strong points as well as the limitations of the current set of Egyptian legal rules and then determine if and how the rules of the American unconscionability doctrine may complement them. Then, I will offer my view on how reform of the Egyptian system should be implemented and address the concerns that such reform may raise.

A) Analysis of Current Egyptian Rules

The primary general rule addressing unequal contractual obligations in the Egyptian Civil Code is the exploitation rule in Article 129. Analysis of this rule shows that it has two primary components; an exploitative behavior from one party and a lesion incurred on the other. The rules on the latter part of the equation strike a commendable balance by refraining from arbitrarily imposing a certain value or threshold after which a contract becomes unbalanced and, at the same time, signaling courts to restrict the application of the rule to the most unbalanced of contracts.[264] This approach avoids the pitfalls of under-inclusion and entrusts the court to do its job on a case-by-case basis.

On the other hand, the overall effectiveness of Article 129 is severely hampered by the restrictions in the first part of the equation, the exploitative behavior, to that of an "obvious levity" or "unbridled passion." The lack of a clear definition of either of those conditions only further complicates the issue. As previously discussed, the original proposal for that article was much more inclusive but the conservative nature of the

[263] This is apparent from observing the changes proposed in the New Code such as the restriction of the previously absolute right of property and the failed attempt to directly attribute a "social function" to ownership, the regulation of the relationship between the owners of different floors in a multi-storied building, and the drastic change in the philosophy and function of contract law. *See*, BECHOR *supra* note 9, at 103, 107, 148.

[264] *See supra* p. 27 and note 118.

times eventually prevailed and the article was drafted in its current form.[265] This is undoubtedly one of the main limitations of the exploitation rule in the Civil Code.

Furthermore, requiring the lesioned party to have entered the contract *only* as a result of the other party's exploitation of their state seems unrealistic; supposedly, the lesioned party entered the contract to gain a perceived benefit for themselves, exploitation of their state merely pressures them into accepting harsher conditions that disturb the overall objective balance of the deal. I would suggest that the provision should clarify that issue by requiring the lesioned party to have accepted the contract *under its current condition* only as a result of the exploitation. Finally, the strict one-year time limit imposed on the exploited party's right to complain is unnecessarily restrictive. While the legislator's desire to stabilize transactions is understandable, the conditions that allowed exploitation may well persist for more than one year after the formation of the contract and thus would make it unlikely for the party to raise the exploitation defense in the short time available.

Despite initial appearances and the sweeping powers granted to courts to strike down onerous terms found in adhesion contracts, the rules on adhesion contracts find limited applicability in practice. Judicial insistence on restricting their definition of adhesion contracts to those whose subject is an essential product or service under a monopoly all but removes any relevance of the adhesion rules outside of the few traditional examples recognized since before the times of the Civil Code. It is a shame that courts, despite not being shackled by a legislative definition, refuse to expand the scope of adhesion contracts, and insist on clinging to their pre-code definition. Courts were more active before the introduction of the Civil Code, creating and applying rules on adhesion based solely on justice and without any legal text to support their theory. It is bewildering that even as the Civil Code confirmed the previous actions of the judiciary and adopted their adhesion theory among its provisions,[266] courts ceased to innovate, seemingly fearful of breaking the rules they had created, thus dooming the rules of adhesion to stagnation. This highlights the crucial, albeit unofficial, role that courts can play in the creation of legal rules and should encourage us to refrain from stifling courts through overly detailed rules.

[265] *See supra* p. 29 and notes 129, 130.
[266] SANHURI, *supra* note 85, § 118 at 232-33.

Other than Article 129 and adhesion rules, the rule on the unlawful use of rights may apply to some cases where unequal contractual obligations exist. This rule may be used as an active defense if a creditor insists on strict application of contractual terms despite significant harm inflicted on the debtor. Unfortunately, the requirement for the benefits gained by the creditor to be vastly insignificant in comparison to the harm befalling the debtor[267] greatly restricts the practical application of this rule in contract law; it is much more likely that the benefits gained by the creditor to equal the loss incurred by the debtor and thus accusing the creditor of "greed" would be more appropriate than accusing him of abusing his rights.

The rules governing unforeseen events are not of much use to those finding themselves in unequal contracts as it is only applicable in cases of unforeseen general events that occur *after* the contract's formation and merely attempt to restore the balance of the obligations closer to the pre-event level.[268] This will not help if the contract was already lopsided before the event. Similarly, the obligation to act in good faith cannot offer much utility in those cases as well. There is no obligation that requires a party to "take it easy" during the negotiations phase;[269] absent special personal relations, any reasonable person would try to gain as much benefit for themselves as they negotiate to create a new contract since, supposedly, the other party would be trying to do the same anyway. Additionally, a party's insistence on the performance of a contract as agreed does not contradict the obligation to perform in good faith.

B) Is There Room for Unconscionability in Egyptian Law?

American unconscionability shares similarities with several of the rules found in the Egyptian legal system discussed earlier. A comparison between the elements of Article 129 and the unconscionability doctrine reveals that the former bears a stark resemblance to unconscionability's two prongs: the procedural and the substantive. The lesion requirement found in Article 129 resembles the substantive prong of unconscionability as both look to the essence of the agreement to determine the overall balance between the parties' obligations and allow judicial interference only in case of grave inequalities.[270] Simultaneously, the exploitation elements of Article 129 appear

[267] *See supra* p. 37-38.
[268] *See supra* p. 25.
[269] *See supra* p. 39-40 and accompanying note 189.
[270] *See supra* p. 27 and note 118; U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1952) (“The basic test is whether, in the light of the general commercial background and the commercial needs

to be a somewhat limited form of procedural unconscionability as identified in the American doctrine.[271] though the latter is much more open-ended as it allows courts to decide on that issue without the constraints of the specific words "obvious levity" or "unbridled passion" used in the Egyptian counterpart.[272]

The major framework of the unconscionability doctrine does not differ much from the framework of Article 129. Both sets of rules allow the court freedom to determine whether equality exists between reciprocal obligations,[273] and neither assumes that the contract is foul based only on the inequality of obligations but rather requires evidence of exploitation to reach such a conclusion.[274] The American system considers the issue of unconscionability as a question of law which precludes the presentation of such cases to juries.[275] Conversely, the Egyptian system considers whether a contract was formed due to exploitation as a question of fact and is thus viewed as being outside the normal jurisdiction of the Court of Cassation.[276]

The major point of difference between Article 129 and unconscionability lies in the scope of what constitutes exploitative behavior or amounts to procedural unconscionability. The Egyptian system adopts a strict approach that consider exploitation only if its target was the "unbridled passion" or the "obvious levity" of the lesioned party. On the other hand, American courts do not have such a restriction and are thus able to freely examine the procedural aspect of contract formation and the personal circumstances of the contracting party to determine whether their choice to strike the agreement was truly free.

Another point of similarity between the Egyptian system and the unconscionability doctrine is that both systems recognize adhesion contracts, or rather boilerplate contracts, to varying degrees. The Egyptian system offers strong legislative protections to the adhering party but is severely restricted in practice by a narrow judicial

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of the particular trade or case, the clauses involved are *so one-sided* as to be unconscionable under the circumstances existing at the time of the making of the contract.") (emphasis added).

[271] *See supra* p. 48 and note 237.

[272] *See supra* p. 28 and notes 121-127.

[273] *See supra* p. 28, 43 and note 122.

[274] *See supra* pp. 27-28, 47-48 and note 123.

[275] *See* Murray, *supra* note 5, at 39 ("The court determines, 'as a matter of law,' whether the clause is unconscionable. . . . The comment to subsection (2) clearly indicates that the commercial evidence mentioned in the subsection is for the consideration of the court and not the jury. . . . The jury does not consider the question of unconscionability at all.")

[276] *See supra* p. 29 and note 128.

interpretation of what constitutes an adhesion contract.[277] In contrast, the unconscionability doctrine seamlessly integrates the concept of boilerplate contracts, whether they were adhesion contracts or not, under the umbrella of procedural unconscionability. It does not have the limitations of "adhesion" found in the Egyptian system and instead allows courts to take into consideration all the circumstances surrounding the agreement including the fact that it was offered on a boilerplate template when it decides on the issue of unconscionability.[278]

C) The Proposed Reform

The Egyptian legal system would benefit from a reconsideration of Article 129 as well as the rules on adhesion contracts. The problem with contracts of adhesion is much more nuanced because its restrictions are self-imposed by courts. The criteria for adhesion contracts were mentioned in the Explanatory Memorandum of the Civil Code not the provisions of the Code itself and were based on contemporary judicial application. The courts refuse to deviate from the established criteria despite the passage of decades. At any rate, I believe an expansion of the rules of exploitation may render the current rules on adhesion contracts rudimentary. As for the rules on exploitation, as previously discussed,[279] the original proposal of the rules on exploitation had a wider scope that would have put it on par with the American unconscionability doctrine but was eventually scarped in favor of a more restricted approach that fosters transactional stability. Since the adoption of the Civil code, the economic and social structure in Egypt has encouraged the appearance and prospering of large corporations and institutions and increased the disparity between the average person and such entities. The need to protect the average citizen from exploitation has never been more crucial.

Article 129 is in dire need of reform to gain any relevance. The reform should retain the strong points already present in the current version by maintaining the judicial power to annul the contract or reduce the obligations of the lesioned party. It should also maintain the other party's right to avoid annulment by offering to increase their reciprocal obligations. The imposed time limit of one year from the date of the contract is unnecessarily restrictive. While the idea of imposing a relatively short period to

[277] *See supra* pp. 31-32, 53.
[278] *See supra* p. 48 and note 237.
[279] *See supra* p.29 and note 129.

challenge exploitation is commendable for the sake of transactional stability, I suggest that the deadline should be calculated from the date of the contract's *performance* rather than the date of its formation. This should maintain relative contractual stability while simultaneously preserving a reasonable chance for the exploited party to regain their composure and reassess the graveness of her situation.

In addition, the reform should free Article 129 from its shackles by expanding the grounds for exploitation to, ideally, include all situations where the court finds that the lesioned party had no genuine choice. The arbitrary restriction of exploitation to "obvious levity" and "unbridled passion" was a triumph of the conservative pullbacks influenced by the old individualistic spirit that once ruled legal thought. This unfortunate decision has neutered article 129 and proved in the process Professor Murray's prediction that legislative definition of unconscionability would do more harm than good, a prediction that he made in defense of Llewellyn's refusal to define unconscionability in the UCC:

> [Llewellyn] understood that a highly adumbrated statutory attempt might do much more harm than good. It would impede the development of the unconscionability analysis. Instead of the covert tools of traditional contract law, courts would be struggling with the semantics of statutory language and the articulation of the underlying analysis would be indefinitely postponed.[280]

D) Rationale of the Reform

The Egyptian legal system has never shied away from protecting weaker parties and promoting social solidarity as it deems those values integral to Egyptian society and those were, as Bechor noted, some of the primary goals that Sanhuri set out to achieve in drafting the Code:

> [T]he structure of social forces the New Code sought to promote by means of Civil Law, which comprises four principal components: advancing and sustaining the poor, which the Code sought to achieve through the relative nature of contract law; advancing the stronger members of society, in order to allow the leading social forces to move ahead; restricting property rights in a coercive manner in order to develop models of social solidarity; and lastly, developing models of legal and social flexibility in order to prevent such a coercive legal and social structure from leading to a social explosion and an exacerbation of the existing situation, rather than its amelioration. [281]

The Code's inclination to protect the weak is evident from its insistence on combating exploitation as it appears in usuary agreements, its promotion of social solidarity through measures such as granting debtors grace periods to perform their obligations,

[280] Murray, *supra* note 5, at 38.
[281] BECHOR, *supra* note 9, at 67-68.

and from the various articles that assign specific rights to the weaker party and forbids agreements to the contrary.[282] While a creditor's right to have the debtor honor their agreement is certainly a consideration that is worthy of respect, we should not forget that there are other equally important considerations at play.

Enforcing obviously unfair contractual terms extracted from the debtor under practical conditions that almost amount to duress cannot be justified just by reciting the old maxim *pacta sunt servanda*. Protection of the weak is one of the pillars of Egyptian society, or rather any human society, and thus we should strive to rebalance the scales to bring some equality back into unfair contracts. That the legal system is unable to bring absolute equality to all contracts should not discourage us from attempting to at least put a stop to the gravest of offenses. This conforms to the Islamic *Sharia* principle proclaiming that goals that cannot be fully achieved, should not be completely abandoned.[283]

E) Addressing the concerns

The proposed reform is naturally open to the same criticisms that are traditionally leveraged against unconscionability or any other legal rule that attempts to interfere with contractual substance. Those criticisms may include concerns of over-inclusion due to the open-ended nature of the proposed exploitation reforms, accusations of paternalism and suppression of individual autonomy, and destabilization of the economy as investors refrain from investing in the local economy due to fears of the uncertainty of judicial behavior.

In response to the criticism of over-inclusion, I suggest that any system that attempts to list the cases in which a party's vulnerability may be exploited is doomed to under-inclusion. The issue of exploitation is rooted in human interactions and thus is extremely difficult to abstract into a legal provision. The courts are in the perfect

[282] *See, e.g.*, The Egyptian Civil Code, *supra* note 25, § 147 ¶ 2 (stating that no agreement may strip the contracting party of the right to claim an amendment of the contract in light of the occurrence of unforeseen events), § 149 (invalidating any agreement preventing judicial oversight of abusive clauses in adhesion contracts), § 753 (invalidating any agreements to the contrary of the rules stipulated in the insurance contract section unless they were favorable to the assured or the beneficiary).

[283] This is rough translation of the principle "mā lā yudraku kuluhu lā yutraku kuluhu," an established rule in Islamic *fiqh*. It stands to reason that grand achievements are rarely made in a single huge step but are usually a result of a slow continuous effort and thus a partial achievement of a goal is surely preferable to the abandonment of the cause due to failure to fully achieve the objective.

position to evaluate any claims of exploitation on a case-by-case basis[284] and the law should allow them such powers. Fears of over-inclusion are exaggerated; courts issue hundreds of decisions each day based on judicial discretion, and this is accepted as a necessity for the functioning of law. Granting them discretion in exploitation cases would not be much different than any other legal question that courts answer daily. Furthermore, the practical results of the application of the unconscionability doctrine in the US have shown that its effects on contract law are mild at best. Courts are generally reluctant to interfere with contractual obligations and usually only do so in the most extreme of cases.[285]

As for the criticism of paternalism and suppression of individual autonomy. It is first important to note that claims of exploitation are always brought to the court by one of the parties and cannot be raised by the court *sua sponte.* Thus, the court's interference should not be viewed as oppressive interference any more than it would be if the case was brought by the exploitative party to request contract enforcement. Secondly, the charge of paternalism has gained infamy in recent times despite acceptance of its existence in many aspects of the law,[286] after all, the law supposedly exists to better the lives of the members of society by enforcing rules upon them and punishing those who go against it which makes law the ultimate paternalistic measure. There is no serious opposition today to the state's right to limit contractual freedom to protect and enforce its public policies. The protection of the weaker members of society and the prevention of their exploitation is a noble public policy that should be sought even at the expense of sacrificing, just a little bit, of contractual freedom. Thirdly, to suggest that contracts are born of the parties' free will and individual autonomy entails an acceptance of the classical conceptions of contracts as bargains struck between equals. This line of thinking ignores the realities of modern society and the vast social inequalities that lead to the fact that many contracts are born out of necessity rather than free choice.[287] Equality rarely exists in modern contracts, while contracts should certainly be strictly enforced if they were freely concluded between equals, holding an oppressed person

[284] Schmitz, *supra* note 203, at 96.
[285] *See supra* pp. 50-51 and accompanying notes.
[286] *See generally* L. Hawthorne, *The Principle of Equality in the Law of Contract*, 58 THRHR 157, 168-69 (1995).
[287] *See* Hale, *supra* note 6.

hostage to their unfree choice only reinforces injustice, or in Professor Hawthorne's words:

> In all interpretations [of freedom of contract] the premise is that both contracting parties are equal. Nevertheless, true equality seldom exists . . . the doctrine of freedom of contract, coupled with formal equality, reproduces social inequalities and allows the domination and exploitation of one contracting party by the other. Formal equality before the law is an engine of oppression.[288]

As for the criticism of judicial uncertainty and fears of investment withdrawal, we should note that claims of exploitation can be easily avoided if the dominant party in the contract refrained from exploiting the weaker party. Hence, if judicial interference is warranted, it would only be a result of the dominant party's wrongdoing. In addition, the imposed one-year deadline on the parties' right to raise the issue of exploitation along with the defendant's right to offer to increase their obligations to avoid annulment should ensure relative contractual stability. Furthermore, the practical application of the unconscionability doctrine in the US shows that it is not that unpredictable. There is no reason to suggest that the situation would be drastically different in Egypt. Finally, I maintain that exposing our most vulnerable to exploitation to attract or appease investors is a dangerous affair that would only attract the wrong kind of investors. Egypt should maintain its development plans, support its declared public policies, continue to fight inequalities, and trust that fair investors will recognize the huge potential in the Egyptian market and adapt to the local rules to access this market.

[288] Hawthorne, *supra* note 286 at 163.

VI. Conclusion

Protection of the weak has always been a declared top priority of the law.[289] The Egyptian Civil Code was drafted with the intention of improving the situation of the polarized Egyptian society and promoting social solidarity and justice.[290] We owe it to ourselves to honor Sanhuri's legacy and continue to build on his work to improve the quality of life for all Egyptians and restore our faith in humanity.

In this article, I have attempted to examine the issue of the legal treatment of unequal contractual obligations by offering a comparative analysis between the Egyptian legal systems and the American unconscionability doctrine. I highlighted the lack of a philosophical foundation that supports strict contractual enforcement if the contract lacks fairness or equality in the exchange. I offered an analysis of legal rules found in the Egyptian Civil Code that may be relevant to the issue and emphasized their shortcomings. I endeavored to present an overview of the American doctrine of unconscionability to show how the established system of one of the most powerful economies deals with the issue of unequal contracts in a less restrictive manner. I concluded by presenting a vision for a proposed reform to the Egyptian rules on exploitation that attempts to overcome the shortcomings of the current provisions and preserve Egyptian values while simultaneously maintaining relative contractual stability.

Having presented this proposal, I call upon Egyptian legislators, legal practitioners, and all those who value justice to support it and abandon the age-old conceptions of the sanctity of contracts. Many ailments afflict modern society, not least of which is the vast social inequalities. The machinery of justice should strive against exploitation by rebalancing the scales of unequal contracts to protect the weaker members of society. Courts should never become complicit in oppression by enforcing unjust contracts. After all, "[c]ourts are called halls of justice, not forums of formalism."[291]

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[289] *See* The Avalon Project: Code of Hammurabi, *supra* note 1.
[290] BECHOR, *supra* note 9, at 67-68.
[291] Schmitz, *supra* note 203, at 117.