

**THE RIGHT TO A JUST REMEDY IN PRIVATE LAW—A  
RIGHT AND A HUMAN INSTINCT:  
AN ANALYSIS OF HOW GREED AND LAWLESSNESS  
REMOVES CONFIDENCE**

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**Abstract:** This article explores the fundamental concept of justice and the right to a remedy in private law. Specifically, the question of whether the belief that justice will prevail is a spoiled concept to have, and only shared by populaces in places without corruption, rule of law issues, etc. The paper delves into the historical and global recognition of the rights of obligees, and scrutinizes the diminishing trust and conviction in justice, especially in jurisdictions plagued by corruption and weak rule of law. Bribery and corruption in judicial systems undermine access to remedies, particularly for the poor, and contribute to the erosion of faith in the judiciary. The analysis extends to non-state judiciaries, exploring the role of tribal courts in addressing private law matters in regions with challenges in formal legal systems. Ultimately, the paper contends that the instinct for justice is a timeless and universal human trait, inherent in the evolution of legal systems. While corruption and external influences can erode confidence, the desire for a just remedy remains engrained.

**Keywords:** Justice, Corruption, Judicial Corruption, Instinctive Access to Justice, Sociology of Remedies and Their Opinions, Comparative Legal Systems

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## INTRODUCTION

In private law, the rights to justice and equity—with a right to remedy as a safeguard and legitimizer of enforceability—are privileges the United States, and any jurisdiction with a rule of law, bestows upon its citizens.<sup>1</sup> Specifically, in the United States, a bedrock of our legal system in matters of private law is the right to a remedy and access to restorative relief.<sup>2</sup> Arguably, private law exists as a means to exercise such claims,<sup>3</sup> and is also for ameliorating individual justice.<sup>4</sup> Whether in negligence, intentional torts, property, or breach of contract claims, the plaintiff or obligee is owed the right to a remedy.

The purpose of contract law revolves around morality and enforcement. Arguably, contract law can be understood, in its purpose, to enforce *moral* obligations.<sup>5</sup> It is considerably a moral duty to uphold a contract,<sup>6</sup> which highlights the instinctive nature of contract law's scope. In fact, the word “moral,” as it relates to some moral obligation, can often be found in contracts literature,<sup>7</sup> highlighting the strong interconnection between emotion, which some understand as a natural obligation between persons, and an internal belief that a person owes some level of standards to another.

One might argue, especially in a purely individualistic world, one is owed little in a public to private citizen relationship, and in turn, nothing in a person-to-person relationship.<sup>8</sup> Further, one may argue that individualism is on the bottom layer of this agency in regard to rights of accountability, and above it are tribalism, which gives agency to individual, and then on top, an organized state with a just judiciary.<sup>9</sup>

I believe that in any setting, whether individualistic, tribal, just, authoritarian, or corrupt, a self-entitlement to justice and an owed feeling of accountability and right to remedy with a looming liability to keep things in check exist in any social structure between every person, even if systematically, a judiciary acts negligently in delivery. Regardless, if a certain government or judiciary overlooks large issues in lawlessness, private law legitimacy always remains. This idea can be found in legal systems east to west, corrupt to fair, autocratic to democratic.

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<sup>1</sup> Daphna Lewinsohn-Zamir, *Do The Right Thing: Indirect Remedies in Private Law*, 94 B.U. L. REV. 55 (2014).

<sup>2</sup> Hugh Collins, *Private Law, Fundamental Rights, and the Rule of Law*, 121 W. VA. L. REV. 1 (2018).

<sup>3</sup> See Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873 (2011).

<sup>4</sup> Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109 (2013).

<sup>5</sup> See Stephen Michael Waddams, *The Modern Role of Contract Law*, CANADIAN BUS. L.J., 1983

<sup>6</sup> Daniel Markovits & Emad Atiq, *Philosophy of Contract Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021).

<sup>7</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7–8 (2d ed. 2015).

<sup>8</sup> Claude S. Fischer, *Paradoxes of American Individualism*, 23 SOCIO. F. 363 (2008).

<sup>9</sup> Danny Jones, *CIA Spy Explains How the United States Betrayed Him | John Kiriakou*, YOUTUBE (May 23, 2022), <https://www.youtube.com/watch?v=dfYnLqYEnfw>.

In contract law in Louisiana’s mixed civil law system, obligees have rights, as do obligors, like the rest of the common law United States.<sup>10</sup> In Louisiana, as well as throughout the United States, various types of breach can be remedied.<sup>11</sup>

The broad idea that a liable party owes restorative retribution to a breached plaintiff can be understood through jurisprudence. For example, Louisiana has a statute stating “[e]very act whatsoever of man that causes damage to another obliges him by whose fault it happened to repair it.”<sup>12</sup> All states have similar laws, such as in Maryland: “[E]very man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.”<sup>13</sup>

This right exists around the world, with similar verbiage, in places as diverse as the European Union,<sup>14</sup> countries abiding by Islamic jurisprudence,<sup>15</sup> Israel,<sup>16</sup> and common law regions such as Australia<sup>17</sup> and the United Kingdom.<sup>18</sup> This idea is even bestowed in countries lacking rule of law,<sup>19</sup> whether equally available or not. For example, pre-Taliban Afghanistan,<sup>20</sup> North Korea (although remedies do not exist against an administrative agency in the country),<sup>21</sup> and Egypt<sup>22</sup> all feature a similar right to remedy.

Law, from the origin of the Code of Hammurabi, was made for and is used to ensure social order and disable chaos.<sup>23</sup> It also aims to “care about” the problems of everyone, especially if those individuals are wrong done. Perhaps Hammurabi’s code—arguably the first legal code as it was written in 1754 BC in Babylon—was made for such purpose.<sup>24</sup> This idea of ensuring justice from a breaching defendant for all persons

<sup>10</sup> LA. CIV. CODE ANN. art. 1756, 1986, 1994, 1809, and 1873.

<sup>11</sup> See, e.g., LA. CIV. CODE ANN. art. 1994 (2011); LA. CIV. CODE ANN. art. 1998 (2011); see also Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Lawrence J. Meyer, *Anticipatory Breach of Contract—Effects of Repudiation*, 8 U. MIA. L. REV. 68 (1953).

<sup>12</sup> LA. CIV. CODE ANN. art. 2315 (2011).

<sup>13</sup> MD. CONST. art. 19.

<sup>14</sup> Charter of Fundamental Rights of the European Union art. 47, Dec. 14, 2007, 2007 O.J. (C 303) 12 [hereinafter Charter of Rights].

<sup>15</sup> Nabil Saleh, *Remedies for Breach of Contract Under Islamic and Arab Laws*, 4 ARAB L. Q. 269 (1989).

<sup>16</sup> Ernst Livneh, *Criteria of Liability for Breach of Contract*, 2 ISR. L. REV. 67 (1967).

<sup>17</sup> Peter Cane, *Damages in Public Law*, 9 OTAGO L. REV. 489 (1999).

<sup>18</sup> ADVOCS. FOR INT’L DEV., AT A GLANCE GUIDE TO BASIC PRINCIPLES OF ENGLISH CONTRACT LAW (Allen & Overy eds., 2016).

<sup>19</sup> See World Bank, *Rule of Law – Country Rankings*, GLOBALECONOMY.COM, [https://www.theglobaleconomy.com/rankings/wb\\_ruleoflaw/](https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/) (last visited Dec. 11, 2023).

<sup>20</sup> SAM JACOBSON ET AL., AFG. LEGAL EDUC. PROJECT, AN INTRODUCTION TO THE LAW OF OBLIGATIONS OF AFGHANISTAN (Trevor Kempner et al. eds., 1st ed. 2014).

<sup>21</sup> Jong-Ik Chon, *Basic Rights Under the North Korean Constitution and Related Legal Systems*, 21 J. KOREAN L. 113 (2022).

<sup>22</sup> Ehab Yehia, *Spotlight: Breach of Contract Claims in Egypt*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=eb272891-77a0-4ffc-bf98-793c662ed405> (last visited Dec. 11, 2023).

<sup>23</sup> *Hammurabi’s Code of Laws*, STUDENTS OF HIST., <https://www.studentsofhistory.com/hammurabi-s-code> (last visited Dec. 11, 2023).

<sup>24</sup> *Id.*

dates as far back as Hammurabi's code,<sup>25</sup> which focused largely (nearly fifty percent of the code) on contract law, i.e., private law.<sup>26</sup> Roman jurist Ulpian, born in 170, historically dichotomized the idea of private law,<sup>27</sup> although these ideals were already in place in Hammurabi's code. Ulpian investigated not only contract issues, but also more informal protections for single or two-person obligations, such as grain harvesting, gardening, and broker-to-merchant issues.<sup>28</sup>

Since this first example of a legal code provided remedy to all regardless of social status, 3,800 years ago, it can be understood providing such a right is an instinctive idea.<sup>29</sup> If it is, it would mean demanding justice via legal review and the right to remedy is never selfish; the right to remedy reflects law by nature, not a "spoiled" fantasy. However, it is understandable that many citizens under flawed legal systems in countries across the world may fairly think having a right to remedy is a privilege. We will unravel why.

## I. COMMON AWARENESS OF THE EXISTENCE OF CONTRACTS AND THE INDEBTED RIGHT TO RESTORATION

The idea of an *owed remedy* in private law, specifically in obligations and contract law, is an antiquated yet globally understood idea in jurisprudence. The concept encapsulated a large chunk of even the first legal code, implying it has always been an idea, an issue, and possibly also an instinctive human right. Due to this, legal remedy is something laypeople assume they are owed in society. Knowing the legal history, can we derive that repudiation and remedy upon a duty being broken in private law is instinctive?

## II. INSTINCT OF AN OWED REMEDY IN CONSUMER TRANSACTIONS AND HANDSHAKES

Let's look at consumer transactions and society. Consumers are often aware—even if they don't usually read it—that the "fine print" for products such as a subscription service or cruise ship ticket, etc. is legally binding.<sup>30</sup> Considering the legalese used,<sup>31</sup> consumers believe the "fine print" creates a set of terms they should be subservient to, even though this is not the reality.<sup>32</sup> This subservience suggests that people may view the duties imposed by retail contracts as just and righteous, despite the reality.

<sup>25</sup> Patrick J. Kiger, *How the Code of Hammurabi Influenced Modern Legal Systems*, HIST. (Aug. 22, 2023), <https://www.history.com/news/hammurabi-code-legal-system-influence>.

<sup>26</sup> *Hammurabi's Code*, LUMEN LEARNING, <https://courses.lumenlearning.com/suny-hccc-worldcivilization/chapter/hammurabis-code/> (last visited Dec. 11, 2023).

<sup>27</sup> *Private Works Act*, WAYNE J. JABLONOWSKI L., <https://wjlaw.com/lien-bond-claims/private-works-act/> (last visited Dec. 11, 2023).

<sup>28</sup> AVALON PROJECT, *THE CODE OF HAMMURABI* (L. W. King trans., 2008), <https://avalon.law.yale.edu/ancient/hamframe.asp#>.

<sup>29</sup> Kiger, *supra* note 25.

<sup>30</sup> Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014).

<sup>31</sup> *See When Is Fine Print a Must-read?*, ARAG LEGAL, <https://www.araglegal.com/member/learning-center/topics/budget-and-finance/when-fine-print-must-read> (last visited Dec. 11, 2023).

<sup>32</sup> Omri Ben-Shahar, *Fine Print Subservience*, JOTWELL (July 30, 2019), <https://contracts.jotwell.com/fine-print-subservience/>.

### A. Instinctive Owed Remedy 1: Right to Refund, Without Receipt

In contrast, in their consumer roles, do humans feel they deserve justness for their own mistakes, even when they know there is no legal or contractual basis? A common example is asking for a refund despite a lost receipt. Some consumers in retail settings will demand a refund for a purchased item, even if the store has a policy that a receipt must be presented. In making such requests, consumers may consider that a store will offer compassion, either because it understands the likelihood of misplacement or graciously assumes the item was truly purchased and not stolen by the returning consumer. Such a commitment to customer service will encourage a store to do the *right thing*, at least in the customer's mind. Moreover, the consumer may even proclaim these possibilities, or further support their request with assertions such as "I have shopped here for years, you should cut me some slack." A customer suggesting that their legitimacy and loyalty demands retailer flexibility in response to such claims, despite store policy, reveals that the right to remedy might be instinctive.

### B. Instinctive Owed Remedy 2: Right to Remedy for Defective Products

Although consumers are likely not well-versed in the realm of products liability law and often do not read "fine print" (nearly half of buyers admit to not reading return policies),<sup>33</sup> they are likely still aware, based on some moral compass, when a product defect is so severe or a product so unusable that they deserve a remedy. For example, if I purchased an item from someone, whether via an informal business deal in cash or by purchasing from a formal retailer, and the product is faulty, I believe I should be entitled to a refund or replacement. In 2022, products liability cases hit an all-time high—nearly 6,000—suggesting this principle is well known despite a lack of consumer legal knowledge.<sup>34</sup>

### C. Instinctive Owed Remedy 3: Shaking Hands is a Sign of a Deal

Another example of feeling some internal, instinctive right from an obligee is the idea of shaking hands and thereby creating an agreement with some extra level of security. For example: "We shook hand; thus, you owe me such performance." Shaking hands instinctively signifies the forming of a contract, and a breach of a contract deserves a remedy. That is: "We shook hands, but you didn't deliver; we had a deal so I deserve my obligation to be fulfilled."

Shaking hands has been a way to form a contract since the ninth century.<sup>35</sup> The antiquity of this cultural norm, in conjunction with other previously discussed principles, suggests there are instinctive societal norms about what constitutes justice, regardless of each individual's legal knowledge.

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<sup>33</sup> Brandon Batchelor, *How Your Return Policy Can Influence New Sales and Long-term Loyalty*, FORBES (June 12, 2020, 8:30 AM), <https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2020/06/12/how-your-return-policy-can-influence-new-sales-and-long-term-loyalty/>.

<sup>34</sup> *Report: Product Liability Lawsuits Hit Record High in 2022*, KIRKLAND & ELLIS (Sept. 14, 2023), <https://www.kirkland.com/news/in-the-news/2023/09/report-product-liability-lawsuits-hit-record-high-in-2022>.

<sup>35</sup> *Is a Handshake a Legal Contract*, OBOLOO, <https://oboloo.com/blog/is-a-handshake-a-legal-contract/> (last visited Dec. 11, 2023).

Shaking hands is not always a method to properly form a contract;<sup>36</sup> however, it has been cited as an acceptable means of formation in modern case law as recent as September 2023.<sup>37</sup> Thus, shaking hands has legal relevance. Case law has even referenced a “shaking of hands” to signify an agreement,<sup>38</sup> implicating that shaking hands is a bedrock eponym for sealing a contract.

All aforementioned situations—whether demanding a return without a receipt, knowing a person should not be stuck with a broken product, or shaking hands to create a serious obligation—illustrate the instinctive legal trait of an owed remedy. Regardless of store policy or a consumer’s policy or legal ignorance, these are all common features of our social contract. These examples further reinforce the idea that there is a shared understanding of duty: The obligee party receiving the handshake knows they are owed delivery or performance, while the obligor party offering the handshake knows what they do or do not owe, and that the fulfillment of their duty will extinguish the obligation.

### III. BELIEF IN A JUST CONSUMER TRANSACTION AND SATISFACTION: THE SIGNIFICANCE OF THE FIRST WRITTEN COMPLAINT

A clay tablet, written in Akkadian merely a few years after Hammurabi’s code, was discovered in Ur in present day Iraq.<sup>39</sup> The tablet became a viral phenomenon,<sup>40</sup> and earned the Guinness World Record of the “Oldest Customer Complaint.”<sup>41</sup>

The complaint was addressed from a consumer, Nanni, to Ea-nāšir, a merchant of copper ingot. Nanni sent a servant to purchase the copper from Ea-nāšir. Ea-nasir delivered the metal both late and of a lower grade than was satisfactory. Ea-nāšir also was supposedly rude to Nanni’s servant.

The translated tablet written to Ea-nāšir reads:

*“Tell Ea-nāšir Nanni sends the following message: When you came, you said to me as follows: ‘I will give Gimil-Sin (when he comes) fine quality copper ingots.’ You left then but you did not do what you promised me. You put ingots which were not good before my messenger (Sit-Sin) and said: ‘If you want to take them, take them; if you do not want to take them, go away!’ What do you take me for, that you treat somebody like me with such contempt? I have sent as messengers gentlemen like ourselves to collect the bag with my money (deposited with you) but you have treated me with contempt by sending them*

<sup>36</sup> *Id.*

<sup>37</sup> *Vukadinovich v. Posner*, No. 2:22-CV-118-TLS-JPK, 2023 WL 6211835, at \*1 (N.D. Ind. Sept. 25, 2023) (“The Plaintiff agreed to the amendments, and the Plaintiff and the Defendant shook hands.”).

<sup>38</sup> *Dist. 4, Commc’ns Workers of Am., AFL-CIO v. NLRB*, 59 F.4th 1302, 1312 (D.C. Cir. 2023) (finding a “meeting of the minds” occurs “where an employer’s ‘remarks . . . were the email equivalent of *shaking hands* on the deal at the end of a face to face meeting”) (emphasis added).

<sup>39</sup> *Oldest Written Customer Complaint*, GUINNESS WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/537889-oldest-written-customer-complaint> (last visited Dec. 11, 2023).

<sup>40</sup> Christina Zhao, *3,800-year-old Tablet with World’s Oldest Customer Complaint Goes Viral: ‘What Do You Take Me For?’*, NEWSWEEK (Aug. 24, 2018, 8:56 AM), <https://www.newsweek.com/3800-year-old-tablet-worlds-oldest-customer-complaint-goes-viral-who-do-you-1088904>.

<sup>41</sup> *Oldest Written Customer Complaint*, *supra* note 39.

*back to me empty-handed several times, and that through enemy territory. Is there anyone among the merchants who trade with Telmun who has treated me in this way? You alone treat my messenger with contempt! On account of that one (trifling) mina of silver which I owe(?) you, you feel free to speak in such a way, while I have given to the palace on your behalf 1,080 pounds of copper, and umi-abum has likewise given 1,080 pounds of copper, apart from what we both have had written on a sealed tablet to be kept in the temple of Samas. How have you treated me for that copper? You have withheld my money bag from me in enemy territory; it is now up to you to restore (my money) to me in full. Take cognizance that (from now on) I will not accept here any copper from you that is not of fine quality. I shall (from now on) select and take the ingots individually in my own yard, and I shall exercise against you my right of rejection because you have treated me with contempt.”<sup>42</sup>*

“The Complaint Tablet to Ea-nāsir,” etched in 1750 BC, serves as a remarkable ode to the timeless foundations of contract law, but also to the generally assumed rights of an obligee which span millennia. Despite the vast temporal expanse, this ancient exchange remarkably resonates with the core elements of contemporary contract law. It encapsulates the essence of contract initiation, violation, and dispute resolution—a tapestry that has endured through the annals of history. The timeline and remarkable relatability of this complaint suggest equity is a legal principle, but really—an instinct at heart. This suggests that such complaints based upon the expectations of people in society to receive their fair end of the bargain in contractual relationships, a quality product, a chance for a fair remedy when they are owed one, as well as a standard of business against which the obligor is not immune, are not nuanced.

In the 3,777 years since the society of Old Babylonian thrived, law and society have evolved. Yet we now find ourselves in the United States still adhering to similar legal principles. This emphasizes our enduring expectations for equitable consumer experiences and the belief that every consumer should be treated fairly and provided with equitable contract terms, ensuring they don't end up with subpar products or fall victim to deception.

Then and now, the emotional experiences in retail and contractual situations remain straightforward. The notion that your concerns should be taken seriously and that those responsible for any wrongdoing should be held accountable is clear and straightforward. However, this notion has been emotionally undermined, and therefore made societies not consider the right to remedy an entitlement, in the governmental situations present in countries outside the United States. Such situations contrast against the belief in the prevalence of impartial justice and the commitment of the judiciary and government to fairness, addressing transgressions, and adhering to established norms, including expectations and the rule of law. This contrast also encompasses the government's obligation to respond to allegations of wrongdoing and fulfill its responsibilities promptly, such as rectifying delays, addressing corruption among officers, rectifying negligence within the military, and addressing bribery requests by judges.

To put it succinctly, if a situation like those brought under the Federal Tort Claims Act were to occur in the United States versus a country lacking a strong rule of

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<sup>42</sup> *Id.*



law (in this example, referred to as Country X), the transparency and expectation of justice in the United States would significantly impact an American plaintiff's outlook whereas the lack of such principles would negatively affect a plaintiff in Country X.

An American in this scenario would have much higher expectations and confidence in the delivery of justice. They would be far less likely to tolerate misconduct from the judiciary and would insist on and expect equal measures of judicial remedies for issues such as delays, bribery, and injustice. ("I have been wrong done, therefore, because it is wrong, and justice is fair, then I will receive justice." This is the peak idea that deteriorates under regimens facing rule of law issues.)

#### IV. WHAT LEADS TO THE DIMINISHING TRUST AND CONVICTION THAT JUSTICE WILL BE SERVED AND SHOULD BE EXPECTED?

Since the entitled belief that obligees are owed benefits, remedy, and equity, at least from private parties in private law, particularly in contract law, is not a nuanced nor purely western idea—in fact, obligees' rights to performance and remedy are codified across the globe—why is such justice unavailable in places such as Sudan,<sup>43</sup> Ghana,<sup>44</sup> Somalia,<sup>45</sup> Namibia,<sup>46</sup> Albania,<sup>47</sup> Indonesia,<sup>48</sup> Morocco,<sup>49</sup> Malawi,<sup>50</sup> and Afghanistan,<sup>51</sup> to name only a small handful? This can be seen through protests, proposals for restorative legislation, reports, surveys, and other data.

Contract law is wonderful as it protects the interests of small claims and thus provides justice among social classes. However, in some countries like South Sudan,<sup>52</sup> the judiciary has made such protections a challenge for poorer people. In South Sudan, courts are highly criticized for issues such as bribery, favoritism, and long delays, which particularly affect the poor and aggravate conflicts. Government courts face the brunt of these criticisms as due process requirements are often viewed as breeding corruption and escalating disputes. Obstacles to justice include government and military interference, police misconduct, weak enforcement, and a perceived erosion of traditional authority. Despite these challenges, litigants in South Sudan pragmatically choose between restorative and adversarial dispute resolution methods, depending on

<sup>43</sup> See *Sudan Appoints First Female Judiciary Head to Fight Corruption*, REUTERS (Oct. 10, 2019, 5:58 AM), <https://www.reuters.com/article/us-sudan-politics/sudan-appoints-first-female-judiciary-head-to-fight-corruption-idUSKBN1WP2DM/>; <https://www.ganintegrity.com/country-profiles/sudan/>.

<sup>44</sup> See Franck Kuwonu, *Judiciary: Fighting Graft Needs Muscles*, AFR. RENEWAL (Aug.–Nov. 2016), <https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles>.

<sup>45</sup> See *Freedom in the World 2022: Somalia*, FREEDOM HOUSE, <https://freedomhouse.org/country/somalia/freedom-world/2022> (last visited Dec. 11, 2023).

<sup>46</sup> See *Namibia Risk Report*, GAN INTERGRITY (Nov. 4, 2020), <https://www.ganintegrity.com/country-profiles/namibia/>.

<sup>47</sup> See Benet Koleka, *Scuffles, Flares as Albania Picks Interim Prosecutor*, REUTERS (Dec. 18, 2017, 5:15 AM), <https://www.reuters.com/article/us-albania-prosecutor-protests/scuffles-flares-as-albania-picks-interim-prosecutor-idUSKBN1EC1XH>.

<sup>48</sup> See MAIRA MARTINI, TRANSPARENCY INT'L, CAUSE OF CORRUPTION IN INDONESIA (2012).

<sup>49</sup> See *Morocco Risk Report*, GAN INTERGRITY (Nov. 4, 2020), <https://www.ganintegrity.com/country-profiles/morocco/>.

<sup>50</sup> See *Malawi Anti-bribery Protests Draw Thousands*, VOA NEWS (Jan. 16, 2020, 6:58 PM), [https://www.voanews.com/a/africa\\_malawi-anti-bribery-protests-draw-thousands/6182719.html](https://www.voanews.com/a/africa_malawi-anti-bribery-protests-draw-thousands/6182719.html).

<sup>51</sup> See MARIE CHÊNE, TRANSPARENCY INT'L, TACKLING JUDICIAL CORRUPTION IN AFGHANISTAN (2007).

<sup>52</sup> CHERRY LEONARDI ET AL., PEACEWORKS, LOCAL JUSTICE IN SOUTHERN SUDAN (2010).

the specific circumstances and social dynamics at play.<sup>53</sup> South Sudan is not an uncommon situation. Comparable or identical systems can ferment and transpire anywhere where bribery is required for speedy and righteous justice. It is important to note that many countries who experience issues of bribery in their court systems are also often impoverished.<sup>54</sup> Poor people cannot compete in systems where justice is swayed by financial bribery or influence.<sup>55</sup> This is one example of how, although a belief in equal scales in private law may be instinctual, one's experience within a particular government's judicial system may cause, at minimum, a diminishing belief in the judiciary. In particular, those living under corrupt judicial systems may lack faith that the court itself will help render reflective judgments and do the *right thing*.

Weak rule of law and corruption in countries affect access to remedy.<sup>56</sup> It is said that “[i]f money and influence are the basis of justice, the poor cannot compete.”<sup>57</sup> These two issues work together against poorer people. Further, even if law exists on paper in a weak rule of law country, it is likely not practiced entirely justly. For example, duress is prohibited in the constitution of Iran,<sup>58</sup> yet there have been instances where the government itself has coerced the accused.<sup>59</sup> Further, the constitutions of Iran, Somalia, and Albania all vow to uphold justice,<sup>60</sup> yet each nation has had cited issues, in practice, of lacking due process.<sup>61</sup>

Although many countries have anti-corruption laws, such as Somalia, Zimbabwe, and Morocco,<sup>62</sup> they still have cultures of bribery within the judicial

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<sup>53</sup> *Id.* at 52.

<sup>54</sup> *Judicial Corruption Fuels Impunity, Corrodes Rule of Law, Says New Transparency International Report*, TRANSPARENCY INT'L (May 23, 2007), <https://www.transparency.org/en/press/20070523-judicial-corruption-fuels-impunity-corrodes-rule-of-law-says-repor>; *see also Rule of Law – Country Rankings*, GLOBALECONOMY.COM, [https://www.theglobaleconomy.com/rankings/wb\\_ruleoflaw/](https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/) (last visited Dec. 11, 2023); *Poorest Countries in the World 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/poorest-countries-in-the-world> (last visited Dec. 11, 2023).

<sup>55</sup> *Judicial Corruption Fuels Impunity*, *supra* note 54.

<sup>56</sup> GWYNNE L. SKINNER ET AL., *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY* (2020).

<sup>57</sup> *Judicial Corruption Fuels Impunity*, *supra* note 54.

<sup>58</sup> Nicolas Garon, *Veiling Laws Throughout Iranian History: The Relationship to Religion, Before and During Islamic Law*, 38 CONN. J. INT'L L. 50, 60 (2023).

<sup>59</sup> Rosie Swash, *Arrests and TV Confessions as Iran Cracks Down on Women's 'Improper' Clothing*, GUARDIAN (Aug. 23, 2022, 1:30 PM), <https://www.theguardian.com/global-development/2022/aug/23/arrests-and-tv-confessions-as-iran-cracks-down-on-women-improper-clothing-hijab>; *Respect Lives, Voices of Iranians and Listen to Grievances, Pleads UN Human Rights Chief*, U.N. OFF. HIGH COMM'R HUM. RTS. (Jan. 10, 2023), <https://www.ohchr.org/en/press-releases/2023/01/respect-lives-voices-iranians-and-listen-grievances-pleads-un-human-rights>; *see also* Garon, *supra* note 58.

<sup>60</sup> *Islahat Va Taqyyrati Va Tamimah Qanuni Assassi [Amendment to the Constitution] 1368 [1989]* (Iran); ALB. CONST. 1998 (amended 2016); SOM. CONST. 2012.

<sup>61</sup> *See, e.g., Respect Lives, Voices of Iranians*, *supra* note 59; *Freedom in the World 2022: Albania*, FREEDOM HOUSE, <https://freedomhouse.org/country/albania/freedom-world/2022> (last visited Dec. 11, 2023); *Somalia: Events of 2021*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/country-chapters/somalia> (last visited Dec. 11, 2023).

<sup>62</sup> MARIE CHÈNE, TRANSPARENCY INT'L, *OVERVIEW OF CORRUPTION AND ANTI-CORRUPTION IN SOMALIA* (2012); *Zimbabwe – Global Bribery Offenses Guide*, DLA PIPER (Jan. 11, 2022), <https://www.dlapiper.com/en/insights/publications/2019/09/global-bribery-offenses-guide/zimbabwe>; *Anti-corruption in Morocco*, BAKER MCKENZIE: GLOBAL COMPLIANCE NEWS BLOG <https://www.globalcompliancenes.com/anti-corruption/anti-corruption-in-morocco/> (last visited Dec. 11, 2023).

arena.<sup>63</sup> Bribery is common: In 2007, a paper found that by bribing judges directly, a party could either delay or accelerate their case in thirty-two countries.<sup>64</sup> Sudanese courts feature “bribery, favoritism, and excessive delays, which significantly disadvantage the poor.”<sup>65</sup> Similarly, stalling bribes have been uncovered in India.<sup>66</sup> In the legal system of Zimbabwe, bribery can stall cases for so long it makes “plaintiffs . . . frustrated enough to withdraw their case” and leads “the media and public [to] no longer [be] interested in the outcome.”<sup>67</sup>

Such deterioration of interest—both from plaintiffs and society at large—as caused by human interference with a fair and unbiased judiciary ultimately results in a loss of faith in justice; in such a corrupt system justice is not accessible and poorer people’s voices cannot be heard. The United Nations Office on Drugs and Crime found “[c]orruption undermines the core of the administration of justice, generating a substantial obstacle to the right to an impartial trial, and severely undermining the population’s trust in the judiciary.” It can also perpetuate a viewpoint that government bodies lack accountability and can be reckless.

Bribes were demanded in Iran from judges to release protestors.<sup>68</sup> Bribery also affects justice in Ghanaian,<sup>69</sup> Mozambican,<sup>70</sup> and Burmese<sup>71</sup> courts, and direct bribes to judges and/or magistrates have happened in Afghanistan,<sup>72</sup> Somalia,<sup>73</sup> and Bangladesh,<sup>74</sup> or to the court generally in Malawi, South Africa, and Namibia<sup>75</sup>. Over half of those who received a judicial service in Bangladesh had to pay a bribe.<sup>76</sup>

Transparency International Found that “in more than twenty-five countries, at least one in ten households had to pay a bribe to get access to justice. In a further twenty

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<sup>63</sup> Maxamed Mubarak, *Judicial Corruption in Somalia*, MARQAATI (Nov. 6, 2014), <https://marqaati.org/en/2014/11/judicial-corruption-in-somalia/>; Tracy Mutowekuziva, *Delivering Justice in Zimbabwe’s Courts*, TRANSPARENCY INT’L: BLOG (June 10, 2020), <https://www.transparency.org/en/blog/delivering-justice-in-zimbabwes-courts>; *Judicial Corruption Fuels Impunity*, *supra* note 54.

<sup>64</sup> *Judicial Corruption Fuels Impunity*, *supra* note 54.

<sup>65</sup> LEONARDI, *supra* note 52, at

<sup>66</sup> Vani S. Kulkarni et al., *India’s Judiciary and the Slackening Cog of Trust*, HINDU (May 9, 2022, 12:06 AM), <https://www.thehindu.com/opinion/op-ed/indias-judiciary-and-the-slackening-cog-of-trust/article65394817.ece#>.

<sup>67</sup> Mutowekuziva, *supra* note 63.

<sup>68</sup> Jubin Katiraie, *Iran’s Judges Demand Bribes for Protester’s Release*, IRAN FOCUS (Jan. 31, 2020), <https://iranfocus.com/protests/34247-iran-protest-judge-bribes-20200131/>.

<sup>69</sup> MORGAN BRIGHT GORDON, *BRIBERY AND CORRUPTION IN PUBLIC SERVICE DELIVERY: EXPERIENCE FROM THE GHANA JUDICIAL SERVICE* (2017).

<sup>70</sup> *Mozambique Risk Report*, GAN INTERGRITY (Nov. 5, 2020), <https://www.ganintegrity.com/country-profiles/mozambique/>.

<sup>71</sup> Zue Zue, *Burma’s Judicial System Deeply Corrupt, Parliament Told*, IRRAWADDY (Dec. 9, 2015), <https://www.irrawaddy.com/news/burma/102553.html>.

<sup>72</sup> U.N. OFF. DRUGS & CRIME, *CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS* (2010).

<sup>73</sup> Mubarak, *supra* note 63.

<sup>74</sup> *Bangladesh Risk Report*, GAN INTERGRITY (Nov. 4, 2020), <https://www.ganintegrity.com/country-profiles/bangladesh/>.

<sup>75</sup> Carmel Rickard, *State of the Judiciary: New Report on Malawi, Namibia, South Africa*, AFRICAN LII (May 6, 2022), <https://africanlii.org/articles/2022-05-06/carmel-rickard/state-of-the-judiciary-new-report-on-malawi-namibia-south-africa>.

<sup>76</sup> FARZANA NAWAZ, TRANSPARENCY INT’L, *OVERVIEW OF CORRUPTION WITHIN THE JUSTICE SECTOR AND LAW ENFORCEMENT AGENCIES IN BANGLADESH* (2012).

countries, more than three in ten households reported that bribery was involved in securing access to justice or a ‘fair’ outcome in court. In Albania, Greece, Indonesia, Mexico, Moldova, Morocco, Peru, Taiwan[,] and Venezuela, the figure was even higher.”<sup>77</sup>

Whether corrupt due to economic standing, political bias and influence, or merely a judge’s interest in personal gain, such cultures of bribery allow money to influence judicial services, case outcomes, and ultimately justice. These bribes and biases immediately disadvantage poor and ordinary people, favoring those with money or power. This delegitimizes the judiciary, which lacks impartiality under such a corrupt culture. Thereby, the citizenry of such places lose faith in the courts, and also experience a bitter feeling of injustice.

## V. NON-STATE JUDICIARIES

All of the aforementioned countries are recognized states. The question is then, what about non-state legal systems? The United Nations affords protections to tribal minorities within countries.<sup>78</sup> Moreover, many countries themselves give tribal groups within their borders the right to legal protection.<sup>79</sup> (However, other countries have laws which allow tribes to have their own courts and sometimes parliaments.)<sup>80</sup>

In Pakistan, the former “Federally Administered Tribal Area”—which now has been merged into Khyber Pakhtunkhwa, a region known for lawlessness and harboring terrorists<sup>81</sup>—would, from an outward eye, seem to be the wild west of legal rule.

In areas like this in Pakistan and Afghanistan, tribal disputes are sometimes heard from a meeting of village elders known as a jirga.<sup>82</sup> The jirga, which bases its

<sup>77</sup> *Judicial Corruption Fuels Impunity*, *supra* note 54.

<sup>78</sup> G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

<sup>79</sup> See, e.g., ABBI BUXTON & EMMA WILSON, *FPIC AND THE EXTRACTIVE INDUSTRIES: A GUIDE TO APPLYING THE SPIRIT OF FREE, PRIOR AND INFORMED CONSENT IN INDUSTRIAL PROJECTS*, (2013).

<sup>80</sup> See, e.g., *Tribal Courts*, U.S. BUREAU JUST. STAT. <https://bjs.ojp.gov/topics/tribal-crime-and-justice/tribal-courts> (last visited Dec. 11, 2023); The Indigenous Peoples’ Rights Act, Rep. Act No. 8371, (Oct. 29, 1997) (Phil.); Apoorv Kurup, *Tribal Law in India: How Decentralized Administration Is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better*, 7 *INDIGENOUS L.J.* 87, (2008); Michele Langevine Leiby, *In Pakistan, a Legal System Under Scrutiny*, WASH. POST (May 29, 2012, 9:46 AM), [https://www.washingtonpost.com/world/asia\\_pacific/in-pakistan-a-legal-system-under-scrutiny/2012/05/29/gIQAmJTqyU\\_story.html](https://www.washingtonpost.com/world/asia_pacific/in-pakistan-a-legal-system-under-scrutiny/2012/05/29/gIQAmJTqyU_story.html); *South Africa: Legal Resources: Customary Law & Indigenous Peoples*, BODLEIAN LIBRS., [https://libguides.bodleian.ox.ac.uk/law-s\\_africa/indigenous](https://libguides.bodleian.ox.ac.uk/law-s_africa/indigenous) (last visited Dec. 11, 2023); *Using Tribal Court (Kgotla) for Consultation and Decision-making*, REPUBLIC BOTSWANA, <http://www.gov.bw/public-safety/using-tribal-court-kgotla-consultation-and-decision-making> (last visited Dec. 11, 2023); U.N. Permanent F. Indigenous Issues, Response dated Feb. 17, 2016 from the Sami Parliament of Norway addressed to the U.N. Permanent Forum on Indigenous Issues, U.N. DOC. 16/712-4 (Feb. 17, 2016); *Background: The State and the Sami Parliament*, SÁMEDIGGI, <https://www.sametinget.se/9688> (last visited Dec. 11, 2023); *Quienes Somos*, CONAMAQ, <https://www.conamaq.org/quienes-somos/> (last visited Dec. 11, 2023); *¿Qué es el CNI?*, CONGRESO NACIONAL INDÍGENA, <https://www.congresonacionalindigena.org/que-es-el-cni/> (last visited Dec. 11, 2023).

<sup>81</sup> Zahid Hussain, *Pakistan’s Most Dangerous Place*, WILSON Q., [https://www.wilsonquarterly.com/quarterly/\\_pakistan-most-dangerous-place](https://www.wilsonquarterly.com/quarterly/_pakistan-most-dangerous-place) (last visited Dec. 11, 2023).

<sup>82</sup> ELI SUGARMAN ET AL., *AFG. LEGAL EDUC. PROJECT, AN INTRODUCTION TO THE COMMERCIAL LAW OF AFGHANISTAN* (Daniel Lewis et al. eds., 2d ed. 2011); AMNESTY INT’L, *PAKISTAN: THE TRIBAL JUSTICE SYSTEM*, (2002).

decisions off tribal custom, have been ruled illegal in Pakistan,<sup>83</sup> and have also been called a transgression of human rights.<sup>84</sup> Yet, jirgas often still hear private law matters and offer restorative justice.<sup>85</sup>

Tribal courts in Botswana,<sup>86</sup> Jordan,<sup>87</sup> and Afghanistan<sup>88</sup> also handle private, contract, and commercial law issues alongside the state judiciaries. In fact, in places like Afghanistan, people rely more on tribal jirgas than the state-sanctioned judicial authority due to challenges within the formal legal system.<sup>89</sup>

This furthers the claim that even in such jurisdictions, private law, including contract or any other person-to-person matter, is of such importance, it must be heard. Thereby, it continues to exist within legal practice even if the formal judicial system is lacking. Arguably, the only examined country which blockades citizens from exercising any sort of legal authority in aim of a remedy is North Korea, where actions cannot be made against the state.<sup>90</sup>

## CONCLUSION

From Hammurabi's intent to the present day, from tribal to authoritarian law, from democratic countries to places lacking freedom, the protection of the interests of individuals in private law are common, span through time, and are seen in all legal systems. The earliest legal principles pertaining to private law were established to ensure the rights of ordinary people in transactions were upheld transparently, equitably, and without influence or requirement of money. As society progresses, common activities and their issues birth reflective need for contract law regulations—from grain issues in Old Babylonia, to chip packaging patents,<sup>91</sup> to edge contracts today.<sup>92</sup> It can be inferred that throughout history, a fundamental human inclination toward fairness within private law, especially contract law, has existed. This is accompanied by an expectation of the rule of law, the safeguarding of the rights of parties to an obligation, and a defense against unjust treatment. Such principles and the overlying belief in access to remedy are more expected to be upheld in places with a proper rule of law and pure judiciary.

<sup>83</sup> Momina Khurshid, *Jirga System in Pakistan: A Transgression of Human Rights*, RSCH. SOC'Y INT'L L. (Apr. 11, 2022), <https://rsilpak.org/2022/jirga-system-in-pakistan-a-transgression-of-human-rights/>.

<sup>84</sup> AMNESTY INT'L, *supra* note 82.

<sup>85</sup> Zia Akhtar, ADR (Grand Jirga), Truth, Justice and Reconciliation Commission and Peace on the Pakistan-Afghanistan Frontier (Ph.D. dissertation, Sussex University) (on file with Human Rights Law Review, Queen Mary University of London); NAVEED AHMAD SHINWARI, UNDERSTANDING JIRGA: LEGALITY AND LEGITIMACY IN PAKISTAN'S FEDERALLY ADMINISTERED TRIBAL AREAS, (2011).

<sup>86</sup> U.S. AGENCY INT'L DEV., USAID COUNTRY PROFILE – PROPERTY RIGHTS AND RESOURCE GOVERNANCE: BOTSWANA; Piwane Constance Moumakwa, *The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla*, (Autumn 2010) (M.A. Thesis, University of Tromsø) (on file with Artic University of Norway).

<sup>87</sup> Ann Furr & Muwafaq Al-Serhan, *Tribal Customary Law in Jordan*, S.C. J. INT'L L. & BUS., Spring 2008.

<sup>88</sup> SUGARMAN, *supra* note 82.

<sup>89</sup> *Id.* at 88.

<sup>90</sup> Chon, *supra* note 21.

<sup>91</sup> *See generally* Max A. Cherney, *TSMC Leads in Advanced Chip Packaging Wars*, *LexisNexis Patent Data Says*, REUTERS (Aug. 1, 2023, 7:09 AM), <https://www.reuters.com/technology/tsmc-leads-advanced-chip-packaging-wars-lexisnexis-patent-data-says-2023-08-01/>.

<sup>92</sup> *See generally* Spencer Williams, *Edge Contracts*, 25 U. PENN. J. BUS. L. 839 (2023).

These principles, upon which our legal systems are founded, and which aim to foster a better society, are not novel concepts. They are not limited to first world nations but are historical and seemingly instinctive regardless of society or date.

However, although this feeling of a right to remedy may be instinctive, it is sometimes eroded, or totally deflated, by corruption or political influence within the judiciary itself. Corruption and bribery are regrettably prevalent in regions where the rule of law is lacking, despite such countries often having a legal code which purports to uphold due process. Consequently, this undermines the prospects of a fair trial for individuals from lower socioeconomic backgrounds and may discourage the pursuit of small claims, including disputes arising from single-party contracts.

The desire for a remedy in any government at any time period is never a spoiled idea. Oversight and strong-willed people demanding concessions and change can beat a stagnant and money hungry judiciary. Since the instinct for justice is forever engrained, limits on it shall not sustain.