



**Introduction to the Laws of Kurdistan, Iraq
Working Paper Series**

**The Law of Civil
Responsibility
DRAFT**

Iraq Legal Education Initiative (ILEI)
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
www.law.stanford.edu

American University of Iraq, Sulaimani
Kirkuk Main Road
Raparin
Sulaimani, Iraq
www.auis.ed.iq

CIVIL RESPONSIBILITY

1. INTRODUCTORY CONCEPTS

Picture a busy neighborhood full of restaurants and shops on a Saturday night. Hundreds of people walk along the sidewalks, and many cars fill the streets. Ibrahim is driving one of these cars home from work. Ibrahim is a safe driver. He is not driving fast or talking on his mobile phone, and he is watching for other cars and people. But as Ibrahim continues driving down the street, he has a heart attack. His car swerves off of the street and onto the sidewalk. As the people on the sidewalk jump out of the way, Ibrahim's car continues moving until it crashes into a popular café.

Ibrahim's car is badly damaged and so is the café. The car has destroyed several tables and left a large hole in the front wall. The café owner thinks the repairs will require the café to close for several weeks. A few people in the café also have injuries from diving out of the way of the car. Who should pay to repair the café and to send its customers to the hospital?

The **law of civil responsibility**, found in the Iraqi **Civil Code**, governs obligations among parties that result from their actions. If a person commits a certain kind of act referenced in the law, a **legal obligation** arises. This obligation requires the obligated person to do something. As we will see in our discussion of the objectives of civil responsibility below, the obligated person must generally pay some sort of **compensation**. Compensation is money awarded to repay and help someone who has been injured or otherwise harmed.

Compare this kind of obligation to a **contractual obligation**. Contractual obligations result from a legally enforceable promise.¹ The contracting parties voluntarily agree to do (or not do) something, and this mutual agreement becomes a legal obligation. The law of civil responsibility, however, requires no such voluntary or mutual agreement. Rather, these kinds of legal obligations exist based on the law itself. They reflect a belief that the state, through its laws, has a duty to care for and remedy the grievances of its citizens.²

Civil responsibility has a long history as an area of law. Under Roman law, civil obligations were referred to as either "delict" or "quasi-delict."³ Roughly speaking, a delict was intentional, and a quasi-delict was unintentional.⁴ **Civil law countries** like France—countries influenced by Roman law whose legal systems are based on comprehensive legal codes—continue to use these terms, although their current meanings depend on the jurisdiction.⁵ **Common law** countries,

¹ [Insert reference to Mark Feldman's commercial law working paper.]

² N. Karim, trans., "Excerpt from the Reformation Work Paper, Chapter 2 – The Civil Legislation, Clause 1 – The Civil Code, (1) Rights in Personam," *Reformation of the Legal System Law. No. 35 of 1977*, (1990): 3.4-xv.

³ Franco Ferrari. "Comparative Remarks on Liability for One's Own Acts," *Loyola Los Angeles International and Comparative Law Journal* 15 (1993): 813-14, 830.

⁴ *Ibid.*, 830.

⁵ *Ibid.*

however, like the United States and the United Kingdom, lack such legal codes and refer to civil obligations as “torts.”⁶ In the Iraqi context, they are also sometimes referred to as “torts” or “unlawful acts.”⁷

This working paper presents an overview of the law of civil responsibility in Iraq. As we suggest in the brief discussion above, the law of civil responsibility creates a distinct kind of legal obligation. To help you understand this obligation and where it comes from, we will begin with a history of Iraq’s Civil Code, the role of the law of obligations, and the place of the law of civil responsibility within it. After that discussion, we will move to the scope of and main principles of civil responsibility. Finally, we will provide an overview of the relevant Civil Code provisions, discussing liability, damages, and causation.

1.1. The Origins and Place of Civil Responsibility

As we describe below, the Iraqi Civil Code and the law of civil responsibility within it are the product of a rich history. These texts have two primary influences—the Mejlle and the Egyptian Civil Code—and the law of civil responsibility is one aspect of a broader law called the law of obligations.

1.1.1. The Mejlle

The history of Iraq’s law of civil responsibility begins well before modern Iraq. Starting in the eighteenth and nineteenth centuries, the sultans of the Ottoman Empire began to **codify** their laws, primarily adapting French models.⁸ That is, they began to systematically organize the Empire’s laws into a single comprehensive legal code. Though French laws were a primary influence in most areas of the law, the Ottomans did not use French models when codifying the laws of contracts or civil responsibility. Instead, they codified Islamic law of the Hanafite school.⁹ This code, enacted in 1869, was called the **Mejlle**.¹⁰

The Mejlle, in fact, is less a legal code than a digest of opinion.¹¹ Its provisions tend to be highly specific rather than the kind of general principles of law that can be applied in a variety of cases.¹² Though the Mejlle primarily focuses on contract law, it includes some general principles related to civil responsibility.¹³ For example, Article 92 of the Mejlle states that “[a]

⁶ Ibid., 819.

⁷ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Article 27, Clause 2.

⁸ Dan E. Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” *Journal of Transnational Law & Policy* 16:1 (2006): 7.

⁹ Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” 7.

¹⁰ Ibid.

¹¹ F.M. Goadby, “The Moslem Law of Civil Delict as Illustrated by the Mejlle,” *Journal of Comparative Legislation and International Law* 21 (1939): 63.

¹² Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” 8.

¹³ The Mejlle does not reference civil obligations related to injuries to a person or to a person’s reputation. Goadby, “The Moslem Law of Civil Delict as Illustrated by the Mejlle,” 63. We will discuss these kinds of obligations in the section on liability below.

person who performs an act, even though not intentionally, is liable to make good any loss caused thereby.”¹⁴ According to Article 93, “[a] person who is the cause of an act being performed is not liable to make good any loss caused by such act unless he has acted intentionally.”¹⁵ Finally, Article 90 establishes that “[i]f a person performs any act personally and is implicated therein with the person who is the cause thereof, the person performing such act is responsible therefor.”¹⁶ Thus, the Mejjelle’s general principles focus on the intentionality or deliberateness of an act as well as who performs it. These general principles had an immense impact on the Iraqi Civil Code’s provisions concerning civil responsibility.¹⁷ Despite the influence of French civil law on other aspects of the Iraqi Civil Code, the law of civil responsibility much more closely resembles the Mejjelle than the French model.¹⁸

We will discuss the Mejjelle’s principles and their realization in the Iraqi law of civil responsibility in our discussion of liability below. For now, it’s important that you begin to recognize the influence of the Mejjelle on the law of civil responsibility. As we continue to explore below, this law has a complex history and a number of important influences.

Discussion Questions

1. Why do you think the Ottomans adapted their laws from both French and Islamic law traditions?
2. What is a legal code, and why might it be a useful development for a legal system?

Answers

1. The Ottoman sultans were interested in adopting the best laws of the era, and the French Civil Code was widely regarded to be the best. At the same time, though, adopting French civil law alone would probably not have been regarded as ideal. Islamic law was an important aspect of existing Ottoman law, especially in certain areas like civil responsibility. Thus, the Ottomans tried to make an important compromise, combining French and Islamic influences to create the best possible law, the one most comprehensive, as well as most suitable to local conditions and sensibilities.
2. A legal code is a systematically organized set of laws that encompasses the principles of an entire legal system or a particular area of law. A legal code is helpful to a legal system, because it creates a clear and uniform law. Instead of the confusion of multiple laws in multiple places,

¹⁴ C.A. Hooper, trans., “The Mejjelle. Articles 1-100,” *Arab Law Quarterly* 1:4 (1986): 379.

¹⁵ Hooper, “The Mejjelle. Articles 1-100,” 379.

¹⁶ Ibid.

¹⁷ Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” 44.

¹⁸ Ibid.

the laws are centralized, organized in such a way that the relevant provision can be easily accessed.

1.1.2. The Egyptian Civil Code

In addition to the Mejlle, the other major influence on the Iraqi Civil Code was the Egyptian Civil Code.¹⁹ To create the Egyptian Civil Code, Abd al-Razzaq Al-Sanhuri, an Egyptian law professor, blended European and Islamic legal principles.²⁰ He modeled the new code on the Code Napoléon and French substantive law but also incorporated Islamic legal principles in the area of personal status.²¹ The new code was **enacted** on October 15, 1949, but even before it was became law, it influenced Iraq's civil code.

Starting in 1936, Al-Sanhuri, then dean of the Iraqi Law College, also led the effort to codify Iraq's civil laws.²² With his colleague Professor Munir as-Qadi, professor of the Mejlle at the Iraq Law College, Al-Sanhuri wrote an early draft of the Iraqi Civil Code.²³ After an interruption due to political reasons, Al-Sanhuri resumed his work in 1943, with the draft of the new Egyptian Civil Code as his model.²⁴ Working with a committee of Iraqi legal experts, he completed a draft of the Iraqi code. It was enacted on September 8, 1951 and became effective on September 8, 1953.²⁵

Like the Egyptian Civil Code, the Iraqi Civil Code is a synthesis of Islamic and Western law.²⁶ Most of its provisions derive from Islamic law, but unlike the Egyptian Code, the Iraqi Code does not give preference to any one school of Islamic jurisprudence.²⁷ Instead, in Article I, it explicitly recognizes and includes both Sunni and Shi'ite jurisprudence.²⁸ According to multiple scholars, this rejection of any particular Islamic school of thought was due to Iraq's diverse population of both Sunnis and Shi'ites.²⁹ By contrast, Egypt, whose civil code lacks such language, was a country of Sunnis.³⁰ For a discussion of the sources of law referenced in Article I of the Iraqi Civil Code and their hierarchy of authority, [see Mark's working paper on commercial law].

The Civil Code of Iraq

¹⁹ Ibid., 13.

²⁰ Ibid., 11.

²¹ Ibid.

²² Ibid., 13.

²³ Ibid.; Zuhair E. Jwaideh, "The New Civil Code of Iraq," *George Washington Law Review* 22 (1953-54): 180.

²⁴ Stigall, "Iraqi Civil Law: Its Sources, Substance, and Sundering," 13.

²⁵ Ibid.

²⁶ Ibid., 14.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Jwaideh, "The New Civil Code of Iraq," 181; Kristen A. Stilt, "Islamic Law and the Making and Remaking of the Iraqi Legal System," *George Washington International Law Review* 36 (2004): 747-48.

³⁰ Stilt, "Islamic Law and the Making and Remaking of the Iraqi Legal System," 747-48.

Article I

(2) In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law but without being bound by any particular school of thought; and otherwise in accordance with the laws of equity.

1.1.3. The Law of Obligations

The Iraqi Civil Code is divided into two parts. Part I and its two books discuss obligations in general as well as related sub-topics, including contracts and civil responsibility. Part II and its two books address property, ownership, and property rights.³¹

The law of obligations is considered “the foundation of civil law,” and it addresses issues of individual rights.³² In adopting the law of obligations, the Civil Code departed from earlier Iraqi law and the Mejlle.³³ Though the Iraqi law of obligations is distinct from the Mejlle and includes general principles not found in it, the two bodies of law share a certain level of fundamental agreement.³⁴ The law of obligations reflected principles taken from the new Egyptian Civil Code and from Islamic jurisprudence in general, as well as reimagined principles from the Mejlle.³⁵

Though the Iraqi Civil Code itself does not offer a general statement of the law of obligations, it is possible to derive one from the Code's more specific provisions and the laws that influenced it. An early version of the Egyptian Civil Code defined an obligation as “a legal bond, the object of which is to procure an advantage for one person by constraining another to do or abstain from a definite act.”³⁶ This definition was an adaptation of the definition of a contract in Article 1101 of the French Civil Code, which stated: “[a] contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something.”³⁷ Article 73 of the Iraqi Civil Code has an analogous but more specific provision defining contracts: “A contract is the union of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of the contract.”³⁸

³¹ Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” 14.

³² Jwaideh, “The New Civil Code of Iraq,” 183.

³³ Stigall, “Iraqi Civil Law: Its Sources, Substance, and Sundering,” 21.

³⁴ *Ibid.*, 25.

³⁵ Jwaideh, “The New Civil Code of Iraq,” 183.

³⁶ Frederick Parker Walton, *The Egyptian Law of Obligations*, (London: Stevens and Sons, 1920): 1.

³⁷ *Ibid.*; George Rouhette, trans., French Civil Code of 2006, Article 1101.

³⁸ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Article 73.

The shared characteristic of all three definitions is their focus on an obligation's relational basis. A legal obligation connects two parties through the medium of the law, and indeed in Iraq, an obligation has been described succinctly as "a relation between two parties."³⁹ The terms "legal bond" and "obligation" are inherited from Roman law, and the Romans viewed the two parties as bound together by an imaginary chain.⁴⁰ When the debt was paid or performed, the chain by which the debtor was bound was "unfastened" or "untied."⁴¹ This metaphor captures the nature of the relationship inherent in an obligation: the two parties are legally connected until the obligation is satisfied, and the connection is then severed.

The sources of obligations referenced in the Iraqi Civil Code are contracts, unilateral will, unjust enrichment, and civil responsibility.⁴² Though contractual obligations seem to most obviously fit the chain metaphor above, it applies to these other obligations as well. Contracts, as we have discussed above, are obligations resulting from a lawful agreement between the parties.

Unilateral will refers to an obligation resulting from a promise to do something for (e.g., pay) whoever performs a certain specified act.⁴³ Even when there is no agreement between the parties and/or the person who performed the act did not know about the promise, the **promisor**, or person who made the promise, is required to do what he originally promised.⁴⁴ If the triggering act is completed, the promisor must do what he said he would.⁴⁵

For example, imagine that Hemin, a wheat farmer near Bazian, announces to his neighbors that he will pay 100,000 dinars to anyone who invents a more efficient way for him to irrigate his crops. A young man named Hassan from another town presents him with a new and improved irrigation system. Hemin must pay Hassan the 100,000 dinars, because he has promised to do so. Even though Hemin and Hassan have never met before, and they never made a formal agreement, Hemin's original promise is enough to create an obligation to pay Hassan.

In an obligation stemming from **unjust enrichment**, or gain without cause, a person has received a benefit from another person under such circumstances that it is fair for him or her to pay for this benefit.⁴⁶ A civil responsibility obligation is similar, but in this situation, instead of receiving an unfair benefit as in unjust enrichment, a person has been unfairly harmed.⁴⁷ Because the obligated person has caused this harm in some way, he is bound to compensate the injured person.

³⁹ N. Karim, trans., "Excerpt from the Reformation Work Paper, Chapter 2 – The Civil Legislation, Clause 1 – The Civil Code, (1) Rights in Personam," *Reformation of the Legal System Law. No. 35 of 1977*, (1990): 3.4-xiii.

⁴⁰ Walton, *The Egyptian Law of Obligations*, 1.

⁴¹ Ibid.

⁴² Stigall, "Iraqi Civil Law: Its Sources, Substance, and Sundering," 14.

⁴³ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Article 185, Clause 1.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Walton, *The Egyptian Law of Obligations*, 13; N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Articles 233-43.

⁴⁷ Walton, *The Egyptian Law of Obligations*, 13; N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Articles 186-232;

As you can see, all four of these sources of obligation entail a legal relationship between two or more parties. Based on the source of this relationship, these obligations can be divided into two categories: (1) obligations arising from contract and (2) obligations created by law.⁴⁸ Contractual obligations belong to the first category, and the other three obligations belong to the second. Though even contractual relationships become an obligation only because the law gives them legal effect, the parties' agreement is still the primary source of the obligation.⁴⁹ Thus, a contract belongs in the first category, because the law is only a secondary source of the obligation. Comparing civil responsibility to contractual responsibility will make clearer the distinction between contractual and legal obligations and ultimately, help you better understand what civil responsibility means.

1.2. The Scope of Civil Responsibility

1.2.1. Civil responsibility compared to contractual responsibility

As we discussed in [Mark's commercial law working paper], a contract is a legally enforceable promise between two parties. In Iraq, a contractual obligation occurs when three criteria have been satisfied: mutual consent of the parties (i.e., offer and acceptance), a valid object, and a lawful cause. The offer and acceptance must be voluntary. That is, both parties must agree freely, and the agreement cannot be based on mistake, fraud or duress. If the contract is valid based on these principles, it binds both parties. One contracting party can compel the other to do what it promised to do or collect damages if it fails to uphold its obligation.

Unlike the preexisting, voluntary nature of a contractual obligation, the parties may have no previous relationship. Instead, the obligation and the relationship emerge when one of the parties causes harm to the other that is specified in the Civil Code. The law, not the parties, creates the relationship and the obligation based on the nature of the action. And this obligation is not voluntary, as a contractual obligation is. The law prescribes the duty, and the party that has caused the harm must do what the law requires.

For example, the owner of a restaurant owes a duty to all customers to serve them food that is safe and meets minimum standards of quality. If a customer becomes ill because of bad meat from the restaurant and goes to the hospital, the owner may be required to pay the customer's medical bills or the wages that he lost while he was unable to work. This civil obligation exists even if the owner and the customer have never met and they have made no sort of agreement about the quality of the food. Rather, the obligation exists because the law creates it. When the restaurant serves food that makes the customer sick, the restaurant's act and the harm it causes create the obligation.

⁴⁸ Walton, *The Egyptian Law of Obligations*, 16.

⁴⁹ *Ibid.*, 15.

Though contractual and civil obligations are distinct, both can arise from the same act. For example, imagine your new neighbor has a small herd of goats. Before she moved into her house, you mutually agreed that she would always either keep the goats inside her fence or have someone watch them. You even offered her a small sum of money to pay for the occasional shepherd, because you worried that the goats might damage your garden. If one day the goats eat all of your flowers and cabbages while you are at work, your neighbor has not met her obligation in contract (for not keeping her goats under control) or in civil responsibility (for destroying your flowers and cabbages). In this situation, you could seek compensation because of the violation of either kind of obligation.

As we have discussed, the key difference between a civil obligation and a contractual one is the source of the obligation. Whereas a civil obligation arises based on one person's action and the resulting harm to another person, a contractual obligation exists because of an agreement between two parties.

Discussion Questions

1. Why do you think Iraq has a law of civil responsibility? Why shouldn't a sickened restaurant customer or neighbor with a damaged garden have to pay for the harm him- or herself?
2. Can you think of any alternatives to the current system of compensating people who are harmed?

Answers

1. The law of civil responsibility reflects a commitment to those who have been harmed because of the actions of another. The law embodies a social determination that these injured people should be fairly compensated and that the person who caused the harm should be the one to provide the compensation. Because the customer and the neighbor have done nothing, and another party has harmed them, they should not have to bear the costs of their own harm. If they were forced to bear those costs, the restaurant owner and neighbor with the goats might be less careful in the future about harming other people.
2. If these injured people were not compensated, they might seek vengeance against the person who harmed them or otherwise retaliate against them. More informal means of obtaining compensation might exist (e.g., negotiations between families instead of rulings from judges). Another alternative might be for the wealthier person, whether the person harmed or the person causing the harm, to bear the cost. But similar to what was mentioned above, this might cause poor people to be insufficiently careful and wealthy people to be too careful.

1.2.2. Civil responsibility compared to criminal responsibility

One of the primary distinctions between civil and criminal responsibility relates to who suffers harm. Civil responsibility addresses only harm to specific individuals. If Fatma's dog eats your chickens, she has harmed you, and she is civilly responsible for that harm. As we discussed in [the introduction to Mark's criminal law working paper], criminal law however, addresses harm to society and harm to specific individuals only as members of that society. For this reason, the prosecutor, an employee of the government, represents the State or the Government, not the **victim** of the crime, the person who was harmed.

Indeed, some crimes like use of illegal drugs lack clear victims. The person who committed the crime has harmed society at large by breaking the law and thereby making society less safe. Thus, criminal responsibility entails a different kind of legal relationship: one between a person accused of a crime and the society where the crime was committed. The legal relationship civil responsibility creates, however, is between individuals.

As with contractual and civil responsibility, civil and criminal responsibility can emerge from the same act. If Pakshan takes money from a bank by punching one of the bank employees, she harms society by damaging property rights; other people will fear for their safety and possessions. At the same time, she has also directly harmed the bank employee, who may need medical treatment or be unable to work for some time. Both harms must be remedied. Criminal law addresses the harm to society, and the law of civil responsibility addresses the harm to the individual.

2. PRINCIPLES OF CIVIL RESPONSIBILITY

2.1. The Effect of Cultural and Religious Influences on Civil Responsibility

The Iraqi Civil Code explicitly recognizes that courts should use custom and Islamic Law when making decisions. Article 1, Clause 2 of the Civil Code establishes how courts should decide which of these to use and when: "In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law..."⁵⁰

In other words, when there is no clearly applicable law, a court should first apply **custom** and usage—actions or behaviors that are widely adopted or generally followed among the people of Iraq. Customs are well defined and well known, but does *everyone* have to do something for it to qualify as a custom? Probably not. The provisions of the Civil Code related to contracts refer to "common usage" and the "usage common among people."⁵¹ It is possible for something to be a custom among a defined subset of people, rather than the entire Iraqi population. For example, there is no law in the Civil Code that addresses what should happen if someone accidentally cuts

⁵⁰ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Article 1, Clause 2.

⁵¹ *Ibid.*, Article 79, 164.

a fisherman's net and allows the fish to escape. Perhaps, though, among the community of fishermen in the area, it is well established that the person who cuts the net must both pay for the net to be mended and for the value of the fish estimated to have escaped. Because there is no obvious applicable law related to this situation, a court might apply the relevant custom to make its decision, even if the custom is limited to a certain group of people or a certain industry.

Note, however, that this example assumes that the custom is known and clear. In most cases, unless the custom is a matter of common sense known by everyone (e.g., a doctor should not leave a knife in a body after surgery), one of the parties will have to establish it. The party will present evidence to the court about the practice in question—how widespread and accepted it is—and the court will decide whether it qualifies as a custom. What qualifies as a custom, however, is not clear in the Civil Code. Though the most common, most generally followed practices are probably customs, the boundaries of what qualifies as a custom are hazy. The Civil Code does, however, provide some limited guidance. In the context of contracts, Article 165 states that a court will take a custom into consideration if it is “in continuous practice or predominantly widespread.”⁵² But how many people have to engage in a custom for it to be “continuous” or “predominantly widespread”? This is a question for the courts, and they will recognize and apply a custom if it can be proven to exist.

According to Article 1, if there is no relevant law, and no relevant custom, a court shall decide according to “the principles of the Islamic Shari’a which are most consistent with the provisions of this Law.” This preference for custom above Shari’a seems to give local practice priority above Islamic Law, and in some ways, this is true. It is important to recall, however, our discussion above of the influence of the Shari’a on the drafting of the Iraqi Civil Code. Principles from the Shari’a pervade the Civil Code; they *are* the law of Iraqi in many cases. Thus, what Article I establishes is a preference for custom above principles of Shari’a *not already expressed in Iraqi law*, not a general preference for custom above all principles of Shari’a. Moreover, it is important to remember that many customs in Iraq are linked to Islam.

Another part of the Civil Code, Article 5, also reflects the importance of custom to Iraqi Law: “The change of provisions (rules) to conform to changing times,” it states, “is not denied.”⁵³ According to the explanation that accompanies this article, “rules which have their bases in custom and usage and not in texts and proofs will change with the change of customs and usages on which they had been based.”⁵⁴ The Civil Code, like all laws, does not exist in a vacuum. Instead, it evolves and adapts along with society. Just as the Civil Code accommodates custom and usage, it accommodates changes to them. This provision of the Civil Code provides important flexibility, allowing courts’ decisions to reflect societal changes.

Discussion Questions

⁵² Ibid., Article 165.

⁵³ Ibid., Article 5.

⁵⁴ Ibid., text accompanying Article 5.

1. Why do you think the Civil Code elevates custom and usage over Shari'a?
2. How do you think "changing times" might have affected how the Civil Code currently operates in practice?

Answers

1. Since many principles of Shari'a are already expressed in the Civil Code, al-Sanhuri and the other authors might have thought it more important for the Civil Code to reflect local conditions than to perfectly reflect Shari'a, a body of law much less tailored to Iraq than Iraq's customs. The drafters might also have thought to prefer Shari'a would be to upset the careful balance of Western and Shari'a in the Civil Code. In addition, some principles of Shari'a may have been omitted from the Civil Code precisely because they did not cohere with local realities. To elevate Shari'a over custom would have allowed those principles to operate in Iraq despite their unsuitability.

2. Since technology has changed dramatically since the 1950s, there are probably many situations that the original Civil Code does not address: cell phones and text messaging, the Internet and Facebook, etc. The Civil Code has probably adapted to address, for example, fraud and harassment that happen through the Internet.

The Civil Code may also have changed due to evolving cultural norms regarding the family, the role of women, the place of the disabled in society, the nature of courtship and marriage, and the responsibilities of government.

2.2. Principles of Civil Responsibility in the Civil Code

In addition to the principles related to custom and religion described above, the Civil Code includes certain general principles that are foundations of the law of civil responsibility. These principles impact all provisions of the Civil Code, but they have particular relevance to civil responsibility.

The Civil Code of Iraq

Article 6

The lawful permissibility negates liability: he who exercises his right lawfully shall not be liable on the damages resulting therefrom.

Article 7

(1) He who impermissibly exercises his right shall be liable.

(2) The exercise of a right becomes impermissible in the following cases:

- (a) where such exercise is intended to cause injury to a third party;
- (b) where the benefits sought from such exercise are insignificant such as it will not at all be proportionate to the injury caused thereby to a third party;
- (c) where the benefits to be obtained are unlawful

Article 8

The warding off (prevention) of evil is more deserving (meritorious) than yielding benefits.

The first of these principles, Article 6, expresses the importance of individual rights. If someone causes harm through the lawful exercise of a right, he is not civilly responsible. The Civil Code provides an accompanying example from the *Mejelle*: if someone has dug a well on his property, and the animal of another person has fallen into the well and died, the person who dug the well is not responsible for the animal's death.⁵⁵ Because the man has dug a well on his own property, which is his right, he is not responsible. Similarly, if a person renting the property dug a well with the landlord's permission, the renter would also not be responsible. It is the lawfulness of the exercise of the right, not the person who exercises it, that matters. Thus, if the renter dug the well without his landlord's permission, he would be responsible. Implicit in this well example is also a judgment about the conduct of animal's owner. He has unlawfully let his animal onto another person's property and so long as the well was lawfully dug, he has no right to complain about what happened.

Article 7, however, expresses the limits of the exercise of a right. Article 6 refers to a person exercising rights "lawfully" or "permissibl[y]" and Article 7 addresses an "impermissible" exercise of a right. There are three ways a person can impermissibly exercise a right. First, a person impermissibly exercises a right when, by the action, he or she intends to harm someone else. To return to the well example above, if the landowner had dug the well in order to kill his neighbor's wandering cow, he would be responsible for the harm. Though the neighbor isn't injured, his cow is, and he is thereby harmed. By intending to cause injury, his otherwise lawful exercise of a right becomes unlawful.

Second, a person impermissibly exercises a right when the harm that results to someone else greatly outweighs the benefits that result from the exercise. For example, imagine the owner of a factory built an electrified fence around the property to protect it from thieves and wild animals. This factory, moreover, was near a school, and children walked along the road by the factory on

⁵⁵ *Ibid.*, text accompanying Article 6.

their way to and from their homes. Given the injury that could result to the children from the electrified fence, building it would be impermissible, because the benefits to the owner would be comparatively minimal (greater safety, security, etc.). Even though the property belongs to the owner of the factory, and he can ordinarily do whatever he wishes with his property, he cannot build a fence that would endanger resident children, because the benefit is not at all proportional to the harm.

Third, a person impermissibly exercises a right where the benefit expected from the exercise is unlawful. This is similar in some ways to the first type, intended injury, but here the emphasis is on the benefit, not the intent to injure. The benefit may still be unlawful, even if it doesn't injure another person. For instance, imagine a landowner insures his house and land and then sets them on fire. (Insurance is an agreement where an owner, through regular payments, buys compensation if his property should be damaged or destroyed.) His intent here is not to harm the insurance company; rather, he merely wishes to collect money that is not lawfully his. Because being paid by the insurance company for damage he caused is an unlawful benefit, the exercise of the landowner's right is also unlawful. Ordinarily, he can do whatever he wants to his property; that is his right. But here, because the benefit from the exercise of the right is unlawful, he cannot exercise his right without being held responsible.

The final general principle, Article 8, reflects a determination that preventing harm is more important than creating benefits. Though we learned from Article 7 that disproportional harm outweighs a comparatively insignificant benefit Article 8 goes even further. Even if the harm and the benefit are equal, the law will err on the side of preventing harm, even if that restricts someone's ability to exercise his or her right. Here's an example: Fatima lives next to Faisal, and she wants to sell her property to an oil company. This deal would greatly benefit Fatima, enabling her to buy a new house and send her children to the best school. Faisal, however, is a farmer, and the sale would devastate his ability to farm or live on the land. The pollution would make the water on his land unsuitable for his animals and also damage his crops. Under Article 8, this sale would be unlawful. Because the harm to Faisal is so great, even if the benefit to Fatima is also substantial, Article 8 prevents the sale.

These principles are about fairness and justice or **equity**. They reflect decisions about how to balance the interests of many people within a society and thereby define the boundaries of the law of civil responsibility.

3. THE OBJECTIVES OF CIVIL RESPONSIBILITY

The principles just discussed help determine when someone is civilly responsible. But what does that mean? What does the law of civil responsibility *do*? This law has three primary functions: compensation, punishment, and deterrence. We will discuss each in turn.

As we discussed in the introduction, compensation is money awarded to someone who has been injured or otherwise harmed. The goal of this money is to help make the injured person

“whole”—that is to return them to their pre-harm condition. In some situations, this may be possible. If someone runs over your bicycle with their car, destroying it, you can use the compensation they give you to buy a new bicycle. Maybe you won’t like this bicycle quite as much as your old one, but it’s still a bicycle. Your bicycle was destroyed, and now you have a new one.

In situations involving bodily injury, however, money often cannot compensate for the harm caused. Imagine an accident causes a young woman to lose her sight or the use of her legs. Can any amount of money buy her back the ability to see or walk? Probably not. Thus, for some kinds of harm, money is inadequate. Moreover, bodily injuries like these raise important questions about calculating compensation. How much is sight or mobility worth? This is a difficult question with no clear answer, and courts struggle to make these kinds of decisions.

The law of civil responsibility can also serve to punish the person who causes the harm, whether or not they intended to cause harm. Most people, wealthy or not, would prefer not to pay compensation, which serves as a financial penalty or punishment even as it helps the person harmed. This money, however, may punish people to varying degrees based on their wealth. For example 50,000 dinars is an enormous punishment for a poor person but not for a rich person. For this reason, should a wealthy person be required to pay more than a poor person for causing the same harm? Which is more fair, paying the same amount of money or suffering an equivalent financial burden?

In addition to punishing the person who causes the harm, the law of civil responsibility also **deters** him or her from committing such acts in the future. If people know they will be required to pay money when their actions harm other people, they may be more careful. For example, Aziza usually shovels snow from her house into the road. She realizes, however, that the snow on the road could cause a passerby to slip. Since she would be civilly responsible for the harm to the person who slips, she stops shoveling the snow into the road. The potential of paying compensation deters her from committing the risky act.

In some situations, however, the person may still choose to commit the potentially harmful action. That is, the benefit of the act may outweigh the financial cost. Let’s return to the flower-eating goats we discussed earlier. Imagine that your neighbor has no fence or goatherd and regularly lets her goats wander into your garden, where they eat your flowers and vegetables. Your neighbor must pay compensation for this harm, but this compensation may be cheaper for her overall. That is, paying you for your lost flowers and vegetables may be cheaper for your neighbor than buying food for her goats or building a fence.

In such a situation, the law of civil responsibility may help promote **economic efficiency**. That is, by specifying the costs of certain acts, the law helps ensure that only those who can afford to pay compensation commit these acts. If someone still chooses to take a certain action, despite knowing the cost, the benefit of the action to this person outweighs its cost. As with the neighbor

with the goats, a person would, in theory, only take such an action if it created economic value. The neighbor compensates you for your lost vegetables and flowers to feed her goats, which she can then sell to other people. An analogous example, which we discussed in the case of contractual obligations, [cite to Mark's commercial law chapter] is efficient breach. In some situations, it may be cheaper for a party to breach its contract than to do what it has promised. Similarly, here, it may still be cheaper for a party to commit a harmful act, even with the cost of compensation, than to forego the benefit from the act.

Discussion Questions

1. Is deterrence only applicable if the person who committed the wrongful conduct intended to do so?
2. Does it matter whether the actor intended to cause harm? That is, should he or she pay the same compensation for the same injury regardless of whether her action was intentional or unintentional?

Answers

1. Even though deterrence most affects situations where a person has acted intentionally, it can still operate to incentivize greater care in the future. For example, though a driver does not intend to hit a pedestrian, this may have still been avoided if the car had been traveling more slowly, etc.
2. As the system currently operates, an actor who commits a harmful act pays the same compensation regardless of whether she intended to cause harm. If the primary goal is to help the injured party, then the compensation should be the same. But if the primary goal is to deter harmful conduct and/or to punish it, then differing amounts of compensation makes more sense.

As you can see from the discussion above, civil responsibility is an area of law that raises many complicated questions related to fairness and efficiency. As we explore the substance of the law, keep in mind its objectives and ask yourself whether a given case fulfills the purposes of civil responsibility.

We will now examine each of the basic elements of a civil obligation: injury or damage; causation; and liability. **Injury** or **damage** refers to who or what has been harmed. **Causation** means analyzing how the injury resulted. Finally, **liability** is a question of who society should hold responsible.

4. HARM/INJURY/DAMAGE

Harm, injury, or damage is the starting point of an obligation under the law of civil responsibility. These terms, though they have slightly different meanings, are used

interchangeably in English translations of the Civil Code.⁵⁶ All three refer to the result of an unlawful act, its negative effect on another person. This negative effect must be present in order for a civil obligation to exist. Otherwise, there is nothing for which to hold someone civilly responsible. Harm, injury, and damage can be divided into three primary types: physical injury non-physical injury, and damage to property.

The Civil Code of Iraq

Article 202

Every act which is injurious to persons such as murder, wounding, assault, or any other kind of inflicting injury entails payment of damages by the perpetrator.

Physical injury is perhaps the most obvious type of harm. Since everyone has a body, damage to it is easily understood. A broken leg or other wound is concrete and visible to a court. Article 202 reflects a broad understanding of what qualifies as an unlawful act in the context of physical injury. So long as the act injures someone, it is unlawful, and the person who commits it (the **perpetrator**) must pay **damages** or compensation to the injured person. These damages may compensate for hospital costs, lost wages, and other financial burdens suffered by the injured person and his family as a result of the unlawful act.⁵⁷ As we discussed in the Objectives section above, however, even a large sum of money may not provide full compensation to a person who suffers a disabling injury or is killed.

In discussing non-physical injury, the Civil Code refers to “moral injury,” which Article 205, Clause 1 defines as “any encroachment (assault) on the freedom, morality, honour, reputation, social standing, or financial position (credibility) of a third party.”⁵⁸ For example, if Ahmed told people in his town that another local man, Saad was dishonest and stole money, Ahmed’s act could cause Saad moral injury. Saad’s reputation in his community might be damaged, and banks might be reluctant to loan him money. Thus, though the injury to Saad cannot be seen, it is no less real than a physical injury. The Civil Code’s broad definition of non-physical injury acknowledges this reality.

The Civil Code also recognizes the interaction between physical and non-physical injuries. In Article 205, Clause 2, the Code acknowledges that family members may suffer moral injuries caused by the disease of a spouse or other close family member.⁵⁹ For example, pollution from a company’s factory causes Hamid, a prominent man in his community, to develop cancer. His wife can demand compensation from the company for the damage the cancer caused to her social

⁵⁶ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Chapter 3, Section (i)(1); *ibid.*, Article 189.

⁵⁷ *Ibid.*, Article 203.

⁵⁸ *Ibid.*, Article 205, Clause 1.

⁵⁹ *Ibid.*, Article 205, Clause 2.

standing. Because the company's unlawful act—its polluting factory—caused the cancer, it is responsible even for moral injury resulting from the original physical injury.

The final type of injury is damage to a person's property. Like physical injury, property damage is often concrete and visible. If you crash into your neighbor's prized tree with your car or throw a rock at her window, the damage is at least the value of replacing or repairing what has been damaged. In addition to this physical damage, the Civil Code also acknowledges more subtle forms of damage, including decreasing the value of someone's property.⁶⁰ For instance, imagine Hind owns an apartment building overlooking a beautiful valley. When the city builds a landfill in the valley, the value of Hind's apartment building decreases. Her tenants move out because of the smell and the sight of trucks and garbage.

This description of types of injury provides a general overview, but it is not exhaustive and does not reference all the injuries included in the Civil Code. If you are interested in further detail, we recommend that you read the Civil Code itself. Some of its articles are notable for their specificity (e.g., Article 223, Article 225, Article 227, Article 230). As you read them, consider what may have prompted the authors of the Civil Code to include them, as well as how courts may have altered their interpretation due to changing times.

Now that we have discussed injury, we will turn to causation, the connection between an unlawful act and an injury. As you will see, understanding the nature of an injury is closely related to understanding who or what caused it.

5. CAUSATION

On a rainy night, Farhad stopped to adjust the defective windshield wipers on his rental car. He parked the car in a parking space on the side of a road and stepped out to fix the wipers. A passing car struck him, and Farhad died. Should the rental car company be held responsible for Farhad's death?

Causation relates to the connection between an action (or inaction) and harm. Based on this principle, for the rental car company to be responsible for Farhad's death, Farhad's family must show that the failure to check the windshield wipers (inaction) caused his death (harm). More specifically, they must prove that the rental car company's failure to check the windshield wipers was both (1) the **actual cause** and (2) the **legal cause** of Farhad's death.

Actual cause is a factual inquiry. The relevant question is: did the (in)action cause the harm? Here, the car company's failure to check the windshield wipers caused Farhad to stop and leave his car, which caused his death. If the company had checked the wipers, they would have been working, and Farhad would not have stopped. Because of the nature of the inquiry, actual cause

⁶⁰ Ibid., Article 186, Clause 1.

is sometimes also referred to as “but for” cause. To restate our original question in a different way: but for the company’s failure to act, would Farhad be dead?

Legal cause, also known as **proximate cause**, is a different kind of inquiry from actual cause. It raises legal and normative questions. In this context, the relevant question is: is it reasonable or fair to hold the actor responsible for the victim’s injury? One of the important considerations when making this judgment is **foreseeability**. In other words, should the person who committed the act have reasonably anticipated that it would cause the harm? Here, the rental car company can argue that it had no idea that defective windshield wipers would cause Farhad’s death and that the real cause of his death was the other driver. As you can see, legal cause can be a difficult question. Though both the actual cause and legal cause inquiries are straightforward, sometimes complicated factual circumstances force courts to make tough decisions about whether the injury was reasonably foreseeable.

Causation is one of the more complicated aspects of civil responsibility, and this brief discussion is intended to introduce you to the relevant issues and questions, not to make you an expert. As we have noted, causation entails important questions about fairness. These questions are even more pronounced in the area of liability.

6. LIABILITY

In addition to harm, and a connection between that harm and an unlawful act (causation), a civil obligation entails a determination of responsibility or liability. This legal determination of responsibility is distinct from being responsible in a non-legal context. For example, imagine Najat pushes her older brother, and he falls and cuts his hand. There is an act that causes harm, and Najat’s mother may even tell her daughter that she is responsible or at fault for hurting her brother. But the law is not present here, and there is no civil obligation.

In a legal context, however, through liability—holding someone responsible for an unlawful act—a court declares that a civil obligation exists. In so doing, the court determines that someone responsible for an act should be held responsible for the harm it caused.

Importantly, as we will see below, even if a person committed an act that would ordinarily be considered unlawful, she may not be held responsible under certain circumstances. Similarly, even if she did not herself commit the act, in certain situations she may be held responsible for the conduct of another person or thing. We will briefly introduce liability for one’s own actions and those of others below.

6.1. Liability for One’s Own Actions

6.1.1. Acts

Article 202, which we discussed above in the context of harm, makes clear that a person is generally liable for the harm she causes. The article states: “Every act which is injurious to persons . . . entails payment of damages by the perpetrator.”⁶¹ Thus, an injurious act in itself creates liability. As one scholar has noted, Article 202 “omits any references to the concepts of intention, culpa or fault. Accordingly, all personal injuries should be compensated for under Iraqi law, whether they be caused intentionally, negligently, or otherwise.”⁶²

The impact and importance of this principle cannot be overstated. In most situations, harm stemming from an act is enough to create liability. By committing an unlawful act, the perpetrator is liable. Thus, there is generally no need for a distinct determination of liability that takes into account the nature of the perpetrator’s conduct or whether she intended to cause harm. That is, her **culpability** (the blameworthiness of her conduct) is irrelevant. Whether someone accidentally or intentionally commits an act that causes harm, she is held equally responsible. This type of liability in which culpability is not considered is called **strict liability**.

Discussion Question

What do you think of this system of liability that regards an accidental murderer and an intentional one as equally responsible?

Answer

Though this system seems unfair in some ways, it focuses on the harm to the victim, not the culpability of the perpetrator. This may be an appropriate balance in a system whose primary purpose arguably is to compensate victims, not to deter perpetrators. The criminal system is better suited to punish culpable conduct.

6.1.2. Omissions

Just as parties may incur civil liability based on their actions, they may also be liable based on their failure to act. For example, under a broad version of liability based on omission, a pedestrian who fails to warn another about ice ahead could be held responsible if the other slips. This situation of inaction complicates the clear rule of responsibility of Article 202. Whereas it may be easy to determine when someone’s action has harmed another, it is more difficult to determine when inaction has done so. For this reason, in cases involving omissions, culpability necessarily becomes more important. Otherwise, the scope of responsibility would be far too broad.

Culpability in this context is linked to the concept of **duty**, what society requires of someone in a given situation. For example, in many places, a driver is expected to stop at stoplights, signal

⁶¹ N. Karim, trans., 1990 English Translation of the Iraqi Civil Code, Article 202, Clause 1.

⁶² Dan E. Stigall, “A Closer Look at Iraqi Property and Tort Law,” *Louisiana Law Review* 68 (2008): 810.

when turning, and turn on her headlights after dark. Because society recognizes these actions as duties, a failure to do one of them may make the driver liable for the consequences of the omission.

Consider an extreme example: a child begging for money on the street later dies from hunger after no one stops to help. Are all the passersby who failed to provide food or money liable for the child's death? Let us assume for the moment that causation is satisfied. Should society create a civil obligation to help starving children? More generally, do people have a duty to help others in need? Is this a moral duty, or should it be a legal duty? As you can see, the law of civil responsibility raises difficult questions.

Discussion Questions

As we discussed in the section on the Principles of Civil Responsibility, according to Article 7(2)(b), a person unlawfully exercises his right when the benefits from the exercise are insignificant compared to the injury to someone else. Should this same principle apply in the situation of omissions? Is it lawful to fail to act when the harm the inaction causes greatly outweighs its benefit?

Answers

It makes sense for the same principle to apply to both actions and the failure to act, just as most of the law of civil responsibility applies to both. At the same time, however, the right *not to act* seems to be more sacred in some ways than the right *to act*. It's similar to the right to be left alone. In addition, though holding someone responsible for an omission may serve the same compensation function as imposing liability for an action, deterrence and punishment seem less effective in the context of omissions.

6.2. Liability for the Actions of Others

Should parents be responsible for the harm caused by their children? Should companies be liable for the unlawful acts of their employees? Though the Civil Code focuses on the liability of individuals for their own actions, it includes other forms of liability as well. These other forms of liability reflect a societal belief that certain kinds of relationships entail shared a responsibility for harmful conduct. These relationships generally involve one party who has authority or control over the other.

The most obvious example of such a relationship is that between parents and children. Children do not always understand the consequences of their actions, and parents are expected to protect them. They are also expected to protect society *from* their children. Article 218 reflects this principle: "The father and then the grandfather shall be obligated to compensate the injury

caused by a minor” unless “he has established the duty of control (over the minor) or that the injury would have taken place even where he had performed said duty.” Parents (and grandparents) thus must bear responsibility for the consequences of their children’s or grandchildren’s actions. When should this responsibility end? Is it a question of age or maturity?

Discussion Questions

The Civil Code holds government and companies responsible for the actions of their employees (Article 219-20) and owners responsible for their animals (Article 221-26). Why?

Answers

In some ways, the employer-employee relationship is analogous to a parent-child relationship. A company or government has a supervisory role. It tells its employees what to do (or not to do), just as a parent does. Like parents, companies and governments are held responsible for failing to stop an employee’s action or forcing an employee to act. Animals are even more analogous to young children. Because they require the same kind of constant supervision and control, it is reasonable to hold their owners responsible.