Introduction to Islamic Law

A. Overview

The Islamic Sharia discusses all matters of religion and life. Therefore, religious consideration takes effect as an internal control of human acts.

The civil division in Islamic jurisprudence (i.e. transactions) is different from western litigation on civil law as Islamic Jurisprudence is governed by the idea of lawful and prohibited acts. Therefore, western and Islamic Jurisprudence are different in essence and in purpose.

The former aims to regulate the social relationships between people and is primarily interested in human acts which appear to connect men with each other. However, the Islamic Sharia has two purposes:

- First, to regulate the relationship between man and his Creator
- Second, to regulate the social relationships of people.

Accordingly, Islamic jurisprudence has two provisions for each human act:

- First, the earthly provision which is related to the material form and the external effect of the act in the earthly life
- Second, the afterlife provision which is related to the essence and the fact of the act, the intent behind it, its circumstances and its subsequent effect in the afterlife.

Therefore, transactions in the Sharia have two considerations: a judicial and a religious consideration.[1]

[1] For example, it is stated that: "*One of the partners of the house went away. So the other partner wanted to get a man to reside therein or to rent it. This should not be done, according to the religion, because he has no right to dispose of a third party's property. However, he may dispose of the same, according to the judicature, because a*

It can also be noted that Muslim Jurists distinguished in their books between two liabilities: moral and legal liability.

The interaction between the Sharia and recently promulgated Civil Codes.

The Twentieth Century was characterised by the emergence of Arab Civil Codes. Before that, uncodified Sharia Law, writings of Islamic jurists, and more specifically the *Mejelle,* which is the Ottoman codification of the Sharia concepts and rules on civil matters, were the main sources of law.

The Egyptian Civil Code, promulgated in 1948, is often considered as "having succeeded, to a large degree, in achieving reconciliation between West European jurisprudence on the one hand, and Islamic jurisprudence on the other".[2] This code has influenced the promulgation of numerous other Civil Codes, such as the Jordanian Civil Code in 1976 and the Civil Transactions Code of the UAE in 1985.

Kuwait, which achieved full independence in 1961, turned to Egypt for assistance in adopting a new system of codified law, more specifically a French-based civil law system.
However, two important aspects of Kuwaiti law remained unchanged and unaffected by modern legislation: the *Mejelle* (except for the provisions specifically superseded by commercial legislations) continued to be in force; and law of personal status and inheritance.
In 1981, a new Civil Code and its explanatory memorandum were implemented. Its provisions "are in harmony with the Schools of Islamic Jurisprudence" and at the same time "benefit from the great advances that have been achieved by current legal thinking in the art of legislation and modern procedures."[3]

Such reconciliation can also be illustrated by the introduction of new concepts into the Jordanian Civil Code such as joint liability (which was not known in the *Mejelle* or in Islamic jurisprudence, two main sources of the Jordanian Civil Code).

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man is free to dispose of his possession as long as no one disputes the same". Mu'een Al-Hukaam by Al Tarabulsi.
Or, *"We are restricted to the apparent acts and Allah will make man account for his hidden intents"*. Al Yamani, Vol 4, p 121

[2] Anis Al-Qasem, Arab Law Quaterly (4), Part 3, August 1989.

[3] Introduction by Shaikh Salman of the new Civil Code.

1. The distinction between civil and criminal liability

Secular legislators consider that some damage must occur to render a person legally liable for his act.

In some cases, a tort may affect society, rendering the tortfeasor liable to the State (as the representative of society); this liability is called criminal liability. In other cases, the effects of the tort are restricted to a certain individual or individuals, rendering the tortfeasor liable only to the individual or individuals who incurred the damage; this liability is called civil liability.

With regards to the Sharia, it should be noted that Muslim jurists defined each type of liability separately. As such, jurists allocated a special section for crimes divided into sections for homicide, crimes less than homicide, blood money, adultery, banditry…
The basis of such division was the applicable practices taken from the Holy Koran, the Sunna and the acts of the rightly guided caliphs.

Islamic jurists set down and arranged their ideas without theorising. They immediately dealt with human acts which create rights and obligations and then discussed the branches of those acts.

2. Distinction between contractual and tortious liability.

In general civil liability is an obligation to indemnify for the damage caused when the debtor breaches his obligation. If the breach is of an obligation arising from a contract, then the liability is contractual. If the breach is related to the public duty imposed by law on everyone not to cause damage to others, then the liability is tortious.

Islamic jurisprudence does not include the terms ‘tortious’ and ‘contractual’ liability as such. However, according to the person who wrote the thesis (p40/41), it does include evidence that Muslim jurists were aware of the distinction between these kinds of liability, especially in terms of indemnification. Indeed, it has been stated:

"Contractual liability is not based on liability in kind. The purpose of the contract is to create profit. The question is only the lawfulness of the contract. Liability should be established on the ground of whether the agreement to contract is invalid or is considered permissible. Contrary to this is the liability for events which cannot be expected. Therefore, this damage is indemnified in kind as stipulated in the provision and the decrease in the value of the damaged thing due to the damage is not permissible".[4]

With regards to contractual liability, it should be noted that liability in Islamic jurisprudence is not extinguished on replacing what is lost by producing something similar to what was contracted for. This is because the purpose of the contract is to obtain profit and benefit; therefore, the liability should be proportional to the agreement between the contractors and liability means to make good the proposed or expected profit.

With regards to tortious liability, liability gives rise to an obligation to provide a similar thing, the intention being to make good the damage. In a tortious liability situation the creditor and the debtor are third parties and strangers prior to the occurrence of the damage.

B. The basis of tortious liability: erroneous and strict liability.

As in many western countries, two contradictory theories have competed to be the basis of civil liability. The first theory, strict liability, states that justice requires indemnification of a person who incurs damage which is caused by the act of someone else. Therefore, the basis of liability is the damage, and the actor will be required to indemnify the injured person, even if he was not at fault. The second theory, fault-based liability, states that it is just and right not to hold a person liable if he has caused damage to another unless he has committed an error and, consequently, that he should be liable only to the extent of his error.[5]

[4] "Al Mabsut" Vol. 11, p80 by Al Sarakhsi.

[5] However, it seems noteworthy to say that the competition between these theories is secondary, because, as we will see, Islamic civil law is ruled by the principle according to which "injury must be removed".

1. **Erroneous liability.**

As said above, in this theory fault is a vital condition and the basis for establishing liability. Article 163 of the Egyptian Civil Code provides that every error that causes damage to a third party requires the party at fault to pay the indemnity to the third party. In this provision liability arises if three conditions are fulfilled: error, damage and a causative relationship between the two.

Error

It should be noted that "trespass" is an expression frequently used to refer to the act that causes damage in Sharia. Trespass is therefore the same as the element of error for modern jurists. The Sharia jurists did not clearly define trespass materially or morally; it is defined linguistically as the excess of a limit or a right. Therefore, it encompasses the notions of negligence, omission, and carelessness.

When a person exercises his rights within their limits, there is no liability. The Sharia jurists regard trespass as the occurrence of an objective incident, where indemnity is applicable, irrespective of the capacity of the trespasser or his intention. These elements are subjective internal circumstances and are therefore irrelevant to the evaluation of whether there is a trespass. However, if trespass occurs against a person, the Sharia takes into account the person who is at fault, and distinguishes between whether the actor is a discreet person or not. The adult will be held liable as he is deemed to be of full capacity as regards his intention, choice and discretion; while the minor[6] or lunatic will not be held liable the jurists did not expect full capacity of them.

For the modern jurists, the error that establishes tortious liability may be a positive act causing damage (positive error), or an omission to do an act that may by turn lead to a damage (passive error). Islamic jurists were aware of this distinction, although the expression they used was trespass by act and trespass by omission.

[6] It should be noted that in Islamic Law the age of discretion is 7 years.

Many modern jurists distinguish between different types of omission. Firstly, there are omissions related to acts (for instance, a person omits to cover a hole that he has created), and pure omissions (for instance, failure to rescue a drowning man).

It can be noted that the majority of jurists in France did not distinguish between these types of omission and decided that liability will arise whenever a person deviates in his behaviour from the behaviour of the ordinary person. In this respect, it can be noted that a French law issued on 25 June 1945 provides that omitting to provide help to a person in danger if it is possible to do so without suffering any personal risk is a crime.

In Egypt, the jurists do not see any requirement for such an obligation, as the omission to provide assistance is considered a breach of an ethical duty, not of a legal obligation.

Damage

- UAE Civil Transactions Law

The basis for liability in the Civil Transactions Law is the occurrence of damage alone in the case of a direct act, or damage arising from trespass in the event of an indirect act.

Article 282 of the Civil Transactions Law provides that *"Any damage done to another obliges the actor to compensate it"*.

Article 283 provides that "*If damage is direct, compensation is obligatory and unconditional*".

If the damage is direct, the criterion is objective and the basis of liability is not fault; whenever damage is incurred by someone, the actor will be liable to compensate for the damage.

Article 283 (2) further provides that "*If damage is indirect, it is stipulated that trespass or wilfulness must be present and that the act results in damage"*.[7]

Liability for a harmful act is not available unless a third party incurs damage as a result of such an act. Damage means anything that affects a person's rights or lawful interests. It may

[7] For example, if a rope by which a lamp is tied is severed, the lamp will fall. So, if the lamp breaks, this will be considered as direct damage to the rope and indirect damage to the lamp.

be material, which is connected with the victim's body or property. It can also be moral, which is connected with the person's feelings or honour.

Material damage has to prejudice a right or financial interest of the victim and it has to be certain. Therefore, damage is material if there is prejudice to the victim's rights, such as an assault on somebody's life, causing bodily harm, causing the victim to incur medical expenses or to suffer financial loss by hindering his ability to earn his living.

Blood Money

Islamic blood money is payable for bodily injuries or death according to a scale set by the Sharia jurists. Full compensation is payable for death and also for the loss of a bodily organ or the function of the organ if there is only one and it cannot be replaced. Multiple blood money compensation can be paid in case of multiple injuries.

Article 299 of the Civil Transactions Law says that when blood money is payable, no other compensation can be claimed in addition. However, the Dubai Cassation Court, either on the basis of an interpretation of Article 299 itself (which limits the article's coverage to payment for bodily injury and therefore permits material damages for other losses[8]), or by referring to Article 389 (which says that it is for the judge to determine the compensation for any damage, such compensation being intended to cover all the damage suffered) has changed this.[9]

Trespass against a victim's proprietary rights is also considered to be damage (for example damage caused to his house or any other property).

With regards to the condition of certainty, it should be noted that damage is indemnified if it is certain. It may be immediate or future. Immediate damage is damage that has actually occurred. As such, compensation is payable if the other elements of liability are present. Future damage which is certain to occur should also be indemnified. If the damage is unstable, the judge has to assess it as it is at the time of the judgment not as it was when it occurred.

[8] Dubai Appeal Case 325/20 (14/3/98)
[9] Dubai Appeal Cases 1048, 1065 and 2091 of 2000 (28/3/01).
It should also be noted that Article 4 of the Formation of Courts Law 1992 provides a hierarchy of sources of Law which the court is to apply and which puts Sharia in second place to specific Law.

It should be noted that UAE Law, like French Law, is familiar with the notion of "loss of a chance or opportunity". It is considered to be certain damage and therefore has to be compensated.

Also, moral damage is compensated in UAE Law. Article 293 of the Civil Transactions Law provides that: *"Indemnity is applicable to moral damage. Moral damage represents trespass against a third's party freedom, honour, reputation, social status or financial position." "It is also permissible to give an indemnity for spouses and relatives who incurred moral damage due to death of the victim".*[10]

The causal link.

To give rise to liability, a causative relationship has to be shown to exist between the harmful act and the damage incurred.

Like French and German Law, Islamic Law is familiar with two theories of causation; the theory of 'equivalence of conditions' and the adequacy theory.

Under the theory of the equivalence of conditions, every condition without which the damage would not have occurred (*conditio sine qua non*) is a cause of the damage; all these conditions are regarded equally.

Under the adequacy theory, only the main or effective reason is considered as causing the damage. If the act or omission is not effective on its own, it is seen as incidental and therefore irrelevant. For example, if a car owner did not take the care required to safeguard his car and someone steals it, and the thief then drives too fast and runs over a passer by, the negligence of the car owner is not a sufficient cause of the damage and he will not be liable for the passer by's injury.

The French Cour de Cassation has chosen to use the adequacy theory.

[10] This is contrary to the Egyptian Civil Code (Article 222(2)) which restricts moral damages for death to the second degree relatives.

With regards to the UAE, Article 284 of the Civil Transactions Law provides that: *"If the harm is both direct and indirect, the rules relating to direct harm shall apply"*.

Causes of exoneration.

Article 287 of the Civil Transactions Law provides that "*If it is established that damage arose from a foreign cause in which the actor played no part such as an act of God, sudden accident, force majeure, act of a third party or act of the victim, that person will not be liable to pay indemnity unless it is otherwise provided for by law or agreement."*
Act of God, sudden accidents and force majeure are similar because they refer to events that cannot be avoided or foreseen.

With regards to the act of a third party, the defendant is not liable if the third party is the sole, effective or dominant cause of the damage. However, if the defendant's act is the dominant or effective cause, he alone will be liable. If both acts are equally effective, Article 291 of the Civil Transactions Law provides that*:" If there are multiple liable parties for a harmful act, each one shall be responsible proportionately. The judge may rule equal, joint or several liability among them."* In a Dubai case, a driver was negligent whilst driving at night and came upon loose camels on the road. As a result he crashed the car causing serious injury to his passenger. The Court of First Instance apportioned liability 70% to the driver and 30% to the camel owner. The defendant's insurance company challenged this saying it should have been 20% to the driver and 80% to the camels owner. The Court of Cassation refused to intervene saying there were no evidence to change the apportionment which in any event was within the discretion of the Court of First Instance.

With regards to the act of the victim, if it is the only reason for the damage, or the effective cause, the defendant is not liable because the victim caused the damage to himself. If the damage is caused by both the victim and the defendant, then they may both be liable. If the act of the defendant is the effective cause, he shall be liable alone.

The consent of the victim may exonerate the defendant. For instance, if someone knowingly got into a defective car as a passenger and was injured, he has consented to his injury. As such, liability is divided between the passenger and the driver.

Compensation.

If liability is established, the liable party has to indemnify the victim for the damage. The meaning of indemnity is to make good the damage incurred by the victim. The indemnity should compensate for the entirety of the damage. Therefore, the indemnity should not exceed the damage. Any increase would be unjust enrichment. In such a case, the victim would have to repay the excess.

The indemnity is restricted to actual damage, whether it is expected or not and whether it is a loss, or a missed profit incurred by the victim. In this respect, Article 292 of the Civil Transactions Law provides *that "In all cases, the indemnity shall be assessed in accordance with the damage incurred by the victim and any lost profit provided that the same is a natural result of the harmful act."*

The assessment of indemnity is a matter for the judge of first instance and is generally outside the control of the Court of Cassation (Egypt and Dubai).

2. **Strict liability.**

The beginning of the nineteenth century was characterised by great industrial progress, and by the high risks included in such a development. The notion of fault as a basis for liability was not sufficient to face the new problems encountered by society. Therefore, some authors demanded a reconsideration of the 'fault element' of civil liability.

It should be noted that the concept of justice dominates Islamic jurisprudence and the Sharia, and the prohibition on causing injury or damage to others is central in the Islamic Law of obligations. Article 19 of the *Mejelle* provides that in Islam, there shall be no damage and no mutual infliction of damage. A direct consequence of the prohibition on causing damage is the obligation to make redress, as expressed in Article 20 of the *Mejelle***: "Injury must be removed**"; this is the cornerstone of Islamic civil liability.

Some authors have pointed out a major difference between European continental law and Islamic law: in European continental law, responsibility is based largely on the principle of negligence. If damage is not due to a person's negligence, he is not liable for compensation;

objective responsibility (non-fault based) is applied only in exceptional cases. In the Mejelle, objective responsibility is an essential principle.[11]

• Vicarious liability.

Islamic vicarious liability may be defined as the liability imposed on one person for the tortious act or omission of another which causes loss to a third person.

> "In the practice of tort law, the doctrine of individual tort liability is one of the foundations of individual security. The tortfeasor himself is the only person who can be sued for a particular tort action; no one else can be held liable for the same. This rule is called "the rule of strict liability". The rule of strict liability serves as a fundamental principle and as the bedrock of judicial acts under the Islamic law of tort, although many exceptions to that rule have been allowed in multifarious circumstances. Therefore, the terms "strict liability" or "vicarious liability" do not appear as such in the classical books.
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> "These exceptions are permitted to make allowances for justice and equity when the strict following of that rule might have prevented this."[12]

So For example, the UAE Civil Transactions Law contains different sections regulating: liability for personal acts, liability for the acts of third parties, liability for animals, things and use of the highway.

Strict liability may arise where liability is imposed on the employer for the act of his employee. Islamic civil law has divided employee into two categories:

- Exclusive employee: can be defined as a person working for a definite time and on a specific job; or a person hired to work for the employer alone, and not for another.
- Independent contractor: can be defined as a person who is hired and is not restricted by the condition that he is not to work for anyone other than the hirer. Vicarious liability does not encompass this category of workers.

[11] Law in the Middle East, ed., Khadduri (The Middle East Institute, Washington DC), Vol 1.
[12] Dr Abdul Basir bin Mohamad, *Arab Law Quaterly*, Part 2, May 2000.

With regards to exclusive employees, the fact that he has submitted himself and made himself available for the job, which is for the benefit of his employer, means that he will not be held liable for any damage which occurs which is not his fault, in the course of his duty, as he is working with the permission of the owner of the property. Therefore, the employer will be liable when:

- There is a warrant in the contract providing that the employee is to give his service for the benefit of the employer. However, if the commanded act concerns another person's property, the command will be null and void if the property owner had not given his consent, because the Sharia does not allow a person to exercise any action on another's property without his consent. Consequently, if a person commands another person to get hold of another's property illegally, the person who gets hold of the other's property is liable by virtue of the fact that the command of the first person is invalid.
- An injury to a third party has occurred whilst the employee was acting in the course of his employment within its range of activities.

If the above conditions are not fulfilled, the employer is not vicariously liable for any act or omission.

The reason for the liability of the employer for an injury which is caused by his employee is that his employee is his authorised representative. "Liability is an obligation accompanying gain". However; this does not mean that an employee is always exonerated from liability: if transgression or negligence on the part of the employee could be proved by the employer as causing the particularly injury or harm to the third party or his property, then the employee should not be free from liability.

As seen above, the principle is that a person is liable for his own acts only. However, the Dubai Court of Cassation in 2001 ignored this fact and applied the provisions of the Civil Transactions Law, namely Article 313(1) which states that *"No one shall be liable for a third party's act. However, the judge may, in accordance with the victim's request, obligate any one of the following as applicable to pay the indemnity adjudged on the person who caused the damage if he sees a justification thereto."*

This Article refers to the persons who are obliged to act as a custodian over others or persons who acts as principals over their subordinates.

With regards to the liability of the principal for acts of his subordinate, Article 313(1)b of the Civil Transactions law provides that liability may be on any *person "who has actual authority of control and supervision over the person who caused the damage, notwithstanding that he may not have had a free choice, if the harmful act was committed by a subordinate to him in or by reason of the performance of his job".*

The wording of this provision shows that the key concept that gives rise to liability is a relationship of subordination, which is based on two elements: the element of actual authority, and the element of control and supervision.

The element of actual authority is generally proven by the existence of a contract, very often a labour contract.

Control and supervision means that the principal has the authority to issue instructions to the subordinate and the authority to control the latter's execution thereof.

So for example, a physician who works on his own in a hospital is not considered as a subordinate. However, it should be noted that the principal is not required to be able to perform control and supervision in respect of technical matters. Therefore, a pharmacist is a subordinate of the owner of the pharmacy although the latter has no technical knowledge of the matter.