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Criminal Law

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Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan*

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project' seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to "think like a lawyer" for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney (J.D., 2014), under the guidance of Stanford Rule of Law Fellow Megan Karsh (J.D., 2009) and me. Jessica Dragonetti, Kara McBride, Cary McClelland, Neel Lalchandani, and Emily Zhang (J.D., 2015) are writing papers for the latter part of the series primarily concerned with Iraq's engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former and current presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, have provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors' responsibility.

ILEI plans to continue publishing working papers through 2014. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country's future.

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CRIMINAL LAW

I. INTRODUCTION

At its core, criminal law is about the kind of society we want to live in. On the one hand, we want to live in a safe society—criminal law seeks to protect the public from harmful acts by making those acts illegal and punishing people who commit them. These punishments will hopefully *deter* people from harming others in the first place, and will ensure that people who present a danger to society will be *incapacitated*—meaning they will be unable to commit future crimes while they are temporarily or permanently placed in prison. Safety also requires that we consider how to rehabilitate offenders of crime, to make sure that they do not reoffend when they return to society.

We also want to live in a *just* society. When someone is harmed by a criminal act, justice requires the perpetrator be caught, held to answer for the crime, and punished. But justice equally requires that innocent people are not punished for crimes they did not commit. Article 37 of the Iraqi Constitution states that "The liberty and dignity of man shall be protected." Criminal laws must make sure that the state cannot easily or arbitrarily deprive someone of their liberty. Justice requires more than a simple accusation—the state must produce evidence that proves a specific person committed a specific crime.

Beyond guilt or innocence, justice also requires that we consider what punishment is appropriate for a given crime. What if the offender is a homeless, starving child who steals a loaf of bread? Criminal law places value judgments on acts and the circumstances that give rise to them. How bad is it to steal bread? How should we punish someone who does it? How, if, at all, should the homeless child's particular situation influence our treatment of the case?

Criminal law tests the limits of our society's compassion and capacity to forgive. Some people may believe that certain crimes are unforgivable and that certain people are prone to criminal behavior and must be kept from society. Others may believe that crimes are a product of a person's circumstances, and that there is more to a person than the worst thing they have ever done. Most people probably fall somewhere in between. Ultimately, these beliefs about humanity and good and evil shape our laws of crime and punishment.

Throughout this chapter, we will explore the principles underlying Iraqi criminal law, using the Iraqi Penal Code as our guide. You will learn about guilt and innocence, and factors the court takes into consideration when deciding a case. By the end of the chapter, you should have an idea of what constitutes a crime, and how, why, and under what circumstances offenders are punished.

II. HISTORY OF CRIMINAL LAW IN IRAQ

In order to better understand the criminal law of today, it is necessary to explore the historical foundations of criminal law in Iraq. Thus, this section will briefly examine the history of Iraq's **codified** criminal law (see the Introduction above for a more detailed discussion of codification).

Iraq's criminal legal traditions have ancient roots, dating back more than four thousand years to the oldest known law code surviving today, the Code of Ur-Nammu from Mesopotamia. In fact, fifty of the more than 280 provisions of the ancient Code of Hammurabi are said to concern the punishment of crimes.[1] The Mesopotamian laws were successively replaced over the following centuries by Islamic law, then by the laws of the Ottoman Empire. Initial Ottoman criminal laws represented a hybrid of Islamic and other legal traditions, evidenced by criminal reforms undertaken by Sultan Suleiman, such as the replacement of physical punishments with fines for certain crimes.[2]

In the mid-to-late 19th Century, the Ottoman Empire conducted significant legal reforms, including the enactment of a new Penal Code in 1858 that was modeled on the French Penal Code. The Ottoman Penal Code remained the criminal law of Iraq until the onset of the British Mandate, when the Baghdad Penal Code of 1918 was introduced. While the Baghdad Penal Code was in large part based on the prior Ottoman criminal law, the British made significant amendments to the Code by incorporating provisions from the Egyptian Penal Code.

Iraq's first comprehensive criminal code as an independent nation was written in 1969. The Penal Code (Law No. 111) of 1969 is still in force today, although it has been amended numerous times over the last several decades. The Penal Code of 1969 is an extensive document consisting of over 500 articles and covering all aspects of substantive criminal law. Aside from articulating general principles of the criminal law, the Penal Code defines and codifies all crimes, ranging from offenses against the public welfare and the security of the State to offenses against private persons to offenses by public officials. Moreover, the Penal Code provides a systematic framework for determining the punishment of criminals. From a codification perspective, the adoption of the Penal Code was perhaps the most important development in criminal law in Iraq, and with its amendments, remains the primary law governing criminal behavior and punishment. Consequently, we will spend the majority of this chapter examining articles from the Penal Code.

Iraq enacted the Criminal Procedure Code (Law No. 23) of 1971 to govern all aspects of criminal investigation and adjudication. In particular, the Criminal Procedure Code covers the initial prosecution of criminals, the investigation and detention of suspects, the treatment of evidence, search and seizure, the jurisdiction of the criminal courts, the review of criminal judgments, and miscellaneous issues such as execution and pardons. Like the Penal Code, the Criminal Procedure Code of 1971 remains in force, although it has also been amended numerous times since its initial enactment. Because local law enforcement is not one of the powers constitutionally reserved for the central government, the Kurdish Regional Government is free to amend the Criminal Procedure Code as it sees fit. Furthermore, new laws and amendments originating in the central government after October 23, 1991 are not recognized as law in Kurdistan, unless they are separately enacted into law by the Kurdistan Parliament.[3]

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1. Professor Akram Nash'at Ibrahim, Modernizing Iraqi Penal Code to Serve and Protect Human Rights, Iraqi Judicial Forum (2004), available at http://gjpi.org/wp-content/uploads/judicial-system-modernizing-the-penal-code-10-04.doc, at 3.

2. See Constance Johnson, Iraq: Legal History and Traditions, The Law Library of Congress (2004), at 9.

3 Amendments to Criminal Procedure Code No. 23 of 1971 in the Kurdistan Region of Iraq (2009), available at http://gjpi.org/2009/09/21/amendments-to-criminal-procedure-code-no-23-of-1971-in-the-kurdistan-region-of-iraq/.

Consequently, there are significant differences between the procedural codes of the central government and the Kurdish Regional Government.

In the 1970s and 1980s, Iraq enacted additional laws related to crime and punishment including the Public Prosecutor Law No. 159 of 1979 and the Juvenile Welfare Law No. 76 of 1983. After the end of the Saddam Hussein regime in 2003, the Coalition Provisional Authority issued several orders suspending or modifying certain provisions and punishments contained within the Penal Code and Criminal Procedure Code.[4] The subsequent elected governments of Iraq introduced numerous amendments to these Codes, in addition to enacting statutes covering more specific areas of criminal law, such as the Military Criminal Procedure Law No. 30 of 2007, and the Internal Security Forces Penal Law No. 14 of 2008. As of the publication of this textbook, additional amendments to the Penal and Criminal Procedure Codes are being considered. Despite these ongoing developments, the codified criminal codes, dating back several decades, form the foundation of criminal law in Iraq today, and will be examined in later sections of this chapter.

Reading Focus

1. What are the two primary Codes that govern criminal law in Iraq?
2. Are criminal laws established at the federal or regional level?

III. CRIMINAL LAW BASICS

This section will introduce the basic principles of criminal law in Iraq. These principles are the foundation upon which the criminal justice system is built.

The first part of this section examines two basic assumptions of the criminal justice system: 1) the *presumption of innocence*; and 2) the *principle of legality*. The next section will introduce a set of ideas and rules that determine when an individual is criminally liable for his offensive conduct. These rules are often called the *principles of liability*. Finally, the third part of this section will explore the classification of crimes.

A. Foundational Principles

1. The Presumption of Innocence

First, let us consider the following scenario. You are walking near campus when a police officer stops you and begins to question you. The officer explains that the house next to yours was robbed the night before, and you are the primary suspect. You are innocent—you were asleep at

4. See, e.g., CPA Order 7 on Penal Law (signed 10 June 2003); CPA Order 31: Modifications of Penal Code and Criminal Procedure Code (signed 15 September 2003), available at http://gjpi.org/central-activities/criminal-law/.

home when the robbery occurred. You try to convince the police officer that you're innocent, but you don't have any evidence that you were asleep at the time of the robbery, and the officer does not believe you. He arrests you and takes you to jail. After spending a few nights in the local jail, you are taken before a judge. The judge tells you that you will be found guilty of the crime unless you can conclusively prove you did not rob the house. Is the judge's decision fair? How would you prove that you are innocent?

For those who believe the judge acted unfairly, you already have a sense of one of the most important assumptions of criminal law in Iraq: **the presumption of innocence**. Article 19 of the Constitution states: "The accused is innocent until proven guilty in a fair legal trial." If the state accuses someone of a crime but is unable to prove to the court that the defendant committed the crime, he must be set free, even if he is unable to prove he is innocent.

As you can tell from the examples above, it is extraordinarily difficult to prove innocence. While there will likely be some evidence tying the robber to the house on the night of the robbery, there may not be any evidence that conclusively proves you are innocent. Moreover, a person's liberty is often at stake in a criminal trial. If the defendant loses, he or she may go to prison, or in some cases, be killed. With such serious consequences, the state must be sure that they have the guilty person, and the only way is to force the state to prove that the defendant is guilty.

Note that this also means that some people who actually committed crimes might go unpunished if the court does not have enough evidence to prove that they are guilty. Unless the state has sufficient evidence to prove guilt, a defendant will be considered legally innocent and set free.

Discussion Questions

1. Have you ever been accused of something you did not do? How did it feel? How would you have proved your innocence?
2. Why does criminal law in Iraq contain a presumption of innocence? What are the practical reasons? The philosophical reasons?
3. "It is better for ten guilty people to go free than for one innocent person to be wrongfully punished." Do you agree? Why or why not? How is this related to the presumption of innocence?
4. Human Rights Watch reports that some suspects in Iraq are detained for months, even years, before their trial. How does this practice relate to the presumption of innocence?[5]

2. The Principle of Legality

The **principle of legality** requires all laws to be clear and publicly accessible, and prohibits retroactive increases in punishment. In the context of criminal law, this means everyone should be able to find out what is legal and what is a crime, and that no one should be punished for doing something that was not a crime at the time of the act.

5. See Human Rights Watch World Report 2013, available at: http://www.hrw.org/world-report/2013/country-chapters/iraq?page=1

This ban on retroactivity also applies in cases where the state attempts to increase the punishment for a certain crime after the fact. While the government is fully within its right to increase the sentence for a crime (assuming the punishment is not excessive), any new sentence cannot apply to those who committed a crime before the punishment was increased by law.

The principle of legality is clearly laid out in Article 19 of the Constitution. Article 19 states "There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed." Further, the Article continues, "Criminal laws shall not have retroactive effect, unless it is to the benefit of the accused." Thus, the government could retroactively *decrease* punishment because it would be to the benefit of the accused.

Discussion Questions

1. Imagine that the punishment for theft is one year. Hawre commits a theft on Wednesday. Then, on Thursday, the government decides to increase the punishment for theft to two years. On Friday, Hawre is caught and he is convicted on the following Monday. What should his punishment be? What if the new law lowered the punishment for theft from one year to six months?
2. Why do we have the principle of legality? If the government decides that something should be illegal, shouldn't it be illegal no matter when it was committed? Considering this question, imagine a world in which a person could be punished for something that was not illegal at the time they did it. Why might that be problematic?

B. Principles of Liability

What is a crime? When can we say someone is guilty of committing a crime? These are more complicated questions than they appear, and they will lead us into questions of public policy, morality, and human nature. Murder, theft, and assault are all crimes, but why are they illegal? Are there any instances when we think someone is less **culpable**—less blameworthy—for something we would normally consider a crime? Are there instances when we actually want someone to feel free to follow through with an act that would normally be a crime?

Criminal law in Iraq attempts to answer these questions by applying certain principles of liability. This section will briefly explore four such principles: 1) the concept of physical elements of a crime; 2) the concept of mental elements of a crime; 3) the principle of concurrence; and 5) and the principles of group criminality.

The goal of this section is not to make students experts in criminal liability, but rather to introduce certain fundamental theories. These subjects can be quite complicated even for legal scholars. For now, your objective should be to gain a basic understanding of foundational principles.

1. Introduction to the Elements of Crimes

Crimes consist of a number of parts called **elements**, all of which must be proven for a defendant to be convicted of that crime. For example, Article 420 of the Iraqi Penal Code states: "Any person who conceals or buries a dead body without notifying the competent authorities before it is discovered or an inquest carried out is punishable by a period of detention not exceeding 2 years plus a fine not exceeding 200 dinars or by one of those penalties."[6] Thus, for someone to be convicted of the crime of concealment of a dead body, the following two elements must be proven by the prosecutor: 1) the defendant concealed or buried a body; AND 2) the defendant did not notify the authorities before the body was discovered or before the judicial investigation was completed. If the prosecutor fails to prove either of these elements—even if he proves the other element—the defendant must be **acquitted**, which means he is found not guilty and set free.

For example, if the court finds that the defendant buried a body, but also finds that the defendant reported it to the authorities before the body was discovered and before the authorities had completed their own investigation, the defendant is not guilty of the offense. All elements must be proved for the defendant to be convicted of a given offense.

Under Section Three of the Penal Code, an offense consists of a physical element and a mental element. The physical element concerns the defendant's acts or **omissions** (the lack of an action), while the mental element concerns the defendant's knowledge or intent. The next sections explore the physical and mental elements of crimes.

2. Physical Offense Elements

The physical elements of a crime are those acts or omissions, taken together, that result in illegal behavior.[7] In other words, they describe things that individuals are not supposed to do. This conduct can be either affirmative actions (acts) or failure to take action when the law imposes a duty to act (omissions). "Acts" are straightforward, but the concept of "omissions" may seem somewhat counterintuitive at first. How can someone be convicted of a crime for *not* doing something? Let's look at an example.

Rawand is awoken in the middle of the night by screams from his neighbor's house. He runs outside, and finds that his neighbor's house is on fire. Rather than helping his neighbor contain the fire, however, Rawand merely watches. Soon, a police officer arrives and begins fighting the fire. He shouts to Rawand for help, but Rawand continues to stand and watch. Under Article 370 of the Penal Code, Rawand may be charged with the crime of failure to give assistance. Article 370 states: "Anyone who, without justification, refrains from or hesitates in giving assistance

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[6] Many of the fines listed in this text have been updated in the Iraqi Penal Code. The new financial penalties can be accessed at www.iraqld.com (Arabic only).

7. Article 28 of the Penal Code states, "The physical element of an offence is the criminal behavior involved in the commission of a criminal act stipulated by the Code or failure to carry out an act stipulated by the Code."

when requested to do so by a competent public official . . . at a time of fire . . . is punishable by a period of detention . . . ."

The **physical elements** of a crime are the elements that collectively form the act or omission in question. They are sometimes called the **objective offense elements** because they refer to a state of affairs or facts that objectively exist, regardless of how they might be perceived by an individual. For example, if Hawre takes a loaf of bread without paying for it. The objective elements of theft in this case are that 1) Hawre took the bread and 2) Hawre did not pay for the bread. These facts must be established to convict Hawre of theft, and they are either true or false—he either took the bread or he did not, and he paid for the bread or he did not. These objective elements do not depend on Hawre's intent to steal the bread, or anyone else's perception of the situation. Note that Hawre may not have intended to steal the bread and if intent is a requirement of theft, he may not be guilty. We will cover this in the following section: The Mental Element.

Discussion Question

Why do we make Rawand's *lack* of action a crime? Think of laws as **incentivizing** or **discincentivizing** behavior. What is the law trying to accomplish here?

3. The Mental Element

While physical offense elements concern what a defendant did or did not do, the mental element concerns the defendant's knowledge and intent. Why is intent important? One simple explanation is that society may not want to punish an individual for the unintended consequences of his actions (or may not want to punish him as harshly as someone who *meant* to commit the crime). Consider the example of a taxi driver who speeds through a crosswalk, killing a pedestrian. Imagine if the taxi driver knew the pedestrian and had gotten in a fight with him earlier that day. It might seem worse then if the taxi driver actually meant to run down the victim, and society may want to punish that offense more harshly than if the taxi driver was simply careless.

This distinction is evident in the Penal Code. Consider the differences between Article 410 and Article 411— both of them refer to the crime of assault that results in death. The mental elements are in bold.

Article 410:
Any person who **willfully** assaults another by striking or wounding him with the use of force . . . and who **does not intend to kill that person** but the assault leads to the death of such person is punishable by a term of imprisonment not exceeding 15 years. . . .

Article 411 – (1):
Any person who **accidentally** kills another or causes him to be killed **without premeditation** so that it is the result of **negligence**, **thoughtlessness**, **lack of due care and attention** or **lack of regard for any law**, regulation or decree is punishable by detention plus a fine or by one of

those penalties.

The mental elements in Articles 410 and 411 serve two purposes. First, the mental element distinguishes **willful** assault— where someone intends to strike or wound another person— from an accident. Because it is worse for someone to fatally wound another person intentionally, the penalty for doing so is much higher. Second, notice that Article 410 includes a second mental element— "who does not intend to kill that person." Why? Because if the perpetrator intended not only to harm, but to kill the victim, then the offense is **murder**.

Why does the Penal Code have any penalty for accidents? We all make mistakes, right? Remember that laws always come back to incentives and disincentives. This is a very serious accident that resulted in someone's death. Suppose Rawand decides he will impress his girlfriend by swinging two swords wildly in public. Much to Rawand's horror, one of the swords slips out of Rawand's hands and lands in his best friend's chest, instantly killing him. While we might not want to punish Rawand as if he had intended to kill his friend, it is important to disincentivize such reckless, dangerous behavior.

The Penal Code acknowledges that there are different levels of intent, and often distinguishes between offenses or punishments depending on the level of the mental element (as in Articles 410 and 411 above). Intent may be **simple** or **premeditated**. According to Article 33 (3), "Premeditation is the resolute contemplation of the commission of an offence before it is committed and is far removed from an outburst of jealous rage or mental turmoil." In other words, premeditated intent is when someone resolves to commit a criminal act and then attempts to carry it out; simple intent refers to all other times that someone intends to commit a criminal act. In the taxi driver example, if the driver decides that he will wait outside of the victim's office until the victim leaves work, at which point the driver will hit and kill the victim, the taxi driver has premeditated intent to kill and may be found guilty of murder. Now let's say the taxi driver is driving along when he sees a person who insulted him earlier that day. Suddenly filled with rage, the taxi driver slams his foot on the pedal, fully intending to hit and kill the pedestrian. The taxi driver had simple intent to kill, but the murder was not premeditated.

This is an extraordinarily important distinction, as premeditation may mean the difference between life or death for the taxi driver. Article 405, the provision for murder, states that "Any person who willfully kills another is punishable by life imprisonment or imprisonment for a term of years." Article 406 adds that "If such killing is premeditated," the offense is punishable by death.

But as we established above, people don't always *intend* to commit criminal acts, and they may be less **culpable**— or less blameworthy— depending on their mental state when they committed the crime. The Penal Code does not explicitly define unintentional mental elements, but the most common mental states that appear in the code are, in order from most culpable to least culpable: 1) criminal intent; 2) knowledge; and 3) negligence. The following table takes a closer look at what each level of culpability means in plain language:

Levels of Intent

- A person acted **willfully** when he hurt someone **intentionally**.
- A person acted **knowingly** when he didn't want to hurt someone, but he **knew** (or was reasonably certain) that he would hurt someone.
- A person acted **negligently** when he didn't mean to hurt anyone, and he didn't even know the odds of hurting someone were high, but he **should have known** the odds of hurting someone were high, and someone got hurt.[8] (Samaha 2004: 89)

When a crime contains a mental element—such as the words "intentionally," "knowingly," "willingly," etc.—the prosecutor must prove that element in order for a court to find the defendant guilty. Different crimes may have different mental elements, so it is important to consult the specific statute to determine what, exactly, the prosecutor must prove.

Let's take a moment to explore the concept of **reasonableness**, since it is the key to crimes in which negligence is the mental element. You may have already encountered it in other areas of the law, such as contracts (i.e. would a reasonable person have thought that Hawre's head nodding indicated acceptance of the offer?), but we will review it here because it is also an important concept in criminal law. In legal analysis, we often speak of the **subjective** and the **objective.** The subjective refers to the perspective of the specific person—how did *this* person, for example, the defendant, think, feel or act? The objective means the perspective of a neutral, reasonable observer—how would a reasonable person think, feel or act, if he were in the defendant's position?

If a crime requires the mental element of **negligence**, the defendant is guilty if a reasonable person in the defendant's position should have known that the odds of hurting someone were high, and someone got hurt. In that situation, the prosecution does not need to prove that the defendant knowingly or intentionally committed the crime; it is enough that a reasonable person in the defendant's position should have known the risk involved.

Finally, a certain class of crimes called **strict liability** offenses do not require the prosecutor to prove the defendant's mental state. To convict a defendant of a strict liability crime, it is enough for the prosecutor to show that the defendant is responsible for the act or omission (i.e., prove the physical offense elements). In other words, for this set of crimes it does not matter if the offender acted intentionally or made a mistake, he will be held criminally liable either way.

For example, Article 352 provides that "any person who contaminates the water of a public well or storage tank or reservoir or other such thing that is provided for use by the public by rendering it less suitable for the purpose for which it is used or accidentally causes such contamination is punishable by a period of detention not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties." Here the defendant will be held strictly liable for water contamination, and the penalty is the same regardless of whether the contamination was intentional or accidental.

8. The Penal Code sometimes uses the phrase "negligence, thoughtlessness, lack of due care and attention or lack of consideration for any law, rule or regulation."

Comparative Note

In the United States, another mental state— **recklessness**— is between negligence and knowledge. A person acted **recklessly** when he didn't want to hurt someone, but he knew the **odds** of hurting someone were **very high**, and someone got hurt. Why would reckless behavior be more culpable than negligent behavior? In the example of Rawand swinging swords in public, would that be reckless or negligent?

Discussion Question

1. If someone breaks a law by mistake, and she was not acting recklessly or negligently in any way, should she be punished? Why?
2. What is the rationale behind strict liability? What type of crimes do you think should be classified as strict liability crimes?

4. Concurrence

Now that you are familiar with physical and mental offense elements, consider the following scenario. Azad and his brother own a shop. The shop is having problems with rodent infestations, so Azad places poisoned food in the storeroom, hoping to kill the rodents. He immediately tells his brother what he has done, and warns his brother to stay away from the poisoned food. The next day Azad and his brother get into an argument. Azad becomes extremely angry, and tells his brother "I wish you would die!" as he storms out of the shop. That evening, forgetting Azad's warning, the brother eats the poisoned food and dies. Is Azad guilty of murder?

If we think about physical and mental offense elements, it seems that Azad should be held criminally liable. He poisoned the food that killed his brother (physical element) and he clearly stated that he wanted his brother to die (mental element). A simple case of murder, right? Wrong.

According to the principle of concurrence, Azad is not criminally liable for his brother's death. The principle of concurrence states that in order for a person to be held criminally liable, the mental element must trigger the physical element, or the elements must occur at the same time. Thus, because it was not Azad's intent to kill his brother when he placed the poisoned food, it is irrelevant that he later said he wanted his brother to die. He did not desire to kill his brother when he poisoned the food, nor did his desire to kill his brother lead him to poison the food. The mental element did not trigger the physical element, nor did the elements happen at the same time. As a result, Azad should not be held criminally liable for his brother's death.

5. Attempt

Imagine a man decides to kill his neighbor to take the neighbor's land. The man buys a gun and bullets, and goes out looking for his neighbor. When he finds the neighbor, he says, "I am going

to kill you so that I may take your land," points the gun at the neighbor, and pulls the trigger. But the gun misfires and the neighbor escapes. Should the man be punished for murder?

The law of **attempt** deals with crimes that never resulted in the harm. That is, the law of attempt becomes relevant when the defendant has *tried* to commit a crime, but has not managed to satisfy the physical element of an offense. For example, in the hypothetical above, the man has not killed anyone, and therefore has not satisfied the physical element for homicide. The question is whether he should be punished for trying, and whether he should be punished as harshly as if he had succeeded.

Articles 30 to 32 of the Penal Code answer these questions. According to Article 30, an attempt "is the initiation of an act with intent to commit a [crime] which is prevented or frustrated for reasons unrelated to the intentions of the offender." Article 31 sets out the punishments for attempts. For most offenses, the punishment for an attempt is half the maximum punishment of the crime. Thus, if the maximum punishment for an offense is ten years in prison, someone who attempts that offense but fails to cause the harm will be punished by five years in prison. For crimes punishable by death, an attempt is punishable by life imprisonment, and for crimes punishable by life imprisonment, the punishment for an attempt may be no more than fifteen years.

One of the most difficult situations in criminal law is determining exactly when a person's actions become an attempt. For example, in the hypothetical above, if the man had told his wife he planned to kill the neighbor, and the police found out about the plan, is the existence of the plan enough to convict the man of attempted murder? What if he had already purchased a gun and bullets? What if he had already purchased a gun and bullets and is apprehended on the way to his neighbor's house?

Article 30 of the Code declares that "the intention to commit an offence or preparations to do so are not considered an attempt unless otherwise stipulated by law." The key question, then, is at what point do "preparations" become an attempt? Legal scholars in many jurisdictions have addressed similar issues, and there is no consensus on the matter. Generally, the closer a person is to completing a crime, the closer that person is to an attempt. In the end, however, the question is one for the court to decide.

Discussion Questions

In the first scenario where the man pulls the trigger to kill his neighbor but the gun misfires, the man would almost certainly be guilty of attempted murder, punishable by life in prison. Is this a harsh or fair punishment given that no one was killed? Why does the Penal Code punish attempts almost as harshly as successful crimes?

6. Parties to a Crime

Until this point, we have been considering the question of when an individual should be held criminally liable for his own conduct. This section will consider the question of when several persons should be held criminally liable for conduct they plan or commit together. To address these situations, we must explore the concepts of **conspiracy** and **association**.

Why are conspiracy and association important? Imagine that two farmers conspire to steal livestock from a neighbor. The first man plans to distract the neighbor while the other takes the animals. Are they both criminally liable? Should they receive the same punishment? The answers depend on the law of conspiracy.

Now consider a slightly different hypothetical involving the same two farmers. This time, rather than forming a criminal plan, the men are simply talking about their neighbor. The first farmer mentions that the neighbor's livestock is the best in the province, and he knows the neighbor does not lock his gate or employ any guards. He further mentions he will be taking the neighbor to dinner next Thursday, so the house will be empty. Next Thursday, while the neighbor is away at dinner, the second farmer steals the livestock. Should both farmers be punished? Should they be punished as harshly as if they had both planned and taken part in the theft? This time, the answers depend on the law of association.

Conspiracy

Article 55 of the Penal Code defines **conspiracy** as "an agreement between two or more people" to commit a crime, "even though that agreement is in the initial planning stages or has been in existence only for a short time." Simply stated, a criminal conspiracy is an agreement between two or more persons to break the law at some point in the future. As the Code says, it does not matter if an agreement only involves the planning of a crime that was never carried out. The members of the conspiracy—often called conspirators—will be punished nonetheless.

Articles 56 and 57 describe the punishment for conspiracy, and Article 59 addresses the dissolution of a conspiracy. According to Article 59, a conspirator can fully escape liability for his role in a criminal conspiracy by promptly informing the authorities of the conspiracy before the crime is committed and before the authorities have begun any investigation of their own. If the authorities have already begun the investigation, he is not exempted from liability unless the information leads to the arrest of the conspirators.

Association

It can be difficult for novice criminal law students to distinguish between conspiracy and association. We have just seen that a conspiracy is two or more persons planning to commit a crime together, whether or not the crime is committed. **Association** is when an individual assists another in the **commission** of a crime (i.e., the crime actually occurs). Generally, the person who actually commits the crime is called the **principal**, while the person who assists the principal is called an **accessory**.[9]

9. Article 47 (3) provides that "any person who incites another in any way to commit an act contributing to an offence if that person is not in any way criminally liable for the offence" is a principal to the offence. In other words,

According to Article 48, someone is an accessory to a crime if they incite "another to commit an offence and that offence is committed" because of the incitement, or if they "conspire with others to commit an offence" and that crime is then carried out on the basis of the conspiracy.

Additionally, anyone who knowingly supplies the principal to a crime "with a weapon, instrument or anything else to commit" the crime, or "deliberately assists him in any other way to carry out those acts for which he has received assistance" will be considered an accessory. In all cases, however, the crime must take place as a result of the assistance given. Under Article 50, an accessory shall be treated as a principal offender (i.e., given the punishment prescribed by law for the offense he helped commit), unless the law stipulates otherwise.

Discussion Questions

1. Explain the difference between conspiracy and association. What is the rationale for punishing association more heavily than conspiracy?
2. Explain the difference between principal and accessory.
3. Is it possible for an individual to be both an accessory to a crime and part of a criminal conspiracy related to that same crime? If so, what punishment would the individual receive?

C. Defenses: Justifications and Excuse

Now that we have established the elements of crimes, let's explore scenarios in which we think someone should not be punished or should be punished less harshly, even though they technically committed the crime. For example, assaulting another person is illegal, but what if you are being attacked? Do you have any legal way to defend yourself? How are policemen permitted to kill others in certain situations?

Iraqi criminal law recognizes that sometimes individuals should not be held criminally liable (or should be less criminally liable) for their conduct even though the conduct satisfies all the requisite principles of liability. These defenses are divided into two categories: **justification** and **excuse**. Ultimately, when an act meets the criteria of either category and is considered a justification or an excuse for the act, the person will not be penalized. But there is an important distinction between the two. If you meet the requirements of a justification, it is as if the law says you did nothing unlawful—you were *justified* in doing the act. Justifications turn otherwise unlawful conduct into lawful conduct. Excuses, on the other hand, do not go so far as to consider your conduct lawful, but do eliminate the criminal penalty because the circumstances of the act were so unique that you are excused from liability.

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the principal did not physically commit the offense, but he is more criminally responsible for the offense than the person who physically committed it.

1. Justifications

***Necessity*:** Pretend you are a prisoner. Escaping from the prison would normally be a crime. But what if the prison starts burning and the only way to avoid death is to escape? If you ran away from the prison, would you still be guilty of the crime? Your intuition might be that you should not be held criminally liable because your conduct was necessary to save your own life. If so, you are right—the law recognizes a defense called necessity. When an individual successfully presents a necessity defense, there is no criminal liability because the law recognizes, under the circumstances, that the conduct of the accused was not unlawful. Thus, necessity is an example of a justification excuse.

Article 63 details the requirements to justify what would otherwise be a crime as an act out of necessity. The elements include (i) the act must be performed to protect yourself or others or your property or the property of others, (ii) from a significant or imminent danger, (iii) you did not cause the damage or have any other means to prevent the damage, and (iv) the response must be proportionate to the danger.

There is a great deal of ambiguity in the necessity defense that is dependent on the particular circumstances of an incident. The code does not specify how to determine whether an act is "proportional" to the danger, how to decide whether the danger is "imminent," or in what circumstances will a judge determine that you had "other means to prevent the danger." Ultimately, the judge will have to make a decision on a case-by-case basis by looking at the evidence and attempting to determine what a reasonable response to the situation would be.

Thus, in the prison example, even if there was a fire and you claimed it was necessary to escape, you would still have to meet the elements outlined in Article 63 before the judge would formally recognize necessity as a justification for your actions. In this case, the most relevant issue might be whether there was a way to avoid the fire without escaping from prison. Perhaps the fire was too small to be a significant threat, or perhaps there was another part of the prison where they told you to report where you would have been safe. In these situations, you might not get the benefit of the necessity defense and could still be held criminally liable.

***Legal Defense (Self-Defense or Defense of Property)*:** The idea of a legal defense is closely related to the concept of necessity, and it may help to think about legal defense as a type of necessity defense. Like necessity, legal defense is a justification, meaning that when action is proven to have been conducted in legal defense, the law considers that conduct lawful.

Article 42 details the requirements when self-defense of yourself, another, or your property are not a crime. The elements include (i) a person is defending himself or his property against a criminal act (or believes there is a threat of a criminal act), (ii) the authorities are not able to protect him, and (iii) there is no other means to stop the threat.

Articles 43-46 provide limitations on these requirements to prevent unnecessary acts of violence or murder in response to a threat. Article 43 allows you to murder another only in very limited circumstances, namely that you "reasonably fear[]" that death, serious injury, rape, or kidnapping *is likely to occur or is occurring*.

Recall the concept of reasonableness and its relation to subjective and objective offense elements**.** The subjective refers to the perspective of the specific person—how did *this* person, for example, the defendant, think, feel or act? The objective means the perspective of a neutral, reasonable observer—how would a reasonable person think, feel or act, if he were in the defendant's position?

In the case of self-defense, it is not enough to say that the defendant subjectively feared death, injury, rape or kidnapping. The defendant must show that a reasonable person would have feared death, injury, rape or kidnapping if they had been faced with the same circumstances as the defendant.

If you *reasonably* fear that someone is about to kill you, Article 43 and 42 would permit you to kill that person to stop the threat, provided the act meets the other requirements of Article 42. Article 44 is similar to 43 except in regards to property, allowing murder only to prevent arson, theft, burglary, or some other act on your property that is reasonably feared to cause death or injury.

Article 45 includes the requirement of proportionality, as seen under the necessity defense. It states that one cannot inflict "greater harm than is necessary" and that if you overstep what Article 42 allows, you will be responsible for the offense. Article 45 does lessen the punishment in many of these situations to a lesser offense, but you still would ultimately be guilty of an offense if your response is not proportional to the threat.

Performance of a duty**:** Article 40 specifically states that certain acts by public officials or agents are a duty that cannot be considered a crime. For example, if a police officer kills someone in the line of duty, it will not be considered a crime if it meets the requirements of Article 40. These include (i) the officer must have committed the act "in good faith" or (ii) that he was ordered to commit the act by a supervisor. These elements are necessary for police and other public officials to perform their duties given the nature of their work. Without this provision, a police officer might be afraid to get involved in a dangerous situation because he does not want to be at risk of committing a crime, or the police officer might disobey an order from a supervisor because he does not want to ultimately be responsible. Article 40 allows law enforcement and other public offices to operate effectively.

Exercising a legal right**:** Similar to Article 40, Article 41 describes other specific acts that can be performed without penalty. These include punishment of family members, surgical operations, acts of violence in sporting events within the rules of the sport, or an act of violence against someone caught committing a crime.

Loss of reason or volition (Intoxication)**:** Article 60-61 details when and why a loss of volition or reason due to insanity, intoxication, or the influence of drugs will release an individual from criminal liability. In regards to intoxication or the influence of drugs, Article 60 requires that the individual have been given these drugs *against his will or without his knowledge*. If the individual knowingly ingested the substances, then Article 61 states that the individual is guilty of the offense. If the individual had an intent to commit the offense beforehand, then it is

considered an *aggravating circumstance* (this will be covered in more detail in the section on Punishment).

***Juveniles*:** Juveniles are separately addressed under justifications because of the diminished decision-making capacity of most juveniles, particularly those of a very young age. For this reason, the law often does not hold children as accountable as adults for the same act. Articles 66 to 79 cover a variety of specific provisions for various age groups, from age 7 to 20, that modify the usual punishment, often negating the punishment altogether. The idea underlying these articles is that the youth in question is simply not as guilty as an adult would be for the same act, so the punishment cannot be as severe.

2. Excuse Defenses

Excuse defenses are similar to justifications defenses, though they have a significant, but subtle difference. If a justification defense applies, the act is justified and thus it is lawful. In the case of excuse defenses, the conduct in question is still considered unlawful. The defendant is excused from criminal liability, however, because of the defendant's status or mental state. Thus, we may say justification is generally concerned with the circumstances of an offense, while excuse is generally concerned with the defendant's ability to form the requisite intent. Excuses do not *justify* a crime, but they *excuse* a person from the penalty or reduce the penalty (called a mitigating excuse). The end result might be the same, namely, that a person might not serve any jail time or receive any penalty for an act that would otherwise be a crime, but the law distinguishes between these two categories.

Within excuses, as mentioned above, there are full excuses and mitigating excuses. Full excuses completely negate any penalty related to the offense; mitigating excuses reduce the penalty. Article 130 to 134 create two ways for a judge to reduce a penalty for a crime, (i) by creating a category for "mitigating excuses" which detail specifics of certain acts that might reduce a penalty, and (ii) by allowing the judge to reduce the penalty because "the circumstances of a felony or of the offender call for leniency."

There are two mitigating excuses that apply regardless of the offense: 1) an offense committed with “honourable motives” or 2) an offense committed “in response to the unjustified and serious provocation of a victim.”[10] This means that an individual who commits an act that does not meet any of the specific justification or excuse criteria, but is found to have had honorable motives or been unjustifiably provoked, may be given a more lenient penalty. The judge will have to look at the facts of the case to determine whether this mitigating excuse applies.

For example, if Rawand punches Asad, but only because Asad punched Rawand first, the court might take into account the fact that Asad started the fight. It's less clear what constitutes an honorable motive as the term is not defined by the code.

[10] Article 128 (1).

Violence Against Women and Legal Reform in Iraqi Kurdistan

Prior to 2000, in Kurdistan as well as the rest of Iraq, men had invoked the "honorable motive" provision after murdering female relatives over suspicion of adultery or in other honor killings. Article 409 of the Iraqi Penal Code specifically provides that, if a man finds his wife or girlfriend in the act of adultery, and in response he kills her or her lover immediately, he is punishable by a maximum of 3 years of detention.

Article 409 remains in effect for the rest of Iraq, but honor is no longer a mitigating excuse for crimes against women in Kurdistan. In 1992, shortly after the formation of the KRG, a group of Kurdish women organized a petition signed by 30,000 women to reform the law in Kurdistan.[11] Although the petition was unsuccessful and largely forgotten during the civil war, the Kurdish women's campaign resurfaced with renewed force in the late 1990s.[12] The group sought and obtained support from the international community and human rights organizations such as Amnesty International, and was ultimately successful in pressuring Kurdish parliament to change the law.[13]

On April 12, 2000, Decree No. 59 stated: "Lenient punishment for killing women or torturing them with the pretext of purifying shame shall not be implemented. The court should not apply articles 130 and 132 of the Iraqi Penal Code no. 111 of the year 1969 to reduce the penalty of the perpetrator." Law No. 14 of 2002 reads: "Crimes against women with the pretext of 'honourable motivation' will not be legally liable for lenient punishment and Articles 128, 130 and 131 of the Iraqi Penal Code no. 111 of the year 1969 will not be implemented."

The higher courts appear to be enforcing the new law. In 2003, the Erbil Supreme Court reviewed a 2002 case in which a lower court had sentenced a man and his brother to one year in prison for killing the man's wife and her lover. The Supreme Court resentenced the men to fifteen years in prison.[14]

Reading Focus

1. What is the difference between a justification and an excuse? Why is the distinction important?
2. What are the requirements for arguing that you acted in self-defense? How is self-defense related to reasonableness? Is self-defense a justification or an excuse?

[11] Nazand Begikhani, *Honour-based violence among the Kurds: the case of Iraqi Kurdistan*, *in* 'HONOUR': CRIMES, PARADIGMS AND VIOLENCE AGAINST WOMEN 209, 215-216 (Sara Hossain & Lynn Welchman eds., 2005).
[12] *Id*.
[13] *Id.*
[14] *Id.*

D. Classifying Crimes

Legal systems distinguish between serious crimes and lesser crimes for many reasons. Codifying this distinction can help standardize treatment of the guilty, thereby avoiding arbitrary or inconsistent punishment. Formal classification of crimes according to severity can also be helpful in other ways.

For example, when an individual is aware that certain conduct is classified as a serious crime and punished harshly, he knows that society has made a certain moral judgment about that conduct. That is, it is very important to society that individuals be deterred from engaging in that conduct. On the other hand, when conduct is classified as a less serious crime and only punished lightly, he knows that society is not as concerned about the ill effects of that conduct. Thus, by classifying crimes the law can broadcast societal values and influence the way individuals conduct themselves.

The Penal Code classifies three levels of criminal conduct in decreasing severity: **felony**, **misdemeanor** and **infraction**. Articles 25 through 27 explain the difference between them.

Article 25:
A felony is an offence punishable by one of the following penalties:

(1) Death
(2) Life imprisonment
(3) 5 to 15 years imprisonment

Article 26:
A misdemeanor is an offence punishable by one of the following penalties:
(1) Penal servitude or simple detention for a period of between 3 months and 5 years.
(2) A fine.

Article 27:
An infraction is an offence punishable by one of the following penalties:
(1) Detention for a period of between 24 hours and 3 months.
(2) A fine not exceeding 30 dinars.

The level of a given crime may vary depending on the circumstances of the offense. For example, if you drink a Coke at a restaurant and leave without paying for it, you committed theft, but it is a minor theft "punishable by a period of detention not exceeding 3 months or by a fine not exceeding 30 dinars."[15] In other words, it is an infraction. If you are caught counterfeiting keys with intent to use them in a theft, that action is a misdemeanor punishable up to 2 years in detention.[16] If a theft is committed between dusk and dawn and the thief is carrying a weapon, it is a serious felony and the penalty is death.[17]

15. Article 449.
16. Article 447.
17. Article 443.

Discussion Questions

How would you classify each of the following crimes? Is each one a felony, misdemeanor or an infraction?

- Murder where the punishment is life in prison.
- Theft where the penalty is two months in prison.
- Theft where the penalty is 2000 dinars.
- Assault where the sentence is 3 months in prison.
- Assault where the sentence is 6 years in prison.

The Penal Code also distinguishes between **ordinary offenses** and **political offenses**. Political offenses are those committed with a political motive, or that violate the political rights of either the public or an individual. All other offenses are classified as ordinary. Ordinary and political offenses differ in that life imprisonment replaces the death sentence for offenses that are political in nature, penalties imposed for previous political offenses are not taken into consideration at sentencing for a new political offense, and political offenses carry fewer incidental or supplemental penalties.[18] However, the Code includes a list of offenses that will not be considered political even if they are committed with a political motive[19], and they include a significant portion of the offenses that carry the death penalty, as well as any "dishonorable offence." Given that this could include nearly any offense, the distinction between political and ordinary offenses may carry little weight.

IV. PUNISHMENT

Punishment is one of the most important concepts in criminal law. Criminal laws derive their force from the threat of punishment. Without punishment, there would be no consequence for committing a criminal act, and it would be meaningless to define an act as criminal.

Moreover, most punishments result in a **deprivation of liberty**—imprisonment or detention—that can be extremely disruptive to a person's life, even if it is for a short time. Many convicted offenders lose their jobs and their homes when they are sent to prison, and many never regain them when they get out. To avoid unjustified deprivations of liberty, Article 37 of the Constitution establishes that “The liberty and dignity of man shall be protected,” and “No person may be kept in custody or investigated except according to a judicial decision.” Thus, if the criminal justice system seeks not only to deprive people of their liberty, but to justify it under the law, it is of utmost importance to understand why, how, and when we punish.

18. Article 22 (2). On conviction for a political offence, any penalty imposed for a previous political offence is not taken into consideration nor is there a subsequent toss of civil rights or privileges nor is the convicted person prevented from managing and disposing of his assets.

19. These include "Offences affecting the external security of the State, murder and attempted murder, attempts on the life of the Head of State, terrorist offences, and dishonorable offences such as theft, embezzlement, forgery, breach of trust, fraud, bribery and rape." Since these include nearly all offenses that might have resulted in the death penalty, it seems the distinction between political and ordinary offenses may

How should we punish someone who is convicted of a crime? To answer this question, we must first consider the purpose of punishment. Are we trying to deter the defendant in a particular case from committing future crimes? Or are we trying to deter others in the community from committing crimes? When we put the defendant in prison, is our goal to reform or rehabilitate him? Or are we mainly trying to **incapacitate** him by keeping him away from society? Or do people just deserve to be punished after they commit a criminal act?

You may have answered yes to all of these questions, yes to some, or yes to none. Whatever your thoughts on the issue, there is likely a legal scholar somewhere who agrees with you. There is no right answer when it comes to thinking about rationales for punishment, merely different schools of thought. This section will begin by exploring various forms of punishment and then examine the purpose of punishment.

A. Forms of Punishment

In the section on classification of crimes we looked briefly at how the Penal Code punishes offenders. Remember that punishments included monetary fines, imprisonment, and death. Chapter Five of the Penal Code describes these punishments in great detail. While it is unnecessary to cover each article here, there are some points worth noting.

First, there are two kinds of **incarceration**—penal servitude, otherwise known as **imprisonment**, and simple **detention**. Penal servitude is longer term, and the prisoner is forced to work while they are incarcerated. Simple detention is for a shorter period of time (usually one year or less), and the prisoner will not be forced to work.

Second, when it comes to punishment, courts generally have some **discretion** to tailor the punishment to the offense. Discretion means that the courts have some level of flexibility in their decision. Although in many cases, the relevant provision of the penal code will provide the court some guidance as to the appropriate sentence, ultimately the sentencing decision is up to the discretion of the court. Many articles in the Penal Code prescribe the maximum punishment for each offense (e.g. "X offense is punishable by a term of imprisonment not exceeding 7 years"), and some articles only prescribe the type of punishment (e.g. "X offense is punishable by imprisonment"). Similarly, the Code typically gives either a minimum or maximum for the amount of a cash fine, leaving the exact amount up to the court's discretion.

Finally, Articles 95 through 102 deal with incidental and supplemental punishments, or other rights and privileges that may be taken away from or denied a defendant because of his conviction. These rights and privileges include, among other things, the right to carry arms, the right to hold public office, and the right to participate in elections. The convicted person regains some of these rights when he is released from prison, and all of them within two years of being released from prison.[20]

20. Although some former prisoners may be placed under police supervision for up to 5 years following their release. See Article 99 (1).

Discussion Questions

In the United States, some incidental and supplemental punishments are permanent, regardless of the nature of the crime. In some states, if a person is convicted of a felony, he loses the right to vote in elections for the rest of his life. Non-citizens can be deported if they are convicted of certain crimes, even though deportation is not considered part of the criminal penalty. Discuss incidental and supplemental punishments. Do you think they should be temporary, like in Iraq, or permanent, like in the United States? Why or why not?

B. Theories of Punishment

The next sections will briefly examine four of the most frequently mentioned theories of punishment: 1) incapacitation; 2) rehabilitation; 3) deterrence; and 4) retribution. In considering each, we will explore the theory, major criticisms of that theory, and possible responses to those criticisms. Finally, a fifth section will be devoted to a discussion regarding the severity of punishment, and the theory that the punishment should fit the crime.

In exploring this section you may notice that punishments prescribed by one theory of punishment seem to also fit under a second or third theory of punishment. For example, a prison sentence can be labeled incapacitation, but it also involves elements of deterrence and retribution, and possibly rehabilitation, depending on conditions in the prison. Labeling punishments is an inexact science at best, as each punishment can naturally fall into more than one theory of punishment. Keep this in mind as you read, and consider how the theories overlap in practice.

1. Incapacitation

Incapacitation seeks to ensure that offenders are unable to commit future crimes. Under this theory, the primary goal of punishment is to render offenders incapable of criminal acts for the duration of the punishment. Incarceration is the most common form of incapacitation, and rests on the idea that an offender who is physically separated from society cannot harm society. Harsher forms of incapacitation include punishments that invade an offender's bodily integrity, such as amputation of a limb or loss of an eye. The most drastic form of incapacitation, of course, is death.

One of the major criticisms of letting incapacitation drive punishment is that the theory looks to past behavior and then incapacitates offenders to *prevent* future crimes from occurring. If the primary goal of punishment is to prevent future offenses by incapacitating those we think likely to commit future offenses—what stops the system from locking up those it thinks are dangerous, but have not yet committed any crime*?* This reasoning can be countered by pointing to the presumption of innocence as a check on preventive detention, and highlighting that we typically only punish those who have been found guilty by a competent court of law. Nevertheless, incapacitation rests on the assumption that future behavior is best predicted by past behavior—a supposition that you might find troubling.

2. Rehabilitation

According to the rehabilitation rationale of punishment, the primary goal of punishment should be to address the issues that lead offenders to commit crime and help them become productive, law-abiding members of society when they complete their prison sentence. Typically, this view holds that correctional facilities should be used to help offenders who can be helped, and incapacitate those who cannot be rehabilitated. In practice, the rehabilitation model often involves establishing programs in prison that help the offender reenter society. These programs—such as vocational training programs, basic education programs, and counseling programs—are designed to help offenders become productive members of society.

One of the major criticisms of the rehabilitation model is that it may be overly optimistic. That is, to base a penal system on rehabilitation means believing that short-term re-socialization programs can effectively change an offender's behavior. Opponents of rehabilitation argue that rehabilitation programs in prisons are ineffective because prisons are often also places of negative re-socialization where inmates are exposed to harsh treatment and antisocial behavior. Proponents often counter that there are certain offenses—drug-related offenses, for example—that are particularly responsive to treatment. Moreover, proponents point to the fact that most offenders will serve their sentence and return to the community. Therefore we should implement programs to help offenders reenter society, and reduce the risk that they will reoffend.

3. Deterrence

The deterrence theory holds the purpose of punishment is to reduce the number of offenses by raising the costs of committing an offense. For example, while an individual might vandalize public property if it costs him nothing to do so, he might not engage in vandalism if he knows he will spend two years in prison if caught. Thus, the deterrence theory essentially applies an economic cost-benefit analysis to punishment. That is, the deterrence theory asserts that if all individuals act rationally, they will not engage in criminal activity as long as the cost of committing the crime (the punishment) outweighs the benefit (the reward of the criminal activity).

Deterrence is often said to contain two separate but related ideas: **general deterrence** and **specific deterrence**. General deterrence focuses on the general prevention of crime by making an example of specific offenders. That is, the State makes the public aware of the punishment received by an individual offender to deter other individuals from committing the same crime in the future. Everyone knows that murder will carry a harsh punishment—possibly life in prison, even death—therefore most people are deterred from committing murder, no matter how much they dislike someone. Specific deterrence, on the other hand, focuses on deterring a specific offender. The aim of specific deterrence is to discourage an offender from future violations by making him aware of the consequences of his actions. If Hawre knows he will spend 10 years in prison if he commits theft a second time, he might be deterred the next time he considers stealing.

There are a number of standard criticisms of the deterrence model. First, some scholars take issue with the idea that all human beings act rationally (i.e., according to the cost-benefit analysis described above). These scholars argue that there are some people who will commit crime

regardless of the punishment. A second major criticism is that basing punishment solely on its deterrent effect may lead to excessive penalties. For example, if the State truly wanted to eliminate all crime, why not prescribe the death penalty for any criminal conviction, no matter how slight*?* While such a question may seem absurd when taken to such an extreme, if deterrence is the *only* goal, what is the State's incentive to keep punishment proportionate to the offense?

4. Retribution

The retribution theory of punishment is perhaps the hardest to define. It is based on the idea that society is morally bound to punish people who engage in criminal activity. The idea of retribution—at least for many of its proponents—is not, however, based on vengeance. In other words, the retribution theory does not hold that "criminal law exists to displace, or provide an outlet for, emotions that might otherwise give rise to private vengeance." Rather, it is based on the idea that people engaged in criminal activity deserve to be punished, and it is the mandate of society to bring about that punishment.

One major criticism of the retribution theory of punishment is that it stresses the inherent flaws of those who commit crimes, and places less emphasis on the situation in which the crime was committed. Opponents of retribution often point to environmental factors outside the control of the offender—poverty, childhood abuse, and exposure to violence, for example—as being partly responsible for the offender's behavior. An individual does not deserve to be punished, the opponents would argue, for things beyond his control.

5. Mixed (or Multiple) Theories

It should be clear at this point that no theory of punishment is flawless. Each has its advantages and disadvantages, its costs and benefits. Consequently, few people today hold any single one of these views in its pure form. Rather, there is a tendency both on the part of legal systems and human intuition to mix and match theories. That is, many of us may believe that it makes sense to be deterrence-oriented when thinking about corporate fraud or other business crimes, retribution and incapacitation-oriented as to murder, and rehabilitation-oriented as to drug offenses, or any other combination of theories.

C. Severity of Punishment

Whatever theory of punishment, after a defendant has been found guilty, the court must decide his **sentence—**the punishment imposed on a guilty party. As you'll recall, in most cases the law sets a maximum punishment, but leaves the exact punishment to the court's discretion. How does a court make this difficult decision*?* There are two criminal law theories that inform the sentencing decision: 1) the theory of aggravating and mitigating factors; and 2) the legal maxim that the punishment should fit the crime.

1. Aggravating and Mitigating Factors

The theory of aggravating and mitigating factors relies on the proposition that specific facts surrounding an offense should influence the punishment of the offender. In other words, society recognizes that all crimes of a certain type do not merit equal punishment. Amir's assault case may be very different from Rahim's assault case, and it would be unfair to punish them equally. Instead, punishment should consider the manner in which the crimes were committed and the history and background of the persons involved. Factors that are outside of the elements of the crime but merit in favor of a more severe sentence are called **aggravating factors**, while factors that merit a less severe punishment are called **mitigating factors**. Put simply, aggravating factors are facts that make the crime seem particularly bad or make the defendant seem particularly blameworthy and thus merit in favor of a more severe sentence. For instance, if Amir stabs a man ten times to make sure he is dead, that may be worse than if he stabbed the man once in the heat of the moment, and the man died.

Conversely, mitigating factors make the crime seem less bad or make the defendant seem less blameworthy, and thus merit in favor of a less severe sentence. For example, if Amir stabs a man who abused Amir since he was a child, the court might sympathize with Amir's motivations and give him a more lenient sentence even though he is guilty of murder.

Article 135 of the Penal Code provides the following general aggravating factors:

(1) The commission of an offence with a base motive.

(2) The commission of an offence while taking advantage of a defect in the victim's reason or his inability to resist or in circumstances in which others are unable to come to his aid.

(3) The use of brutal methods in the commission of an offence or the harsh treatment of the victim.

(4) The use by the offender in the commission of an offence of his position of employment or the abuse of any authority or influence deriving from such position.

(5) The abuse of public or trusted officer for private gain or the offering, granting or acceptance of some advantage in violation of the person's trusted or public official duties and the official abuse of the rights of others, or attempting to induce such abuse or violation.

If any of these factors are present, the court has the option of increasing the punishment, following the guidelines in Article 136. For example, if the penalty prescribed for the offense is life imprisonment, aggravating factors will allow the court to impose the death penalty. If the prescribed penalty is a term of years, the court can sentence the defendant to more than the maximum term of years allowed by the statute.

Article 137 requires the court to consider all mitigating circumstances—factors that call for a lesser sentence— and weigh them against the aggravating factors. Mitigating factors may cancel out aggravating factors, but this balancing is in the discretion of the court.

Discussion Questions

1. What are some mitigating factors that might be present in a theft case? Think about what might have led to the theft, and factors that might make the defendant less blameworthy or more sympathetic.

2. Imagine a 21-year-old son has been physically abused by his father since he was 5 years old. The father frequently comes home drunk, and beats both the son and the mother. One morning, the son overhears his father threaten to kill his mother. That night, the son stabs his father to death. Under Article 406, murder is generally punishable by life imprisonment, but it is punishable by death if there are certain aggravating circumstances. One such circumstance is if the victim is the parent of the offender. What are the mitigating circumstances in this case? How would you weigh them against the aggravating circumstances? What sentence would you give?

2. Proportionality in Punishment

We also want to make sure punishments fit the crime—that there is **proportionality** in punishment. For example, we probably feel that cutting off someone's hand is too harsh a penalty for fabricating a false driver's license, and doesn't particularly fit the crime. Similarly, we probably feel that a 10 dinar fine would be a grossly insufficient punishment for murder.

Cutting off the drunkard's hand is a clear example of a disproportionate sentence. Most of the time proportionality is more complicated. Consider prison sentences. The majority of crimes are punishable by a term of incarceration, differentiated only by the length of the sentence. Someone who committed a financial crime and someone who committed murder may be sent to the same prison, in the same conditions, with the only difference being how much time they spend there. Similarly, recall aggravating and mitigating factors. Often these factors will result in more or less time in prison. Someone who committed murder, but who was severely abused as a child, will still go to prison, only for less time.

If time is the only variable, is that sufficient to make a sentence proportionate to the crime? What does it mean to spend three years in prison, compared to five years in prison? Prisons are often degrading, inhumane, and dangerous places. In Iraq, and around the world, it is not uncommon for prisoners to sustain severe injuries or die while incarcerated, even if they were only sentenced to a few years.

Consequently, whenever we consider punishments for given crimes, it is crucial to think of what the punishment will actually look like, and whether it fits the crime.

Discussion Questions

1. When we sentence someone to three years in prison, are we sentencing them to prison *and* accepting anything that could happen to them in prison? If so, how do you reconcile that with proportionality?

2. First, without looking at the Penal Code, discuss what you think the maximum sentences should be for the following crimes. What aggravating factors might lead you to give an even higher sentence? What factors might mitigate in favor of a more lenient sentence? Then compare your sentences with those in the Penal Code. Do you think the Code got it right? Why or why not?

- Stealing silver candlesticks from someone's home, late at night while the family is sleeping inside.[21]
- Stealing silver candlesticks from a convenience store during the day. The offender doesn't harm anyone or break into the store; he places the candlesticks in his backpack and walks out, undetected.[22]
- A businessman who has declared bankruptcy hides the fact that he is bankrupt by destroying his accounting books. He then goes to banks and takes out loans based on his fraudulent accounting.[23]

3. Conciliation

It is sometimes possible to resolve a criminal case without punishment— through **conciliation**—where the victim forgives the defendant for the crime. Chapter 5 of the Criminal Procedure Code allows for conciliation in certain cases that normally carry minimal penalties. Chapter 5 of the Criminal Procedure Code allows for certain cases to be resolved by conciliation—where the victim forgives the defendant for the crime. In more serious cases, the State can proceed with the case even if the victim would prefer to forgive the defendant and drop the case.

Discussion Questions

Why might the courts want to continue prosecuting a defendant after the victim has forgiven him? Consider a case of domestic violence in which the victim, the spouse of the defendant, tells the court that they want to forgive the defendant and drop the case. They want to put the case behind them and return to a normal life. Think of the interests of the victim and the

[21] Article 443 (4). The penalty will be death . . . "if the offence is committed between dusk and dawn in a place of residence or a place set aside for that purpose or part thereof."

[22] Article 446. The penalty will be detention for an offence of theft committed in circumstances other than those stipulated in the preceding Articles.

23. Article 468 (1). The fraudulent bankrupt is punishable by a term of imprisonment not exceeding 7 years or by a period of detention of not less than 2 years.

interests of society in continuing to prosecuting this case.

V. CRIMINAL PROCEDURE

This chapter is devoted to substantive criminal law. Substantive criminal law, however, is only one half of the picture. The other half is criminal procedure—the theories and rules that govern the process of investigating and ultimately deciding a case. If the difference between substance and process seems a bit confusing at this point, it may be helpful to think about it in terms of "what" versus "how."

Substantive criminal law is generally concerned with questions of "what." What did the defendant do? What was his intent? Given his act or omission and his mental state, was it a crime? What offense did he allegedly commit? What law proscribes that crime? What are the elements of the offense?

Criminal procedure, on the other hand, is concerned with questions of "how." How do the police discover a crime? How should they treat suspects upon arrest and in interrogation? How does the court gather evidence? How is the defendant represented at trial? How are witnesses examined? In short, criminal procedure seeks to ensure that the accused is treated fairly and that the criminal justice system is impartial, effective, and efficient. To meet these goals, the rules of criminal procedure must apply equally to the police, prosecutors, defense attorneys, and judges, and must be standardized throughout the justice system.

Ultimately, criminal procedure acts as a safeguard against wrongful conviction and establishes requirements that the state must satisfy in order to violate the privacy of individuals. This latter requirement is enshrined in the Iraqi Constitution. Article 17 establishes that every individual "shall have the right to personal privacy so long as it does not contradict the rights of others and public morals," and further establishes the sanctity of homes: "Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law."

While the Constitution establishes the right to privacy and the sanctity of the home, criminal procedure defines the circumstances in which police may violate privacy and enter a home in accordance with the law. Criminal procedure will answer questions including: how certain do the police need to be that they will find evidence of a crime if they are allowed to enter the home? Can they search the entire home, or part of it? If the police see evidence of a crime through the window of a home, are they allowed to enter?

As you can see, criminal procedure is a complex, important topic. Procedural questions arise at every point in the case— from investigation to trial, conviction and appeal. Although this chapter only provides an introduction to substantive criminal law, a complete understanding of criminal law in Iraq requires knowledge of both substantive and procedural law.

VI. CONLUSION

In this chapter, you learned the basics of criminal law in Iraq. You studied the presumption of

innocence, the principle of legality, the principles of criminal liability, and defenses. You read numerous articles in the Iraqi Penal Code and learned to analyze them by their various elements. And you considered punishment and its underlying theories. You can now pick apart any criminal statute and examine the elements of the crime, the maximum punishment and any mitigating or aggravating factors.

As noted in the previous section, if you want a complete picture of criminal law in Iraq, you must also study criminal procedure. Although a book on criminal procedure will help you understand what is going on, the *best* way to study criminal procedure is to go to court and watch criminal cases. Article 19 of the Constitution establishes that all court proceedings are open to the public (unless there is some reason they should be made secret). This is your courtroom, your criminal justice system—go to court and watch how your system functions. As you sit in the courtroom, try to follow along and ask yourself the following questions:

- What was the offense?
- Where is it in the Penal Code?
- What were the physical and mental elements of the offense?
- What evidence was presented?
- Did the state prove its case?
- Did the defendant have an attorney?
- Was the defense attorney effective?
- How was the prosecutor?
- Was the judge fair?
- How would you have ruled?

Someday you may participate as a judge, a prosecutor, a defense attorney, a police officer, or perhaps you will remain a concerned citizen in the back of the courtroom. However you approach criminal law, remember that it is fundamentally about the kind of society you want to live in. As you read earlier in the chapter, 30,000 Kurdish women refused to accept that the law sanctioned violence against women, and they successfully fought to abolish the honor killing provisions in Kurdistan. This is your criminal justice system, it exists to protect you and it is acting on your behalf—take ownership of it.