Carrier's liability in air transport with particular reference to Iran

Kazemi, H.

CHAPTER 3

LAWS AND REGULATIONS IN IRANIAN AIR TRANSPORTATION

3.1 Introduction

Iranian law was codified according to the *Shariah* and under the influence of the civil law system. Before the Civil Code of Iran was written in 1928, the Iranian courts applied the *Shariah* principles and customary law to cases, and there was no written code.[1] Since 1928, the rules and principles of the *Shariah* have been applied to civil affairs including tort and contract, and have been codified in the Civil Code.[2] It was later supplemented by the Commercial Code and the Civil Liability Act 1960 which were adopted from civil law.[3]

Accidents involving domestic or foreign flights had been governed by these codes, since they had been the only enforced laws in this country. Thus if an air accident involving international flights was referred to an Iranian court, the court would have to adjudicate the case in line with the regulations of the Civil Code for liability and conflict of laws. For issues like nationality and personal affairs (such as when determining claimants and their beneficiaries), conflict of laws would refer to the claimant's domicile.[4]

In 1985, Iranian legislators passed the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' that extended limited liability under the Warsaw-Hague Convention to domestic flights.[5] However, after the Islamic Revolution, certain principles that were adopted from the *Shariah* were also applied to compensation for death or bodily injury in the territory of Iran under the Islamic Criminal code.[6] This law conflicted with limited liability in the Warsaw-Hague provisions when applied on air carrier

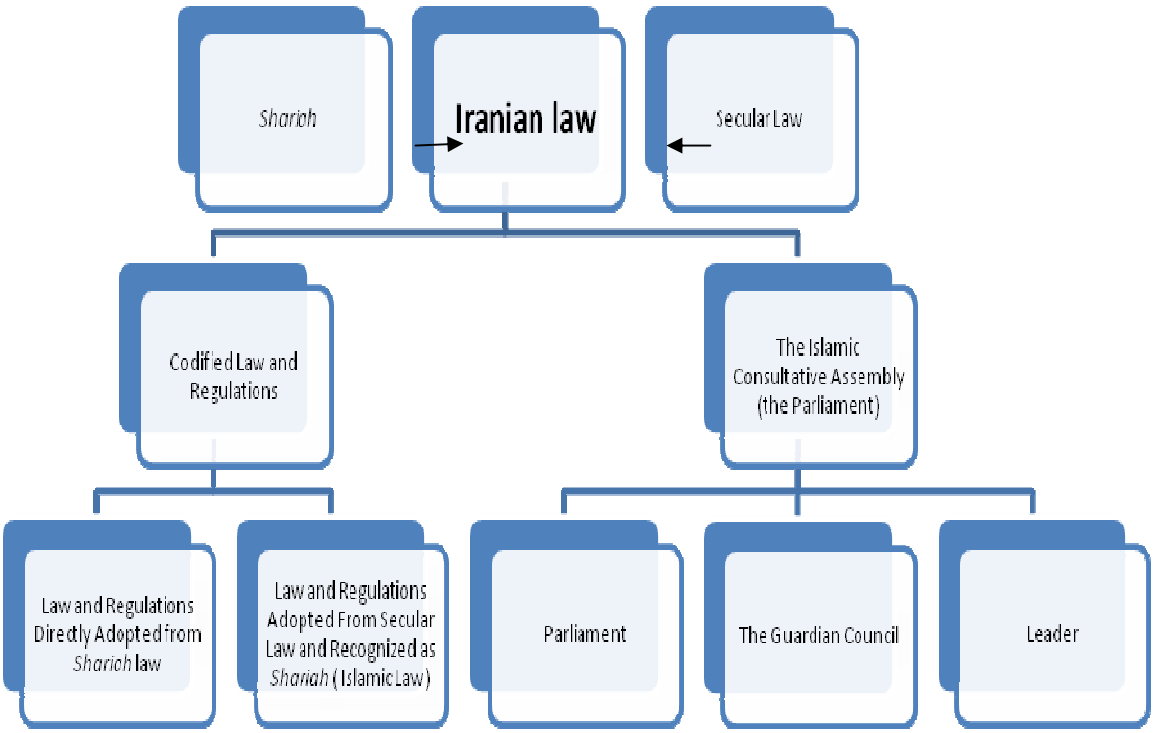
[1] S.H. Amin, *History of Iranian law (Iranashenasi)*, (1382 A.H. 2002), 346.
[2] Ibid., at 343.
[3] H. Sotodeh Tehrani, *Ghanoun -e- Tejarat* Vol. V (1385 A.H. 2005), 77-78
[4] See Arts.5-7 of the Civil Code.
[5] *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.
[6] See Arts.294-407 of the Islamic Criminal Code.

liability for death or bodily injury.[7] In order to find a solution to this conflict, the principles of liability in Iranian law is firstly studied as it is not be possible to understand Iranian law without comprehending the *Shariah*. This chapter therefore begins with a general exploration of the *Shariah* before investigating Iranian law and the impact, which the *Shariah* has on it through codification and the attempts made by the legislatures to make the law *Shariah*-compliant.

It then investigates liability principles in Iranian law. Chapter 3 ends by explaining international liability and Iranian law in order to lay the foundation for a discussion of liability principles under the *Shariah* and the Warsaw-Montreal regime in the next Chapter. Chapter 4 is designed to understand the conflict between the *Shariah* and the Warsaw–Hague Convention in Iran.

[7] See Chr. 4, *infra*.

Figure 1: Iranian Law



Iranian law operates under the influence of the *Shariah* (twelver *Shia*) and secular law, the former more so than the latter. Islamic legislature codifies, modifies and interprets laws and regulations according to *feqh* (Islamic jurisprudence). Laws and regulations are directly extracted from the authoritative books of *foqahā* (learned Islamic jurists) If their books do not address a particular issue, secular law will be adopted provided it is not contrary to the *Shariah*. This latter form of law is also considered as Islamic law. Courts have to observe the law and regulations which are codified, modified, and interpreted by the Islamic legislature. According to the Constitutional Code of Iran, if there is no specific regulation for a case, courts have to refer to the authoritative books of the *foqahā*.

Table1. Persian and Arabic transliteration of technical terms

Arabic	Persian
‘*aqd* (s) *uqūd* (pl)	*aqd* (s) *uqood* (pl)
āqil (s)‘*uqala* (pl)	*āqel* (s) *uqala* (pl)
‘*āqilah*	*Āqele*
‘*aql*	*aql*
‘*ibādah* (s) *‘ibādat* (pl)	*ebādat* (s) *ebādāt* (pl)
‘*ilm al usūl*	*elm-e-osul*
āfāt samawiyah	*afāt-e-samāvi*
al-ahkām al-taklifiyah	*ahkām-e-taklifi*
al-ahkām al-waz‘iyah	*ahkām-e-vazei*
Ali ibn abi Talib	Ali-ebn-e-abi Taleb
al-ijara	*ejāreh*
al-itlāf mubasharatūn	*etlāf -be-mobāsherat*
al-itlāf tasabbūban	*etlāf -be-tasbib*
al-qatl al ‘amd	*Qatl-e-amd*
al-qatl al-khata’	*Qatl-e-khataii*
al-qatl shibh amd	*Qatl-e-shebh-e-amd*
amanat	*amānat*
amin	*amin*
ayah (s*) ayāt* (pl)	*āyeh* (s) *āyāt* (pl)
dhiman	*zemān*
Dinar	*dinār*
Dirham	*derhām*
Diyah	*diyeh*
faqĩh (s) *fuqaha*’ (pl)	*faqih* (s) *foqahā* (pl)
fatwa	*fatvā*
fiqh	*feqh*
hadĩth	*hadis*
harām	*harām*
hukm (s) *ahkām* (pl)	*hokm* (s) *ahkām* (pl)
ijma‘	*ejmā*
ijtihād	*ejtehād*
Ithna ‘Ashariah	*Esnā Ashari*
itlāf	*etlāf*
J‘fari	*Jafari*
Jaf‘ar al-sadiq	Jafar-e-Sadeq
makrūh (s) *makrūhūn* (pl)	*makrouh* (s) *makrouhāt* (pl)
mandūb or *mustahab*	*mostahab*
mubāh (s) *mubāhāt* (pl)	*mobāh* (s) *mobāhāt* (pl)
mubashrat (s) *mubasharatūn* (pl)	*mobasherāt*
mughallazah	*moghallezeh*
muğtahid or *mujtahid*	*mojtahed*
Muharim	*moharram*
Mutahari	*Motahari*
qasb	*ghasb*

qisas	*Qesas*
Qur'ān	*Qorān*
ra' y	*Ray*
Safawi	*Safaviyyeh*
Shafi'i	*Shāfei*
Sharī'ah	*Shariyat*
Shi'a	*Shieh*
sunnah	*sonnat*
Sunni	*Sonni*
surah	*sureh*
talaf	*talaf*
usūl al-fiqh	*Osul-e-feqh*
vecalat	*vekalat*
wāğib (s) wāğibat (pl)	*vājeb (s) vajebāt (pl)*
waqf	*vaqf*
wasiyat	*vasiyat*

Since this study focuses on the Iranian legal system, the legal terminology and certain proper names will be transliterated from Persian to how they are pronounced by the legal community in this country. Although these terms come from the *Shariah* and the Arabic language, they have undergone changes in the Persian phonetic system. In spite of the fact that both languages use the same writing system, i.e. Aramaic alphabet, their sound systems are different. For instance Arabic has a [‘] sound for letter (‘ayn) in words like *Sharī'ah* and *Shi'a* that does not exist in the Persian sound system. Therefore although this letter (‘) exists in the written form of borrowed words from Arabic, it does not have a phonetic representation in the articulated words in Persian. There are, of course, other features like their vowel systems that distinguish the Persian and Arabic sound systems.

For the sake of those who might be familiar with Arabic pronunciation of these terms, the author provides a transliteration of Persian and Arabic pronunciations in table 1. However, he preserves the English spelling for Quran, *Shariah*, *Diyah*, *Shia* and *Sunni* throughout the study since these are more familiar to the western audience and English search engines usually use these spellings.

3.2 The *Shariah*

Muslims differ as to what exactly the *Shariah* entails. Different schools of Islamic thought hold different views of the *Shariah*.[8] Two major branches of Islam are *Sunni*[9] and *Shia*,[10] which have their followers in different States.[11]In this research, the *Shariah* is only studied from the perspective of the *esnā-ashari* jurisprudence (Twelver *Shia* school) because this is the tradition followed in Iran.

According to the constitutional code of Iran, firstly, the official religion of Iran is Islam and the Twelver *Jafari* school,[12] and this principle will remain eternally immutable.[13] Secondly, all civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations.[14] Thirdly, the Parliament cannot enact laws contrary to principles and regulations of the official

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[8] M.H. Kamali, *Principles of Islamic Jurisprudence* (1990), 6-15.

[9] There are four Sunni schools of jurisprudence (*feqh*). These are *Hanafi*, *Shafi'i*, *Maliki*, and *Hanbali*. The modern scholars look at these schools as jus commune. In terms of methodology, two schools of thought existed. First, there were those who maintained that the free use of human reasoning to develop the law was both legitimate and necessary. These jurists were called the people of *ray* or methodologists and later came to be the *Hanafi* and *Shafi'i* schools. Secondly, there were those who advocated the exclusive authority of precedents and traditions of the Prophet. They were called the traditionalists, who later represented the *Maliki* and *Hanbali* schools. See W. B. Hallaq, *The Origins and Evolution of Islamic Law* (2005), at 157; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 49-54.

[10] The *Shia*s are those who followed Ali ebn -e- abi Taleb, the Prophet's cousin and son-in-law. Its name derived from the Arabic for *shiat* Ali, i.e. 'the party of Ali'. *Shia* has three major subdivisions as well as numerous offshoots. The majority is called *Esnā Ashari* (Twelver *Shia*), because they recognize 12 Imams, beginning with Imam Ali. It is believed that the 12th Imam disappeared in 873 but will return as the Mahdi (literally meaning guide). Twelver *Shia* became the state religion of Persia (Iran) under the *Safaviyyeh* dynasty in the 16th century. Imam Jafar -e- Sadeq, the sixth Shia Imam, in rejecting the Abbasid political sponsorship, put forward his own ideological and philosophical viewpoint as the *Shia* school, and asserted that the leadership of the Muslim community was vested in Imams personally, as direct descendents of the Prophet. Therefore, the Iranians consider themselves Twelver *Jafari* School. M.B. al-Sadr, *The Emergence of Shi'ism and the Shi'ites*: in http://www.islamicecenter.com.

[11] H.P. Glenn, *Legal Traditions of the World*. (2007), 199-201.

[12] See footnote 10, *supra*.

[13] See Art. 12 of the Constitutional Code of the I.R. Iran.

[14] See Art. 4 of the Constitutional Code of the I.R. Iran.

religion of the country.[15] Fourthly, the judge is bound to endeavor to judge each case based on the codified law. In case of the absence of any such law, he has to deliver his judgment based on authoritative Islamic sources and authentic opinions of prominent *foqahā* (learned Islamic Jurists). He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.[16]

3.2.1 Definition of the *Shariah*

There are diverse and overlapping definitions in the way the term *Shariah* is used in the scholarly literature. They have delicate differences that need to be clarified. For the purposes of this study, three technical terms will be elaborated. These are the *Shariah* in general, the *Shariah* as Islamic jurisprudence, and the *Shariah* as Islamic law.

1. Generally, the *Shariah* is the code of conduct or religious law of Islam and is deemed as God's law.[17] The *Shariah* is derived from the holy text revealed to the Prophet Mohammad, known as the Quran. Muslims, from two verses of the Quran, believe that it is necessary for those who desire to obey God and to be loved by Him to follow the *Shariah* as introduced and practiced by the Holy Prophet and his true followers.[18] Muslims use the term '*Shariah*' to refer to these divinely inspired spiritual and worldly commandments, which cover actions of worship and behavior, as well as social and commercial transactions.[19]

2. Islamic jurisprudence as the *Shariah* is an effort to comprehend God's law with great precision by *foqahā*. Islamic jurisprudence is a chain of things that must exist, rather than a

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[15] See Art. 72 of the Constitutional Code of the I.R. Iran.
[16] See Art. 167 of the Constitutional Code of the I.R. Iran.
[17] M. Motahari, Jurisprudence and Its Principles: An Introduction to Islamic Sciences (1368 A.H. 1989), 21.
[18] In the holy Quran, the holy Prophet is told 'then we appointed you the religious-law (the *Shariah*) guide under our command, so follow the command.'(45:18) and in another place the prophet is told to convey to his followers: 'if you truly love Allah, then follow me in order that Allah be affectionate to you.' (3:31).
[19] See Motahari, *supra* note 17, at 21

chain of things, which already exist.[20] Islamic jurisprudence, which includes Islamic sources, the principles of jurisprudence (*osul-e-feqh*) and Islamic science (*feqh*),[21] is the field of study that fulfils this purpose.[22]

Since it is possible to refer, in particular ways, to the documents or sources of Islamic law and extract erroneous deductions, as opposed to the actual view of the *Shariah*, essentially there should be a special field of study that enables scholars to discern the correct and valid method of using the sources of Islamic law.[23] Islamic jurisprudence therefore becomes the reference point for deducing and extracting the laws of Islam by means of reasoning and through the guidance provided by God through the Prophet.[24] The *Shariah* as Islamic jurisprudence not only involves clear and explicit Quranic text and the Prophet's example,[25] but also includes the intellectual efforts of the *foqahā* in deducing or finding rulings whereupon the foundational text is silent or has not been explicit.[26]

3. Islamic law as the *Shariah* includes laws and regulations that are codified by Islamic States as contemporary legal terminology requires. The broad scope of the *Shariah* and Islamic jurisprudence makes it impossible for the concept to be compared with the term 'law' as used and understood in contemporary legal scholarship. If law is thought of as a body of binding rules for a community, the *Shariah* includes law and much else besides law. It would therefore be misleading to equate the *Shariah* with law.[27] Hence, in order to compare the *Shariah* with law, this needs to be narrowed down to topics that cover the social and commercial relations in a State. For the purposes of this study, the above limited topics are

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[20] Ibid.
[21] Ibid., at 22.
[22] H. Modarressi Tabatabaei, *An Introduction to Shia Law* (1984), 6-9.
[23] See Motahari, *supra* note 17, at 23.
[24] Ibid.
[25] Ibid.
[26] N. Coulsom, *Conflicts and Tension in Islamic Jurisprudence* (1961), at 23.
[27] B. G. Weiss, *The Spirit of Islamic Law* (1998), 17.

termed as Islamic law. Therefore, this thesis explores the *Shariah* from the perspective of contemporary legal scholarship, i.e. the *Shariah* as applied by Islamic States in codifying their laws.

3.2.2 Islamic Jurisprudence

Adopting the above definition, this thesis will explore the *Shariah* from the perspective of *Shia* jurisprudence. For this purpose, it refers to the main Islamic sources and books of the prominent *Shia* scholars. It introduces the four main sources of Islamic law before explaining the principles of jurisprudence and the classification of jurisprudence. It is worth noting that they are the main tools for judges and Islamic legislatures. This discussion will lead to a better understanding of the subject matters of subsequent chapters.

3.2.2.1 Islamic Sources

There are four main sources of Islamic law, with varying degrees of emphasis, common to all schools of law. These four sources of *Shia* jurisprudence are the *Quran*; the *Sunnah*; *ejmā*; and *aql*.[28]

(i) The *Quran*

There is no doubt that the Holy *Quran* is the primary source of Islamic laws and regulations.[29] However, the *ayat* or verses of this book are not limited to laws and regulations. Further, although it covers certain substantive legal rules, the Quran does not concern itself with all the diversified and detailed requirements of the law.[30] It comprises 114 chapters (*sureh*s). Each chapter is made up of a different number of verses. Hundreds of different types of

[28] M.R. *Muzaffar, usūl -e- Fiqh* (1365 A.H 1986), at 104.
[29] Ibid., at 42-60.
[30] Ibid, and See M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), 129.

issues were introduced in them but only a part of the *Quran*, about five hundred verses from a total of six thousand six hundred and sixty (i.e. roughly a thirteenth of the *Quran*), pertains to laws.[31]

(ii) The *Sunnah* (Tradition)

When there was no explicit Quranic verse on a particular point, Muslims resorted to the *Sunnah*, which was originally taken as the prevailing Arabian customary law. As time passed, the notion of *Sunnah* became more restricted and it was finally taken to be confined to the traditions of the Prophet. In this way, the second source of law, i.e. the *Sunnah* developed. The *Sunnah* means the words, actions and assertions of the Prophet.[32] That is, where a certain law had been verbally explained by him, or how he performed certain religious obligation, or where others had performed certain religious duties in his presence in a way, which earned his blessing and approval. *Foqahā* would consider the action to be the actual law of Islam.[33] The traditions, having received the status of a source of law, were preserved in writing. In Islamic law, the *Sunnah* ranks second after the *Quran* as a source of law.[34]

(iii) *Ejmā* (Consensus of Opinion)

Consensus means the unanimous view of the Islamic jurists on a particular issue.[35] Consensus is binding, because if all Muslims have one view, there is a presumption that the view has been received from the Prophet. It is impossible for all Muslims to share the same view on a

[31] See Motahari, *supra* note 17, at 26.
[32] S.H. Amin, *Islamic law and Its implications for the Modern World* (1989), 2.
[33] See Motahari, *supra* note 17, at 26.
[34] See Amin, *supra* note 32, at 10-11.
[35] See Motahari, *supra* note 17, at 28.

matter, thus their consensus proves that the origin of that view is the *Sunnah* of the Prophet or an Imam.[36]

If at any time a consensus is reached on a particular issue among all Islamic jurists, with no exception, it will bind people of that time era. However, it is not binding on subsequent Islamic jurists.[37] Thus, consensus is not genuinely binding in its own right. Rather, it is binding inasmuch as it is a means of discovering the *Sunnah*.[38]

(iv) *Aql* (Judicial Reasoning)

What is reasonable is law and what is law is reasonable, i.e. every individual rule of law has its own rationality.[39] When in a given instance there is not any authority either in the textual source or in consensus, the subject of the law is required to do what human reasoning commands in the circumstances.[40] An Islamic jurist has to first search the *Quran*, then the *Sunnah*, and only afterwards the consensus to find out the rules applicable to a case before him. If there is not an appropriate legal authority or the texts are not clear enough, he is authorized to apply an accepted principle or an assumption, which according to his wisdom and knowledge might fit the problem best.[41] *Aql* is accepted as a supplementary source of law.[42]

The binding testimony of reason means that if in a set of circumstances reason has a clear rule, then that rule, because it is definite and absolute, is binding. The true and divine points of Islamic law exist independently in the divine knowledge, and Islamic jurists may or may

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[36] See Amin, *supra* note 32, at 21.
[37] Ibid.
[38] A.H. Mohammadi, *Osul-e- Estenbat -e- Hoqooq -e- Islami* (1385A.H. 2006), 201.
[39] See Amin, *supra* note 32, at 11.
[40] Such instances of using human reasoning in the course of making judicial decision include the case where if textual sources demand a given performance, the human reasoning would resolve that all the prerequisites for such a performance are also obligatory. Ibid., at 12.
[41] See Motahari, *supra* note 17, at 25-26.
[42] Ibid., at 32.

not arrive at the same.[43] Closely connected to the notion of human reasoning is the unity between *aql* and the *Shariah* as a whole. They are necessarily linked, especially in the sense that legal rules made by *aql* must be regarded as parts of the *Shariah* and people must obey them. The task of jurisprudence is mainly the vindication of the conviction of full agreement between law and reason, rejecting disagreement between them.[44]

As mentioned above, *aql* is a supplementary source of law in Islam. Where there is no explicit discussion about a particular matter in the *Quran* and the *Sunnah*, Islamic legislators and *foqahā* use this source to develop legal rules in accordance with the *Quran* and the *Sunnah*, to regulate social relations. Thus, its function is limited either to interpret the exact meaning of the *Quran* on the one hand, or to work out appropriate legal solutions when there is no provision in other sources of Islamic law on a specific issue.[45]

Islamic legislators and *foqahā* should observe the *Quran* and the *Sunnah* when providing their opinions. For instance, because there is no specific rule in the *Quran* for carriage by air, they who establish rules in this regard need to observe Islamic resources. Since air carrier liability principles are derived from general liability principles, the following section will discuss the general rules governing liability in the *Shariah*.[46]

3.2.2.2 Principles of Jurisprudence (*osul -e-feqh*)

The *osul-e-feqh* assists the study of the rules used in theorizing the *Shariah*.[47] Since it is possible to refer, in particular ways, to the documents or sources of Islamic law and extract erroneous deductions, as opposed to the real view of the *Shariah*, essentially there should be

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[43] M. Ansari, *Farā'id al-Usūl* Vol. I (1407A.H. 1986), 270-271.
[44] Ibid.
[45] Believing in human reasoning (*ejtehād*) as a supplementary source of law, the *Shia* jurists utilized their juristic reasoning continuously. See Motahari, *supra* note 17, at 44.
[46] Ibid. at 45.
[47] Ibid.

a special field of study that enables the *foqahā* to discern the correct and valid method of using the sources of the *Shariah*.[48] Therefore, the principles of jurisprudence is, in reality, the study of the rules to be used in deducing the *Shariah* and it teaches us the correct and valid way of deducing from relevant sources in jurisprudence.[49]

The most prominent person in *Shia* school, to have compiled books on principles and whose views were discussed for centuries is Mortaza' Alam al Huda (who died in 436 A.H.). His most well-known work was the al-Dhariyah.[50] The approach introduced by him has been followed by the *foqahā* to the present day.

3.2.2.3 Classification of Jurisprudential Issues (*feqh*)

Feqh as such is the end product of *osul-e-feqh*. It is concerned with the knowledge of the detailed rules of the *Shariah* in its various branches, in other words, it is the law itself.[51] The domain of jurisprudence is extremely wide. It contains all issues for which Islam provides instructions. The term '*feqh*' is the extensive, profound knowledge of Islamic instructions and realities and has no special relevance to any particular division.[52] However, it gradually came to be especially applied to the profound understanding of the *Shariah*.[53]

Shariah teaching has been divided into three parts: 1) the realities and beliefs, 2) morality and self-perfection, and 3) the law and issues of actions. Islamic jurisprudence has termed this last division *feqh*. Since the early days of Islam, the laws have probably attracted the most attention and queries.[54]

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[48] See Kamali, *supra* note 8, at 12.
[49] See Motahari, *supra* note 17, at 22.
[50] Ibid., at 12.
[51] See Kamali, *supra* note 8, at 12.
[52] Ibid.
[53] See Motahari, *supra* note 17, at 35-36.
[54] Ibid.

Foqahā have divided divine laws into the law of human duty (*ahkām-e-taklifi*) and the law of human status (*ahkām-e-vazei*). The laws of duty include those duties, which contain obligations (*vājebāt*), prohibitions (*moharamāt*), desirables (*mostahabat*), undesirables (*makrouhāt*), and permissibles (*mobāhāt*). The laws regarding status differ from the laws regarding duty. The former consists of 'do's' and 'don'ts', commands and prohibitions, or the giving of permissions; while the latter concerns status like marriage and ownership and the rights thereof.[55]

The famous *Shia* books classify all issues of jurisprudence into four parts: worship, unilateral and bilateral contracts one-party contracts, and *ahkām*. If they are of the first type, like prayer and fasting, they are termed in jurisprudence as worship (*ebādat*).[56] If an act depends upon the execution of a contract, the contract could be unilateral or bilateral. Bilateral contracts like selling and hire, deposit are called *aqd*.[57] Acts that do not depend upon the execution of a special contract, like inheritance, punishments, and compensation are termed *ahkām*.[58] The basis of liability for death or bodily injury and damage should be studied under principles and regulations of *ahkām* in Twelve *Shia* school. *Ahkām* regarding liability in the *Shariah* in Iranian law will be discussed below.

3.3 Iranian Law

The Constitutional Code is the most important legal text that establishes Iran as an Islamic Republic that implements the *Shariah*.[59] An Islamic government is not like any other government in the contemporary era. It is a regime of Caliphate and Imamate exclusively

[55] Ibid.
[56] See Kamali, *supra* note 8, at 42.
[57] Ibid.
[58] See Motahari, *supra* note 17, at 36.
[59] See Art. 4 of the Constitutional Code of the I.R. Iran.

defined by the Islam. Although its people exercise their right by participating in the shaping of legislature power, God's right is observed by accepting Islamic principles as the base of government.[60]

On the one hand, God created people and send Messengers to guide them. On the other hand, people have the free will to choose the right path or not.[61] The Islamic government receives its legitimacy from the people. Constitutionally, therefore, people are at the top of the power hierarchy pyramid in Iran. Thus, the nature of legislation and sovereignty in the Islamic Republic of Iran is based on divine and human foundations.[62]

The Constitutional Code has accepted the separation of powers among the Legislature, the Judiciary, and the Executive. Each is responsible for a part of government and implements its duties through its related organizations.[63] Although it seems that power should be restricted to those three bodies, a close look at the other articles of the Constitutional Code reveals other sources that are independent of the three powers.[64] In addition to the three powers, those sources also have a right to draft legislation.[65]

3.3.1 The Multiplicity of Islamic Legislatures

Before the Islamic Revolution, there were solely two legislative bodies: the National Parliament and the Senate. However, since the *Shariah* became a fundamental principle in the Iranian jurisdiction for all laws and regulations after the revolution,[66] the Constitutional Code consequently envisaged different means of supervision in its aim to make the law *Shariah*-

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[60] See the Preamble of the Constitutional Code of the I.R. Iran.
[61] The holy *Quran*, *Sureh* 76:2-3.
[62] See Art.56 of the Constitutional Code of the I.R. Iran.
[63] See Arts.57, 58, 60, 61, 156 and 174 of the Constitutional Code of the I.R. Iran.
[64] These bodies are the Councils, the national radio and television organization, the national Security Council and the Expediency Council (See Arts. 7, 75, 176 and 112 of the Constitutional Code of the I.R. Iran).
[65] M. Nasiri,*Tafkik -e- Ghova dar Jomhouri -e- Islami -e- Iran* (1380 A.H. 2002), 35-72.
[66] See Art.4 of the Constitutional Code of the I.R. Iran.

compliant. This is because, in the post-Revolution era, in addition to the fact that laws had to be in conformity with the *Shariah*, other entities were established alongside the Parliament that have rights equal to legislation and their opinions affect existing laws.

Due to the structure of the Constitutional Code, several legislatures have key roles in the field of air transport industry. Some of them are directly involved in the legislative process such as the Islamic Consultative Assembly (Parliament) which enacts necessary regulations for the operation of air transport in Iran. Others, such as the Guardian Council of the Constitution, the Leader (*velayate faqih*), and *foqahā*, have crucial and key roles in the process of codification and interpretation of laws and regulations, especially those relating to air transportation and air carrier liability. Indeed, their impact has always been greater in these areas than in ordinary laws. This led to a multiplicity of legislative bodies.

In order to understand the process of making the law *Shariah*-compliant, it is necessary to be acquainted with the multiplicity of Islamic legislatures in the post-Revolution era.

3.3.1.1 The Islamic Consultative Assembly (the Parliament)

The State's legislature works through the Islamic Consultative Assembly. Its enactments, after fulfilling legal procedures, are submitted to the executive and judiciary for implementation.[67] The Constitutional Code has set specific duties for the Legislature. These can be summed up as legislation and supervision.[68] The Parliament, together with the Guardian Council, makes up the Legislature. The former has the responsibility to enact laws and regulations. The latter is responsible for supervising the compatibility of these laws and regulations with Islam and the Constitutional Code.[69]

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[67] See Art.64 of the Constitutional Code of the I.R. Iran.
[68] See Arts.58, 71, 88 and 89 of the Constitutional Code of the I.R. Iran.
[69] J. Madani, *Hoqooq- e- Asasi* (1382 A.H. 2000), 16.

Chapter 5 of the Constitutional Code deals with Legislature through the Parliament.[70] The Parliament cannot enact laws, which are contrary to the principles and rules of the *Shariah* or the Constitution.[71]

By referring to Islamic jurisprudence, the Parliament paraphrases these principles into contemporary language with a formal format, in order to provide clear and straight forward regulations applicable to daily life. Thus, besides the public interest, the Parliament should observe Islamic principles and the Constitutional Code, which are regarded as the most important public interest. Observing these limits is obligatory, as the enactments cannot otherwise be put into practice.[72]

In relation to its general duties and the heavy workload involved in enacting laws and regulations, the Parliament has established permanent and temporary commissions. Representatives for these commissions are selected based on their backgrounds and specialties, and the State's priorities at any particular point in time.[73] There are different commissions in the Parliament. Every commission consists of a number of representatives who carry out the preliminary research for the codification of regulations on different issues, and present them to the general sessions of the Parliament for final discussions and approval.[74] The Transport and Civil Commissions are responsible for air transport. They affect the transport industry in two ways:[75]

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[70] Another legislative method is through a referendum but this rarely happens. See S.M. Hashemi, *Hoqooq -e-Asasi Jomhouri Islami Iran* Vol. II (1371 A.H. 1993), 105.
[71] See Art.72 of the Constitutional Code of the I.R. Iran.
[72] Ibid.
[73] See Art.34 of the Assembly's Internal Code of Conduct.
[74] See Hashemi, *supra* note 70, at 141.
[75] Ibid.

1. The Transport commission has a pivotal role in the approving or disapproving of Bills related to air transport such as bilateral air transport agreements, and laws relating to air carriers.

2. In the case of an air accident, the Civil Commission instantly participates in and supervises the procedure of the investigation. The commission is diligent in finding the causes of accident, and follows up with payment of compensation to injured parties.

3.3.1.2 The Leader (*velayat-e-faqih*)

The Leader stands above the three organs of power in the Islamic Republic of Iran. The Constitutional Code clearly recognizes his power over all the aforementioned three powers in all sectors and organizations, and explains his rights and responsibilities.[76]

These rights and responsibilities reflect the system and its approach towards leadership. In Iran, the Leader, as a religious leader, enjoys enormous power. He is at the pinnacle of the governmental pyramid,[77] and, as the Constitutional Code makes clear, his orders are legally binding.[78] The Leader has executive, legislative, confirming, and judiciary dominance over the affairs of the society through the three organs of power and other entities. In other words, the governing powers in the Islamic Republic of Iran act under his control.[79]

Therefore, the Leader can apply his opinion to the society directly or indirectly. Based on the *Shariah* and the Constitutional Code, the Leader enjoys such a superior position that he can shape laws and regulations, and instructs the three organs of power to carry out their duties,

[76] See Art.110 of the Constitutional Code of the I.R. Iran
[77] The Leader is a clergy (*faqih*) who is just and pious, and possesses a clear political vision to lead the Muslim community. See Art. 109 of the Constitutional Code of the I.R. Iran.
[78] See Hashemi, *supra* note 70, at 57.
[79] See Art.157of the Constitutional Code of the I.R. Iran.

in accordance with his opinion. This has supposedly affected air carrier liability through one of the following ways:

1. The Leader directly appoints the head of the judiciary, whereas the Islamic scholars are sitting in the Guardian Council for specific periods. He also issues decrees for legislative and political referenda, and asks the National Expediency Council to resolve national problems which cannot be solved in the ordinary manner.[80]

2. When the Leader issues a governmental order, the three organs and other entities in Iran have to obey it. The order is considered as a guarantee for preserving Islamic social order and ranks as basic orders. The Decree for the establishment of the Expediency Council and the decree for the revision of the Constitutional Code, although earlier disqualified by the Guardian Council, are instances of governmental orders issued by the present Leader of Iran.[81]

3. The Leader can also indirectly affect the judgments of courts through his opinion. According to Islamic jurisprudence and the Constitutional Code of Iran, the Leader issues his decrees or opinions (*fatva*) for his followers.[82] When a case is referred to a court, the judge refers to ordinary law and regulations. However, when there is no clear-cut law in that regard, the court issues a judgment in accordance with authentic Islamic sources or authoritative religious decrees. As a result, although judges have the freedom to refer to any decree, they would usually prefer the opinion of the Leader, as he is considered highly knowledgeable of the requirements and circumstances of the time.

The case of equality or inequality for compensation payable to Muslims and non-Muslims in the Islamic Criminal Code for death or bodily injury caused by air accidents is one such case.

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[80] See Art.110 of the Constitutional Code of the I.R. Iran.
[81] See Art.109 of the Constitutional Code of the I.R. Iran.
[82] M.B. al-Sadr, *The Renewal of Islamic Law* (1993), 59-79.

This is a matter which is not directly mentioned in the law, i.e. there is no decisive source in Islamic jurisprudence in this regard. There is one opinion saying that compensation for Muslims and non-Muslims is different, in that the compensation for non-Muslims is half of that for Muslims.[83] However, there is another opinion, which coincides with the Leader's opinion, which states that there is no difference between the compensation for Muslims and non-Muslims, and they should be paid equally. In such cases, the courts prefer to apply the decree of the Leader when issuing their orders.[84]

3.3.1.3 The Guardian Council of the Constitution

The Constitutional Code introduced the Guardian Council and defined a crucial role for it to monitor the conformity of laws with the *Shariah*. Laws and regulations that are approved through the parliamentary process are officially sent to the Guardian Council.[85] The main difference between this Council and other institutions, which are responsible for supervising the conformity of ordinary laws with Constitutional Codes, is that the Guardian Council, in addition to carrying out this duty, also ensures that they comply with Islamic principles.[86]

The Guardian Council has a dual composition.[87] It consists of six Islamic scholars (*faqih-e-adel*) who are just and aware of the present needs of the society and are selected by the Leader; and six legal experts who are qualified in different branches of the law and are chosen by the Parliament from among the law experts introduced by the head of the judiciary.[88] This dual composition therefore enables the Guardian Council to ensure that the

[83] Ibid.
[84] J. Boshehri, *Hoqooq - e- Asasi* (1382 A.H. 2004), 15.
[85] See Art. 94 of the Constitutional Code of the I.R. Iran.
[86] See Arts.72, 85, 94 and 96 of the Constitutional Code of the I.R. Iran.
[87] See Art.4 of the Constitutional Code of the I.R. Iran.
[88] See Art.191 of the Constitutional Code of the I.R. Iran.

legislations passed by the Parliament conform to both Islamic principles and the Constitutional Code.

If the Guardian Council finds an enactment do not conform with the *Shariah*, the Council returns it to the Parliament for review. As long as the Parliament has not modified the legislation according to the comments received from the Guardian Council, it is not considered a law.[89]

It is believed that Article 4 of the Constitutional Code covers all laws and regulations in the country, both past and present. The phrase 'all laws and regulations' has no limitation, either from the perspective of legal hierarchy (constitutional, ordinary, regulations) or time framework (past, present, future).[90] By applying this broad interpretation, the Guardian Council can revise pre-Revolution laws and regulations. Hence, the council is able to declare which laws and regulations are contrary to the *Shariah* in case they are referred to the Council or when the Council itself investigates them.[91] However, the author is of the opinion that it is possible to infer that this Article does not cover past laws and regulations because the Article is a general one which makes no reference to previous legislations. Therefore, the scope of the Article had to be limited to subsequent parliamentary legislations.

According to the Constitutional Code, the Guardian Council is responsible for interpreting the Constitutional Code as well as to ensure that laws are in conformity with it. However, the Council has interfered with many ordinary laws, rules and regulations by providing its interpretations. Although an interpretation of the law is not legislation, any interpretation has its own consequences. Besides, the text of law can be interpreted differently. Whilst

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[89] F. Hedayatnia and M.H. Kaviani, *Barresi Hhoqooqi -e- Shoraye Negahban* (1375 A.H. 1997), 56.
[90] S.M. Khamenei, 'Asl -e- Chahar -e- Ghanon -e- Asasi', (1369 A.H. 1990) IX *Kanon Vokala Journal* 145, at 152.
[91] The Opinion of Guardian Council No.1360/2/8-1983.

interpretations offered by the Guardian Council on articles of the Constitutional Code or ordinary law do not play a direct role in legislation, new rules may be established or the applicability of an existing one can be limited or expanded, which is in fact the establishment of a right or a responsibility or a special rule.[92]

Even after the Parliament ratifies a law and it enters into force, the Guardian Council may interpret parts of that law by issuing notes or questions to parliamentary members or governmental bodies. For example, when the Council examined the Act, which determines the liability of air carriers against the Islamic Criminal Code, it implicitly noted that the Act was contrary to Islamic principles. As a result, some courts accepted this interpretation as law and made their decisions accordingly.[93]

The author is of the opinion that these interpretations can reverse legal cases, and cause non-uniformity in judicial decisions on air carrier liability for passenger's death or bodily injury.[94] Some courts still apply laws that were declared by the Guardian Council to be contrary to Islamic principles, arguing that the overturning of a law is the right of the Parliament, while others refer to the Council's interpretation in their decisions. Accepting the interpretation as law is contrary to the explicit text of several articles of the Constitutional Code. It therefore seems that the limits of Article 4 of the Constitutional Code are vague and are in need of clarification.[95]

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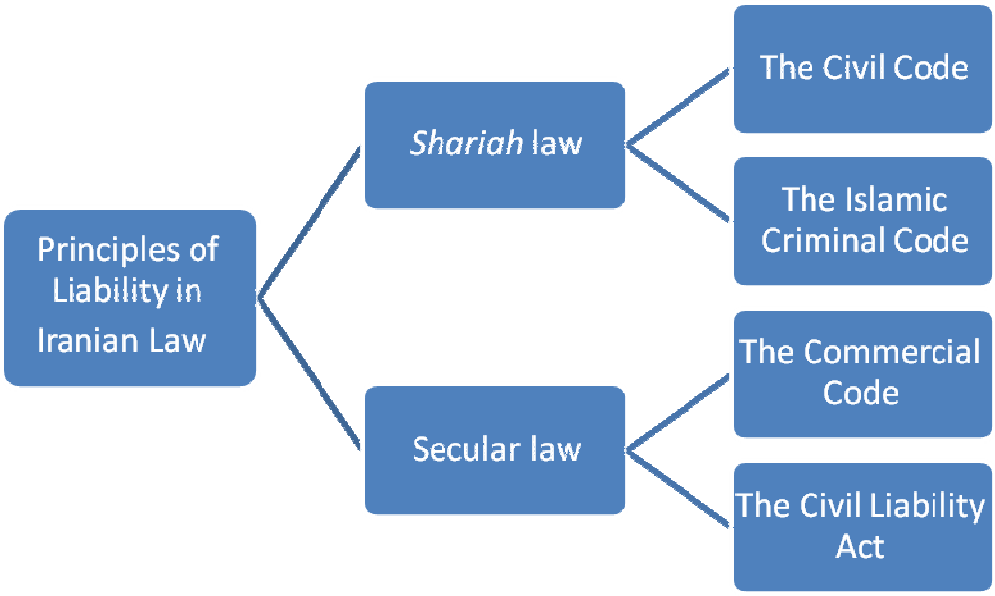
[92] M. Rahnama, *Maraje Ghanongzari dar Iran* (1380 A.H. 2002), 132-138.
[93] Ibid.
[94] See Chr. 4.3.2*, infra*.
[95] See Art. 58 of the Constitutional Code of the I.R. Iran.

3.3.2 Laws and Regulations

Legislators would codify laws based on the *Shariah* by referring to the authentic books of *foqahā*.[96] According to the Constitutional Code, all laws and regulations related to the civil, penal, financial, economic, administrative, cultural, military and political fields must be based on Islamic principles.[97] This underlying principle governs the Constitutional Code and other laws and regulations.[98] As a result, the laws and regulations of air transportation and air carrier liability must be based on the *Shariah*.

Figure 2: Principles of Liability in Iranian Law



Apart from the laws taken from the *Shariah*, it is possible for an Islamic State to adopt laws, which are not directly derived from the *Shariah* provided that they are not contrary to it. This principle has been applied to laws both before and after the Revolution.

[96] See Art. 167of the Constitutional Code of the I.R. Iran.
[97] M. Faraji, *Hoqooq -e- Asasi* (1384 A.H. 2006), 94.
[98] See Art.71 of the Constitutional Code of the I.R. Iran.

After the Revolution, laws that were not in conflict with the *Shariah* were left intact. Prominent among these is the Civil Code whose regulations related to carriage and the principles of liability, and had most of its contents adopted from the *Shariah* in any event. The same is true for the Commercial Code and the Civil Liability Act; while they have been adopted from secular Western codes they fulfill the demands of technological developments.

The following section discusses private laws and regulations including liability; it has two parts. 1) Laws directly adopted from the *Shariah* such as the principles of liability in tort and contractual liability in the Civil Code and compensation in the Islamic Criminal Code, which includes air carrier liability; 2) other laws such as the Commercial Code and the Civil Liability Act, which was adopted from the civil law system.

3.3.2.1 Laws Directly Adopted from the *Shariah*

(i) The Iranian Civil Code

The Civil Code in Iran has been ratified during three legislation rounds.[99] Since the first drafters were familiar with the French culture, they called it the Civil Code. Generally, the Civil Code of Iran is based on the *Shariah* and many parts (such as liability and contract of carriage) are direct translations of Islamic source books.[100] Although the Civil Code was codified before the Revolution, it is based on principles that cannot be easily understood

[99] Articles 1 to 955 were ratified in May 1928; articles 956 to 1206 were ratified in the 9th period; and articles 1207 to 1335 were ratified in the 10th period. Some of these articles were amended in 1982 by the Judiciary Commission of the Parliament. M.J. Langeroudi, *Terminology of Law*, (1377 A.H. 1998), 268.

[100] The main references of the Civil Code for the special contract section had been the famous *Shia* books such as al-Sharai‘, Sharh al-Lum‘ah, Javahir al-Kalām and al-Makasib in *Shia* Jurisprudence, and their interpretations. For foreign laws, they especially had an eye on the French civil law. Therefore the article related to special contracts was almost entirely adapted from *Shia* Jurisprudence and most of the articles from introduction and property division into movable and immovable, benefit, exploitation and easement rights and the basic rules of the validity of contract were adopted from the French Civil Code and adapted to the *Shariah*. Ibid.

unless the *Shariah* is closely studied. Hence, in addition to the Islamic Criminal Code, one should refer to the Civil Code, which is also based on Islamic jurisprudence.

The Civil Code was the most popular law in Iran, and most of its provisions respect its religious basis and the country's custom.[101] However, it was recognized that the *Shariah* alone was not sufficient for the Civil Code, as there are needs that arise in society that would benefit from the experiences of other systems. The Civil Code was influenced by continental law. It adopted legal principles from France, Switzerland and Belgium especially those relating to the formal issues of codification.[102]

The Civil Code contains two articles about transport under the title of rent of carrier.[103] This title has a historical background. In the past, people let their vehicles out to businessmen, so transport in the *Shariah* and the Civil Code is discussed under this title. This study focuses on two issues in contract of carriage and the basis of carrier liability in the Civil Code[104] because although these were modified in subsequent laws, these articles are still in force.

(ii) The Islamic Criminal Code (ICC)[105]

After the Islamic Revolution in 1978, the first piece of law, which was passed by the Parliament in relation to liability for death or bodily injury in 1982, was the Criminal Code. It

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[101] According to article 3 of the Civil Procedure Code, the courts in Iran are obliged to pass judgments in conformity with the law. Where existing laws are unclear, ambiguous, and contradictory or no law applies to a particular case, the court must decide according to the spirit of the law as determined by custom. Custom is a practice that is habitually followed over a long period. It may be practiced in a particular locality, country or countries; Custom in Iranian jurisprudence is a practice that is habitually followed over a long time in Iran. Ibid., at 422.

[102] N. Katuzian, *Maseoliat -e- Madani dar Moqararat -e- Hoqooqi -e- Akhir* (1381 A.H. 2003), 18-20.

[103] See Arts. 516 and 517 of the Civil Code.

[104] See 3.4.2.1 and 3.4.4.1, *infra*.

[105] After the Islamic Revolution, the first Code with regard to Islamic punishment was passed by the Assembly on October 13, 1982. That was a tentative Code for a period of 5 years. Then, in 1996, the period was extended for another 10 years - the Discretionary Punishment Code was ratified on May 27, 1996 and was added to Islamic Criminal Code as articles 498-729. M.H. Sadeqi, *Hoqooq -e- Jazay -e- Ekhtesasi* (1386 A.H. 2007), 221.

was revised in 1991.[106] It contained 497 Articles. The Discretionary Punishment Act was ratified in 1996 and added to the Islamic Criminal Code. Ever since, the Islamic Criminal Code has been applied to matters concerning compensation and liability for death or bodily injury. This Code has benefitted from the view of a majority of the *foqahā*.[107]

The Islamic Criminal Code of Iran consists of two parts. The general part deals with common aspects of crimes with a first chapter called 'General Criminal Act'.[108] The second part, which deals with crime classifications and their punishments, is called the Exclusive Criminal Act. The provisions of the Exclusive Criminal Act are in accordance with the *Shariah* principles such as prescribed punishment, retaliation, compensation, or discretionary punishment.[109] The Act explains each crime separately. It outlines their definitions, interpretations, legal characteristics, exclusive elements and respective punishments.[110] Crimes dealt with under this Act include murder, manslaughter and unintentional homicide.

Undoubtedly, the worst crimes involving bodily injury are those that result in the death of a victim. When an (air) accident causes death or bodily injury to passengers, the case will be referred to the criminal courts. The Exclusive Criminal Code will be applied in the case of death or bodily injury.[111] The Code deals with issues such as the principles of civil and

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[106] The first exclusive criminal regulation was the law of retaliation and its regulation of 1982 that were passed by the Judiciary Commission of the Parliament. After careful and lengthy examinations and discussions, this law was approved in July 1991.It replaced the regulations in Chapter one of Book Three of the General Criminal Code 1925.

[107] See Sadeqi, *supra* note 105, at 15.

[108] This branch of law includes the general field of criminal law and deals with issues and rules covering all crimes such as the limits of criminal liability, mitigation and suspension of punishment, probation, and recidivism. See I. Golduzian, *Hoqooq -e-Jazay -e- Ekhtesasi* (1375 A.H.1996), 7-10.

[109] See Art.1 of the Islamic Criminal Code.

[110] See Sadeqi, *supra* note 105, at 15.

[111] See 4.3, *infra*.

criminal liability in the event of death or bodily injury, and the types of compensation available.[112]

In Iran, carrier's liability for passenger's death or bodily injury is discussed under a specific kind of homicide called quasi-intentional killing (*ghatl dar hokm-e-shebh-e-amd*). This new term, is in fact a mixture of civil liability (compensation) and consolidated Islamic criminal liability (quasi-intentional homicide and unintentional homicide). This kind of killing (or bodily injury) occurs because of negligence, carelessness, or non-observance of related regulations, in such a fashion that if the regulations would have been observed, no accident would have happened.[113]

3.3.2.2 Laws Not Directly Adopted from the *Shariah*.

(i) The Commercial Code

The development of various means of transportation and the expansion of trade relations require rules so that while transactions are done faster and with fewer formalities, fraud is strictly avoided. Whereas the Civil Code was not accountable in this regard, a Commercial Code was codified.[114] The Commercial Code was ratified in 1932. This law emphasizes some provisions of the Civil Code on carriage contracts. On the other hand, it also follows the commercial codes of European States, especially France.

The Commercial Code consists of 16 chapters and includes regulations on different commercial affairs such as commercial transactions, transport, and the liabilities and duties of

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[112] Classification of the act of offender, distinguishing civil liability and compensation from criminal liability, and different types of killing will be introduced to determine those issues that merely require civil liability and compensation. See 3.4.5.1, *infra*.

[113] See Art. 295 of the Islamic Criminal Code.

[114] Before the Revolution, the Iranian economy was based on capitalism and most of the present trade laws had been prepared on that basis. The Islamic Republic respects individual ownership, free trade, and the non-interference of the state in commercial affairs. Although some of the old regulations have been amended and new ones have been ratified, the original trade law is still in force. See Sadeqi, *supra* note 105, at 15.

carriers. Since the Code should be accountable for new changes, in many cases the legislation ratified regulations to respond to the new trade needs.

The Commercial Code's Book Eight about transportation contains 18 articles.[115] They deal with carriage of goods but the book is silent about the carriage of passengers. The legislator at that time has not paid attention to the issue of air and maritime carriage.[116] However, the principles of liability in the Commercial Code are general principles that can be applied to all forms of carriage in Iran. The Code explains the duties, obligations, and liabilities of carriers. Courts, when dealing with claims relating to all modes of carriage (road, rail, sea and air), resort to these provisions if there is no specific statute to that effect.[117]

(ii) The Civil Liability Act 1960

The Civil Liability Act 1960 was adopted from the Civil Code of Germany.[118] It contains 16 articles. The main reason for its codification was that the related laws were not sufficient for civil liability and for compensating the losses sustained by people according to socio-economic demands.[119] As a result, the drafters of the Civil Liability Act intended to improve tort liability in the Civil Code.[120]

The Civil Liability Act 1960 was in fact an attempt to complete the Civil Code. Firstly, the Act altered the basis of liability in favor of fault theory.[121] Secondly, this Act endorses unlimited liability, and recognizes mental injury in the case of death or bodily injury.

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[115] See Arts.377-394 of the Commercial Code.
[116] See Sotodeh Tehrani, *supra* note 3, at 77.
[117] See Arts.377-394 of the Commercial Code.
[118] R. Barikloo, *Maseoliat -e- Madani* (1385 A.H. 2007), 31.
[119] E. Shafei Sarvestani, 'Diyah va Khesarathay -e- Nashi as Sadamat -e- Badani', (1379 A.H. 2001) Vol. VII *Pagohesh Va Hozeh* 35, at 16.
[120] See R. Barikloo, *supra* note 118, at 32.
[121] Article 1 of the Act provides that any person who intentionally or negligently hurts life, health, property, freedom, reputation, trade fame, or any other right that the law confers on people, in a way that causes material or immaterial damage, is liable for his act. Anyone who intentionally or due to his negligence injures or harms

There are two opinions in this regard. Firstly, that this Act was to be abolished by the Islamic Criminal Code after the Islamic Revolution. Secondly, that this Act is highly specific and complements the Islamic Criminal Code on the principles of liability and compensation.[122] If the abolishment of the Act is accepted, there is no possibility for unlimited liability and recognition of compensation of mental injury for passenger's death or bodily injury in Iran. If the second view were adopted, this would create claims for unlimited liability and compensation of mental injury. The former opinion prevails over the latter since the Guardian Council declared that compensation for mental injury is contrary to the *Shariah*. Referring to this opinion, courts are reluctant to award damages according to the Civil Liability Act 1960.[123]

It is arguable that this Act is still in force. It was never explicitly abolished by the legislature. On their face, provisions of compensation in the Civil Liability Act 1960 are not similar to the compensation provisions in the Islamic Criminal Code since the former approves unlimited liability, which is closer to justice. It can nevertheless be argued that through other general principles of the *Shariah* such as the *la zarar* principle,[124] which will be discussed in the next sub-section, there would be no conflict; hence, unlimited liability could be accepted.

3.4 Principles of Liability

Liability does not feature as an independent topic in Islamic jurisprudence. However, *foqahā* have talked about liability while discussing different contracts such as renting, buying, and

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life, health, property, freedom, prestige, the commercial fame of others, or any other right established for individuals by virtue of the law, and as a result of that harm the victim sustains material or spiritual loss(es), the wrongdoer is liable for compensating damages arising out of his act. See Art.1 of the Civil Liability Act 1960.

[122] See Barikloo, *supra note* 118, at 55.

[123] See Opinion of the Guardian Council, No. 1168 (1994). And Case No. 245-31-22.3.1366 The Appeal Court.

[124] See 3.4.1, *infra*.

selling and tort such as destruction.[125] A review of the liability principles in Islamic law shows that *foqahā* have not followed as a single basis for liability in all cases. They have adopted different bases of liability such as, fault, presumed fault, or strict liability. In Islamic jurisprudence, human relations are made up in such a variety that it is impossible to gather all of them under one principle like fault. For liability to arise, one should have done something incorrect or wrong, and sometimes there is no need for there to have been any fault.[126] A liable person is responsible when a damage or injury occurs in a contract or under tort, and he should necessarily compensate it.[127]

One of the most important rules in the *Shariah* is the *la zarar* principle, which prevails over tort or contract principles. *Foqahā* always observe this general principle. It will therefore be discussed before delving into liability issues. This section discusses the liability principle in Islamic jurisprudence. It also explains how far Iranian law has been influenced by this principle or if the former has modified the principle. The *Shariah* has provided this flexibility for Iranian law to adopt secular law whenever required and to give them the status of Islamic law.

[125] S.J. Zehni Tehrani, *Tashrih al-Matalib* (1371 A.H.1992), 421.
[126] N. Katuzian, *Zeman Qahri* (*Masoliyat -e-Madani*) (1369 A.H. 1990), 186.
[127] A. Moqaddas Ardabili, *Majma al-Faideh* (1417A.H.1996), at 140.

Figure 3: General rules governing liability in Iranian Law

<table>
<tr><td rowspan="8">General Rules Governing Air Carrier's Liability in Iranian Law</td><td rowspan="5">Directly Adopted from the Shariah</td><td>General Principle</td><td colspan="3">La Zarar</td></tr>
<tr><td rowspan="4">Specific Principles</td><td rowspan="2">Tort</td><td>The Civil Code (talaf)</td><td>Strict Liability</td></tr>
<tr><td>The Civil Code (tasbib)</td><td>Fault Liability</td></tr>
<tr><td>Contract</td><td>amanat (the Civil Code)</td><td>Fault Liability</td></tr>
<tr><td>Liability for Death or Bodily Injury</td><td>The Islamic Criminal Code (Diyah)</td><td>Strict Liability</td></tr>
<tr><td colspan="2" rowspan="3">Adopted from Secular Law and Given the Status of Islamic Law</td><td>Tort</td><td>The Civil Liability Act</td><td>Fault Liability</td></tr>
<tr><td>Contract</td><td>Contract of Carriage (The Commercial Code)</td><td>Presumed Fault Liability</td></tr>
<tr><td>Liability for Passenger Death or Bodily Injury</td><td>the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights'</td><td>Presumed Fault Liability</td></tr>
</table>

This figure shows both laws extracted from the *Shariah* and laws adopted from secular law.

3.4.1 *La Zarar* (The Principle of No Harm)

This is one of the most famous principles of Islamic jurisprudence.[128] Based on the *Sunnah*,[129] this principle is extracted from the prophetic saying '*la zarar wa la zerara fi al Islam*' which means that there is not any harm in Islam.[130] *Foqahā* have resorted to the *Quran*, the *Sunnah*, and *aql* for proving the *la zarar* principle.[131] The firmest reason for its authority is *aql*. This principle is based on the order of wisdom, satisfying the interests of people and human society. This principle generally provides that no one unlawfully or unjustly may enjoy either his property or the property of others.[132] A person who endeavors to achieve his right should be careful not to cause loss or damage to his neighbors, be they people, or a private or public infrastructure.[133]

The principle of *la zarar* is very broad and it is applicable to any situation. This principle is not confined to a given situation but prevails in any contractual or tort liability. It prohibits people from causing loss to others and from misusing the rights, which affect other members of society. It aims to regulate order and justice in the social and economic relations of the members of society. It also solves the legal conflicts between people, and limits the right of ownership where others suffer a loss.[134]

Wherever judgments result in an illegitimate or disproportionate loss, this principle moderates those judgments and provides a right to the injured party to break the contract and

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[128] Compensation is one of the oldest concepts retained from civil liability. All other rules originated from it. The principle of *la zarar* has the same role in Islamic law. M.H. Mosavi Bojnourdi, *al-Qawa'id al-Fiqhiah* Vol. IV (1413 A.H. 1992), 214-215.
[129] M.K. Khorasani, *Kifayat al-usūl* (1415 A.H. 1994), 431.
[130] Customarily, *zarar* means causing any defect in property or harming the life of a person or whatever belongs to him. *Zerar* means inflicting harm repeatedly, and a *mozar* is the person who inflicts the harm repeatedly and insists on inflicting it. M. Esmaili, *Teori -e- Jobran -e- Khesarat* (1384 A.H. 2005), 61.
[131] The holy *Quran*: *Sureh*s 2: 232 – 283; 5:16 and 9:109.
[132] S.H. Amin, *Remedies for Breach of Contract in Islamic and Iranian Law* (1984), 33.
[133] See Esmaili, *supra* note 130, at 66.
[134] See Ansari, *supra* note 43, at 234.

claim compensation.[135] Above all else, the *la zara*r principle is a governing one, i.e. when there is a conflict between this principle and other principles; it is *la zarar*, which prevails.[136] The *la zarar* principle also covers immaterial damages.[137] There is no doubt that immaterial damages are considered as a loss and there is no reason for limiting this principle to material damages. As mentioned, the Prophet had used two words to explain loss and damage: *zarar* and *zerar*. The former refers to material damages and injuries to persons. The latter refers to immaterial damages.[138]

The author is of the opinion that whereas in the Islamic texts there is not a direct reference to air carrier liability, this principle can be used to achieve total compensation for (air) passengers. Therefore, in chapter 4 where he analyzes the conflict between the Warsaw Convention 1929 and the *Shariah* principles, he uses this principle for proving the legitimacy of unlimited liability and air carrier's liability for death and bodily injury in Iran.

3.4.2 Tort Liability

3.4.2.1 *Etlāf* (Destruction)

If a person destroys the property of another person, he would be held liable and would have to replace it with an identical item or pay its price, regardless of whether the destruction has been made intentionally or unintentionally, or whether he has destroyed the property itself or its interests; or if the destroyer makes the property imperfect or defected.[139] Therefore, the person whose act or omission causes damage to baggage and cargo is liable whether he is at fault or not.

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[135] M.M. Naeini, *Muniat al-Talib fi Sharh al-Makasib* Vol. I (1418 A.H. 1997), 201- 294.
[136] M. Ansari, *Kitab al-Makasib* (1407 A.H. 1986), 273.
[137] M.A. Serag, *dhaman al-udwan fi Fiqh al- Islamyyah* (1414 A.H. 1993), 117-8.
[138] J. Sobhani, *Tahdhib al- usūl* Vol. III (1378 A.H. 1999), at 94.
[139] Ibid.

In Islamic jurisprudence, *talaf*, *māl* and *sabab* are elements for the actualization of *etlāf*:

1. Damage (*talaf*). *Talaf* is sometimes considered with the property. This is called actual *talaf*. Sometimes, it is considered with the value of the property without destruction of the property itself.[140]

2. Property (*māl*): it is whatever people need in their life for their well-being or while they are sick or on their deathbeds, the money that they use, and the interests and profits of affairs that satisfy the needs of people, or things that these affairs are attained by.[141]

3. Causation (*sabab*): a causal relation between loss or damage and action is essential.[142] One way for substantiating the *etlāf* principle is to see 'what a reasonable man thinks'. If a person destroys, uses or damages the property of someone else, he would be liable if he has deviated from the standard of the reasonable man, even if the property still exists.[143]

When something is damaged, the wrongdoer shoulders the compensation, and he is liable for returning its equivalence to the owner.[144] Actual liability is also called the liability of identical items or price, and there is no non-actual liability such as punitive damage. This liability is compensatory damages that provide a claimant with the monetary amount necessary to replace what was lost, and nothing more.[145] If the exact property exists, it should be returned to the owner. If the exact property is destroyed, an identical item or its price should be given to the owner. In this kind of liability, there is total compensation and unlimited liability for damaged property.[146]

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[140] See Mosavi Bojnourdi, *supra* note 128, at 19.
[141] Ibid., at 63.
[142] Ibid.
[143] R. Khomeini, *Kitab al-Bay*' (1368 A.H. 1989), 341.
[144] Ibid.
[145] Langeroudi, *supra* note 99, at 135.
[146] A. Gorji, *Maqalat -e- Hoqooqi* (*Legal Essays*) Vol. II (1375 A.H. 1996), 247.

The Civil Code has used the principles of the *Shariah* to define *etlāf* and the liability of the destructor.[147] In *etlāf*, the existence of a customary causal relation between the act of a person and the destruction of property is sufficient for liability.

In order to understand *etlāf*, the principles of liability of *mobāsherat* and *tasbib* should be discussed.[148] *Foqahā* have divided liability for damaged property to direct causation of destruction (*etlāf-be-Mobāsherat* or *Mobāsherat*) and indirect causation of destruction (*etlāf-be-tasbib* or *tasbib*).[149]

(i) *Mobāsherat* (The Direct Causation of Destruction)

If a wrongdoer directly destroys a property or its interests, he has to return the same property or its price to the owner.[150] According to this principle, the wrongdoer is liable for compensating what he has destroyed even if he was not at fault.

A wrongdoer is considered as a direct causer of a destruction where custom sees a close causality relation between the destruction and that act.[151] To distinguish the direct causer from others involved in the destruction, the criterion is objective.[152] Events are so complex and diverse that it is difficult to examine them with a single principle.[153] Therefore, in proving damage, it is sufficient that a causal relation be established between the act of a person and the destroyed property.[154] It is not necessary to prove the fault of the destructor, since in some

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[147] See Art.328 of the Civil Code.
[148] K. Jalili, *Hoqooqh -e- Maseoliat -e-Madani* (1383 A.H. 2004), 25.
[149] A. Gol Bararzadeh, *Osul-e- Hoqooq -e- Neveshte dar Feqh* (1383 A.H. 2004), 30-40.
[150] N.M. Shirazi, *al- Ghava'id al-Fiqhyyah* Vol. II (1411 A.H. 1990), at 193.
[151] See Katuzian, *supra* note 126, at 55.
[152] Ibid.
[153] Shahid Thani (al- Amili), *Masalik al-Afhām* Vol. II (1413 A.H. 1992), 321.
[154] M. Najafi, *Javahir al-Kalām* Vol. VI (1394 A.H. 1973), 636.

cases it is possible to cause destruction without being at fault.[155] As a result, strict liability is applied.

If someone forcefully causes another person to destroy something or deceives him to do so, the direct causer cannot be considered liable. This is because customarily the attribution of destruction to someone who has caused something is more appropriate than to the one who has been the direct causer.[156] Therefore, the liability of the direct causer is limited to cases where his action in destruction is stronger than that of other causers are.[157]

(ii) *Tasbib* (The Indirect Destruction)

If a person does not destroy a property himself but arranges a setting for its destruction, his act is called *tasbib*. For instance, when someone digs a well in the public passage and people or animals fall in it,[158] he is liable for the compensation of damage. A causer performs an action that makes a setting ready for destruction, in a way that if that act would have not been done, the destruction would not have happened. There is no direct causality between that act and the occurrence of destruction,[159] but since custom has attributed damage to it,[160] he is therefore liable.[161]

In case of indirect causation, the person who has destroyed the property and caused damage to others is liable if he has been negligent.[162] A person is also liable if he has not taken any necessary precautions and the damage has occurred because he has not paid attention to the

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[155] See Art.329 of the Civil Code.
[156] R. Khomeini, *Tahrir al-Wasilah* Vol. II (1384 A.H. 2005), 189.
[157] Ibid.
[158] Ibid., at 190.
[159] Mohaqiq Hilli, *al-Sharai' al-Islam* Vol. III (1411 A.H. 1990), 76.
[160] Here, the custom means the custom of the *'uqala* (reasonable people). According to the *Shariah*, the custom of the *'uqala* is a practice which reasonable persons habitually follow. The custom of the *'uqala* is permanent and comprehensive. Langeroudi, *supra* note 99, at 423.
[161] N. Katuzian, *Osul Kolli -e- Qarardadha* (1372 A.H. 1993), 30.
[162] Ibid.

foreseeable results of his action or in spite of being aware that his action might create damage.[163]

The Civil Code defines *tasbib* as a case when a person prepares a cause for destruction and another person directly destroys the property. In such circumstances, it is the destroyer who is liable and not the causer, unless the cause is stronger than the destruction.[164] In *tasbib*, a person does not directly destroy the property of another, but he prepares the scene for destruction, i.e. he commits an action, because of which the property is destroyed.[165] Customarily, a causer is the one who has created the loss so he is liable. Here the existence of fault is a condition for determining liability.

In order to explain the differences between direct and indirect causation in destruction it can be stated that wherever a person commits what would customarily result in the destruction of a property (making a cause for destruction) his act is deemed *etlāf*.[166] By contrast, if the committed act is not the cause of destruction, but it has provided the setting that could probably result in the destruction, it is called *tasbib*.[167] Therefore, *etlāf* and *tasbib* differ in that:

1. Fault is a condition for liability in *tasbib*, but not in *etlāf*,

2. A wrongdoer directly causes damage in *etlāf*, whereas a wrongdoer arranges the setting for destruction in *tasbib* and it is possible that no destruction occurs at all because of that arrangement.[168]

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[163] See Najafi, *supra* note 154, at 106.
[164] See Art.332 of the Civil Code.
[165] See Art. 331 of the Civil Code. See also Art. 318 of the Islamic Criminal Code.
[166] See Najafi, *supra* note 154, at 94.
[167] Although digging a well in a public passage attracts liability, the same if carried out on one's land or other permitted places, do not give rise to liability. See Katuzian, *supra* note 126, at 76.
[168] S.H. Emami, *Hoqooq -e- Madani* Vol. I (1357 A.H. 1978), 39.

3.4.2.2 Fault

The civil liability regime in Iran is influenced by the *Shariah*[169] on the one hand, and the civil law system on the other. Drafters of the Civil Code have based liability principles on Islamic jurisprudence and have explained *etlāf*.[170] However, in the Civil Liability Act 1960, the legislators disregarded Islamic jurisprudence and based liability on fault. Article 1 of the Civil Liability Act 1960 provides: 'Anyone who, intentionally or due to his negligence, injures the life or health or property or freedom or prestige or commercial fame or any other right established for the individuals by virtue of law, as a result of which another person sustains materially or spiritually losses, shall be liable to compensate the damages arising out of his action.' It puts aside the liability principles of the Civil Code and caused incompatibility with the *etlāf* provisions adopted from the *Shariah*.

Iranian jurists such as Safaei and Ghaem Magham Farahani mention that the Civil Liability Act 1960 based liability on fault, implicitly nullifying strict liability provisions in the Civil Code, and recognized the fault principle as the only basis for liability. It indicated that in the case of direct destruction, the causality relation between the destructor and the destruction of property should not be considered sufficient for imposing liability. It emphasized that only fault should be considered as a condition for bringing liability.[171] As a result, after the approval of the Act, liability based on fault became the main and exclusive rule in Iranian tort law and strict liability was nullified.

The author is of the opinion that Iranian law, depending on the subject matter, recognizes both fault liability and strict liability. According to the general rules in the Civil Code and the

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[169] See Art.167 of the Constitutional Code of the I.R. Iran.

[170] Islamic jurists usually discuss civil liability (*zeman*) resulting from *etlāf*, *tasbib* and usurpation (*Ghasb*) in one book since many of their regulations are identical. However, the Civil Code has distinguished them and discussed usurpation separately. See Katuzian, *supra* note 126, at 134.

[171] A.M. Ghaem Magham Farahani, *Hoqooq -e- Taahodat* Vol. I (1378 A.H. 1999), 161- 215. See also S.H. Safaei, *Hoqooq -e- Madani* (1351A.H. 1974), 543-553.

Civil Liability Act 1960, individuals are liable when they commit a fault.[172] However, strict liability regime that was laid down in the Civil Code and special statutes such as the 'Compulsory Liability Insurance for Motor Cars Act of 1966',[173] makes wrongdoers strictly liable.

Furthermore, in the case of death or bodily injury that will be discussed later, legislators provide strict liability within the Islamic Criminal Code[174] and special statutes. For instance, according to the laws passed in 1968 and 2008, civil liability arising from the ownership of motor vehicles is strict, and the owner of the vehicle should compensate for damages in all circumstances and he cannot discharge his liability by proving that he is not at fault.[175]

Therefore, these laws and regulations have not been nullified by the Civil Liability Act 1960 and it can be presumed that the legislature has overlooked the principle of fault in the Act and has adopted other principles such as strict liability to meet Iranian social and economic circumstances.[176]

3.4.3 Contractual Liability

There are certain general rules for specific individual contracts in the primary sources of the *Shariah*.[177] *Foqahā* have devoted the greatest part of their scholarly writings to specific contracts.[178] However, there is sufficient discussion of the general principles of contract, and there are rules and principles, which are generally and universally applicable to all types of

[172] See Arts.50, 493, 516, 556, 577, 584 and 640 of the Civil Code.
[173] The Compulsory Liability Insurance for Motor Cars Act of 1966 provides that any person, natural or legal, is strictly liable for harms and damages that his motor vehicle or goods impose on others.
[174] See 3.4.5, *infra*.
[175] See the Compulsory Insurance for Owners of Engine Vehicle (Ground and Sea) Act 2008.
[176] See Arts.333 and 335 of the Civil Code.
[177] See Amin, *supra* note 32, at 10-11.
[178] Ibid.

contract.[179] One of the general principles governing the law of contract is the *Quranic* commandment to 'fulfill your obligations'.[180] Accordingly, all private arrangements mutually agreed upon are enforceable, as long as they are not contrary to the *Shariah*. These rules should be considered as the general principles of contract in the *Shariah*. In fact, legal literature is almost exclusively concerned with specific contracts.[181] It covers not only mutual contracts but also unilateral obligations such as gratuitous dispositions and endowments.[182]

The breach of contract may give rise to liability.[183] Contractual liability is the liability of a person who has undertaken an obligation under contract, resulting from either specific contracts or nonspecific contracts.[184] The wrongdoer or obligator is liable for remedying the non-performance or delay in the performance of his obligations.[185] Contractual liability is established where an obligation is delayed or breached through the fault of the obligator, unless he can prove that the cause is external to his control, and the non-performance of obligation is not attributable to him.[186]

For a fault to be considered as a contractual liability, three conditions must be met:

1. There must be an authentic contract. In other words, the contract must be legal, as illegal contracts do not impose contractual liability as they are null and void and then claimant can only claim liability under tort according to laws and regulations.

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[179] The *Quranic* principle: '*ufu bi al uqud* ' (perform your contracts) covers all agreements which may be reached between parties, regardless of how diverse and different they may be, because there is no limitation to the application of this maxim, except what the holy *Quran* itself has provided to be void or unenforceable. See Khomeini, *supra* note 156, at 191.
[180] See Amin, *supra* note 132, at 82-84.
[181] The term used in Islamic law for the concept of contract is *aqd* (which literally means a knot or bond).
[182] See Katuzian, *supra* note 126, at 77.
[183] S.M.K. Yazdi Tabatabaei, *al- Urwat al- Wusqā* (1404 A.H. 1983), 640.
[184] Ibid.
[185] See Emami, *supra* note 168, at 39.
[186] See Katuzian *supra* note 126, at 56.

Moreover, there must be a contractual relation between the claimant and the defendant. Therefore, where a person inappropriately withdraws his offer or the contract becomes void, the fault of one side should not be considered as a contractual fault.

2. There must be a breach of a contractual obligation. That is, one of the parties must have breached an obligation resulting from the contract.

3. There must be a causal relationship (link) between the breach of contract and a sustained damage.[187] The mere existence of a contract is not sufficient for contractual liability. If a party undertakes to perform or abstain from an act, he is liable where he has not carried out his undertaking provided that compensation for such loss has been provided for in the contract, or that it is implied in the contract according to customary law, or that such compensation is taken for granted by law.[188]

In contractual obligations, if a party refuses to perform or delays the performance of his obligation, the innocent party has the right to claim for compensation.[189] The wrongdoer is liable for breach of contract, unless he can prove that his failure to perform was caused by external causes outside his control.[190]

The *Shariah* recognizes the theory of changed circumstances in a very general and comprehensive way. Not only can contractual obligation be set aside because of an 'act of God' (*afāt-e-samāvi*), but also the rescission of a contract is justified when unforeseen developments make the obligation more burdensome and difficult.[191] It seems, therefore, that *force majeure* and changed circumstances are deemed as valid reasons for the rescission of the contract. According to *foqahā*, the legal basis for this rule is the required balance between

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[187] N. Katuzian, *Ghavaed -e- Omomi -y- Gharardadha* (1385 A.H.), 10-12.
[188] See Art.221 of the Civil Code.
[189] See Najafi, *supra* note 154, at 106.
[190] Ibid., at 28.
[191] Ibid., at 26-28.

the rights and undertakings of contracting parties, and the prohibition of unfair loss in the *Shariah*.[192]

If non-performance of a contract is caused by *force majeure*, the obligator is not liable for damages from such time when the execution of the contract was frustrated.[193] The external cause of the frustration must be outside his control.[194]*Force majeure* relieves the obligator from his liability of performance or payment, only in circumstances where he cannot avoid or negate those forces, which cause the impossibility of performance.[195] Hence, if he is able to remove these causes and does not take the necessary steps to do so, he will be liable for damages.[196]

In Iranian law, breach of contract always imposes liability unless it is caused by *force majeure* in which case the wrongdoer is exonerated from liability.[197] The Civil Code does not use terms such as *force majeure*. However, it does refer to 'external cause', a term that includes all causes, which are external to the obligor.[198]

The author is of the opinion that the regulations on *force majeure* are not part of public policy. If the contractual parties agree on liability even in the event of a *force majeure*, the obligor is liable for not performing his obligations,[199] and he cannot be relieved from liability by resorting to the defence of necessary measures.[200] The contracting parties can determine the scope of their rights and obligations as long as these are not contrary to the *Shariah* and the public order.

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[192] Ibid.
[193] See Najafi, *supra* note 154, at 107.
[194] See Katuzian, *supra* note 126, at 79.
[195] See Khomeini, *supra* note 156, at 551.
[196] M. Esmaili, *Force Majeure* (2002), 24-26.
[197] T. Erfani, *Hoqooq -e-Madani dar Qarardad -e-hamle Jaddei va Reili* (1385 A.H. 2006), 238.
[198] See Amin, *supra* note 32, at 55.
[199] See Esmaili, *supra* note 196, at 123.
[200] See Art.230 of the Civil Code.

3.4.4 Contract of carriage

After exploring contractual liability in general, the author investigates the contract of carriage. In order to obtain a sound understanding of the contract of carriage in Iran, the liability of carriers in the *Shariah* which are explained in the Civil Code and the Commercial Code, will be discussed below.

The Civil Code and the Commercial Code are two main laws. The rules and regulations on contract of carriage in the Civil Code and the Commercial Code explain the general principles of carrier liability to include rail, road, sea and air carriers. The legislators have dealt mainly with carrier liability for damaged goods in both Codes.[201] As for the liability principles for passenger's death or bodily injury, these are also discussed in the Islamic Criminal Code, in addition to the general rules in the Civil and Commercial Codes.[202] These will be discussed in the next section.

3.4.4.1 *Amanat* or *Wadiyah* (Bailment or Deposit)

The principles of the contract of carriage are inferred from Islamic jurisprudence,[203] following the rules of *amanat*.[204] *Amanat* in the *Shariah* is a specific contract (*uqūd-e-mo'ayyane*) whereby one person entrusts a thing belonging to him to another in order that the latter should retain it for him free of charge. The person entrusted with the thing is called an *amin*.[205] In

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[201] See Arts.183 and 300 of the Civil Code.
[202] The Civil Code applies the principles of carrier liability in *ejāreh* (Hire) and discusses the related provisions of carriage under that title. However, the Commercial Code defines 'carrier' as a person who carries goods for remuneration and considers it as a *vekalat* (agency). Notwithstanding this, the principles of carrier liability contain similarities because the rules of *amanat* in the *Shariah* are applied in *ejāreh* and *vekalat*. B. Akhlaqi, 'Barresi -e- Mahiat -e- Hoqooqi -e- Qarardad -e- Haml dar Hoqooq -e- Madani', (1371 A.H. 1992) *Majelleh Hoqooqi Vokalay -e- Dadgostari* 1, at 4-11.
[203] When discussing the hire of objects in an *ejāreh*, drafters of the Civil Code have provided the definition, general rules and consequences, just as they are found in the famous *Shariah* books but with small modifications.
[204] See Art. 607 of the Civil Code.
[205] See Najafi, *supra* note 154, at 107.

Islamic jurisprudence, an *amin*[206] is not liable for the damage or loss to the property entrusted to him. His possession does not make him liable, and if the property entrusted to him is damaged because of external events or by a third party, he is not liable.

Since the carrier's liability is like that of an *amin*'s in *amanat*, his liability is not presumed. He would only be liable if his extravagancy or negligence is proved.[207] An *amin* should exercise the utmost care in maintaining the property, as if it belongs to him. If the property is damaged or lost, provided that the *amin* has done his duty well, he will be absolved from liability. This legal protection continues until such a time that the *amin* chooses to dissolve the attribute of *amanat* from him.[208] If he was negligent and the property sustained damage, or if he acts in a way to possess it, the attribute of *amanat* will disappear and he will be liable as a traitor.[209]

The intention of an *amin* for doing things out of the permitted limits is not necessary.[210] The criterion for determining fault is not by analyzing the mental conditions and the intentions of the *amin*.[211] His knowledge or awareness of the fact that an act is negligent is not a condition for his liability since his knowledge or ignorance does not change the effects of liability assigned to negligence. Liability is objective. 'A reasonable man's behavior' is the criterion for determining fault.[212]

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[206] In all bailment contracts, in which one of the contracting parties possesses the property of the other, the possessor is regarded as an *amin*, and the reason is the permission of the owner. With the satisfaction and awareness of a specific purpose which is agreed to by the two parties, the owner hands over his property into the possession of the other party, just like when passengers leave their property with air carriers. Ibid.

[207] See Art.516 of the Commercial Code. See also M. Shahidi, *Gharardad -e- Haml dar Ghanoon -e- Madani va Ghanoon -e- Tejarat* (1378 A.H. 2000), at 70.

[208] Ibid.

[209] Shahid Thani (Al Amili), *al-Rozat al-Bahiyya*' (*Sharh al-Lum'ah*) (1365 A.H. 1986), 385.

[210] See M.A. F. Husaini Maraqi, *al-Anāwin* Vol. II (1417 A.H. 1996), at 486.

[211] See Khomeini, *supra* note 156, at 567.

[212] Ibid.

In *amanat* the burden of proof is on the claimant. He has to prove the *amin*'s fault. When an *amin* claims that he has not committed negligence with regard to the property entrusted to him, that claim is sufficient to exempt him from liability.[213] This is subject to the consensus of *foqahā* and legal scholars, and it has been developed into a principle.

If, in the contract, there is a condition in favor of possession (*amin*) and the removal of liability, even upon proving fault, the owner cannot ask for compensation. *Vice versa* when sometimes the owner of goods adds a condition in the contract that just upon proving the damage even without a fault, he can claim compensation.[214]

(i) Exemption

Delimiting an *amin'*s liability to a value less or more than that of the property entrusted to him can be made through conditions of liability. According to this condition, all of the liability or part of it is dissolved.[215] This condition is valid if the *amin* has been acting duly.[216]

It can be concluded that the *Shariah*, like common law and civil law, accepts exemption conditions in contract of carriage. Islamic jurisprudence considers the correctness and validity of exemption conditions in contractual liability as a clear well-established principle except in two cases: a) when damage was intentional, and b) when the conditions are against public order.[217]

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[213] It seems that most scholars have asked for proof of the nonexistence of negligence from the *amin*. As it is mentioned in the *Sunnah* that an *amin* is clear of liability only if he is from among reliable persons, or elsewhere it is said that an *amin* should take an oath that he has not committed any fault.
[214] See Mosavi Bojnourdi, *supra* note 128, at 4-6.
[215] See Langeroudi, *supra* note 99, at 383-4.
[216] M. Gharavi Ashtiani, *Ejareh dar Sharh al- Lum'ih* Vol. I (1309 A.H. 1930), 34.
[217] See Yazdi Tabatabaei, *supra* note 183, at 332.

(ii) Condition of Strict liability

The carrier's strict liability may be inserted in the contract of carriage in favor of the customer. An *amin* may accept liability for the property entrusted to him even in the case of non negligence. In Islamic jurisprudence, there is no objection to accepting the correctness and validity of strict liability in *amanat*.[218] For example, a carrier may accept by contract liability for damage caused by an act of God. According to the general principles of *amanat*,[219] the carrier is not liable in such cases. However, due to this contractual condition, he would be liable. It has extended the domain of his liability.[220]

3.4.4.2 *Ejāreh* (Hire)

In the Civil Code, a contract of carriage is a kind of *ejāreh* and it is therefore a kind of specific contract (*uqūd-e-mo'ayyane*).[221] The legislature has prescribed obligations on carriers similar to the obligations of an *amin* in *amanat*, which has been extended, to *ejāreh* to preserve and take good care of the goods vested in him.[222] A contract of carriage is considered identical to the *amanat* in terms of the responsibility, duty and obligation of an *amin* (carrier).[223]

A carrier is liable for preserving the property vested in him. There is a general rule in the Civil Code that says that a carrier is responsible for keeping goods diligently and in the case

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[218] Ibid.
[219] In *amana*t, an *amin* is not liable for the damage or loss to the property entrusted to him. His possession does not make him liable, and if the property entrusted to him is damaged because of an act of God, he is not liable.
[220] See Katuzian, *supr*a note 126, at 313-837.
[221] *Ejāreh* is a contract whereby the hirer becomes the owner of the profits resulting from the item hired. The person who lets out an item on hire is called the *Mujir* (lessor); the person who hires is called the *Mustajir* (lessee) and the item which forms the subject of the hire is called an *Aain -e- musta'jareh* (the item hired). See Arts. 466, 509, 513 and 514 of the Civil Code.
[222] Art. 516 provides that contracts for carriage involve same engagements with regard to the protection and care of objects entrusted to carriers similar to those laid down for contracts of bailment. Therefore, if excessive usage or abuse takes place, a carrier is liable for the destruction or damage to the object he receives for transport.
[223] See Arts.607 to 634 of the Civil Code.

of fault, he is liable for making compensation.[224] If he delegates the operation to another person, and during that operation the goods sustain damage, the carrier is liable for compensation.[225]

The carrier is liable for the destruction, loss or damage of goods only in the case of extravagancy or negligence.[226] Therefore, the good's owner and consignor can claim against him for compensation solely in the case of extravagancy or negligence, since the basis of possession is *amanat*.[227] The Supreme Court branch 16 held that Article 614 of the Civil Code on the obligations of an *amin* indicates that if extravagancy or negligence is not proved, the *amin*'s statement should be accepted and he is not liable.[228] In another decision, the Supreme Court branch 30 held that based on Articles 614-615 of the Civil Code, an *amin* has civil liability where the extravagancy or negligence in relation to the goods vested in him is clear.[229] The mere loss of entrusted property cannot be considered as carelessness to impose liability on an *amin*.[230]

Therefore, the Civil Code treats the contract of carriage as a kind of *ejāreh* and the carrier is liable for his extravagancy or negligence (fault).[231] As a result, the carrier is not liable, unless the claimant proves that he is at fault.[232]

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[224] See Art.221 of the Civil Code.
[225] See Art.388 of the Commercial Code.
[226] See Art.614 of the Civil Code.
[227] Confirmation Judgment No. 2808, 05.6.1950 of the General Committee of the Supreme Court, in '*The Collection of Judicial Procedures from 1949 to 1963' in the Book on Liability in Ground Transport* (1973), 129.
[228] Judgment No 29/54024. Y. Barzigar, *Hoqooq – Madani dar Ahkām -e- Dadgah -e- Ali*(1379 A.H. 2001), 247.
[229] Judgment No. 24/3/16-299. Ibid.
[230] A. Matin, *Majmoeh -y- Raviehhay -e- Qazaei* (1380 A.H. 2002), 74.
[231] See Art.953 of the Civil Code.
[232] See Art.516 of the Civil Code states that the carrier's obligation for keeping the goods vested in him is akin to the liability of an *amin*.

3.4.4.3 *Vekalat* (Agency)

In relation to carriage, the Commercial Code deals with topics such as contract of carriage, the characteristics of a contract of carriage, and the duties, rights and exonerations of a carrier.[233] It provides that provisions of *vekalat* in the Civil Code govern carriage.[234] Article 656 of the Civil Code provides that a *vekalat* is a contract whereby one of the parties appoints the other as his representative for the accomplishment of some matter. As a result, if the principle of *vekalat* is applied to contract of carriage in a way, which is identical to *ejāreh*, it in fact means that the principles of liability for an *amin* are applied.[235]

3.4.4.4 Contract of Carriage as an Independent Contract

The author is of the opinion that the contract of carriage has provisions that distinguish it from *amanat*, *ejāreh* and *vekalat*. This is because:

1. In the Civil Code, the carrier is considered as an *amin,* and the claimant should prove fault. However, the drafters of the Commercial Code accepted presumed fault liability.[236] As a result, presumed fault liability is applied to liability for damaged goods and for death or bodily injury.

It seems that the objective of the legislature in shifting the burden of proof to the carrier was to protect the claimant. It is also aimed at preventing probable abuses by the carrier through the attribution of fault and damage to his servants or agents. Therefore, the carrier is liable for any event that occurred during the period of carriage whether he directly performs the contract or delegates its performance to others.[237]

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[233] H. Samavati, *Hoqooq -e- Tejarat* (1378 A.H. 2000), 89-104.
[234] See Art.378 of the Commercial Code.
[235] See Art.666 of the Civil Code.
[236] See Art.386 of the Commercial Code.
[237] See Erfani, *supra* note 197, at 135.

2. The author argues that if a contract of carriage is considered as a mere *ejāreh*, there will be problems in applying provisions of *ejāreh* to a contract of carriage. In *ejāreh*, a leased property is possessed. However, in the case of a person, he cannot be possessed and the carrier has complete freedom in performing its obligation.[238] Therefore, a contract of carriage should be regarded as an independent contract rather than an *ejāreh*.

3. The Commercial Code treats a contract of carriage as a *vekalat*.[239] According to the provision of the *vekalat*; both parties to the contract have the right to cancel the contract. They have the right to cancel the contract after paying costs and compensating for related damages.[240] However, the contract of carriage is not treated as a revocable contract and the carrier or consignor has no right to unilaterally cancel or nullify the contract, or avoid its obligations.[241]

It is submitted that a *vekalat* is a contract where one party appoints the other as his representative for fulfilling an obligation. It is akin to a case where the representative has performed an act under his principal's name. Whereas in a contract of carriage, the carrier does not perform the act of carriage on behalf of the other party, but performs it independently and under his own name.[242]

4. The Commercial Code has not generally dealt with contracts of carriage according to the provisions of *vekalat*.[243] The Commercial Code separates contract of carriage from *vekalat* in certain cases, and gives it a special status. For instance, it does not allow the consignor to retrieve goods from the carrier. The carrier should follow orders from the consignee.[244] In

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[238] N. Katuzian, *Uqood -e- Moayyaneh* (1383 A.H. 2005), 351.
[239] For details about *vekalat* (agency), See 3.4.4.3, *supra*.
[240] See Art.382 of the Commercial Code.
[241] S. Maleki, *Mahiyyat -e- Hoqooqi -y- Haml va Naghl dar Iran* (1381 A.H. 2003), 75.
[242] See Erfani, *supra* note 197, at 107.
[243] See Art.378 of the Commercial Code.
[244] See Art.383 of the Commercial Code

addition, the carrier is permitted to sell the goods if they are not collected within a specific time.[245]

As mentioned above, the author is of the opinion that a contract of carriage is an independent contract from *amanat*, *ejāreh* and *vekalat*. The contract of carriage follows the general conditions of contract mentioned in the Civil Code such as intention, capacity, specificity of transaction, and legitimacy, just like other contracts.[246] It is an independent and irrevocable contract.

According to Article 10 of the Civil Code, contracts shall be binding on those who have signed them if they do not violate the explicit provisions of the law. Since the contract of carriage is an independent contract, it is therefore binding unless it is contrary to the law.[247] Like other contracts, it has to observe the general conditions of contract mentioned in the Civil Code.[248] The carrier is liable for damages resulting from delay, loss or destruction of goods; and for death or bodily injury to passengers within the limits of law and regulations.

The liability principles of the Iranian contract of carriage can be listed below:

(i) Carrier Liability

The Commercial Code determines the rights, duties and obligations of the consignor, the consignee and the carrier.[249] It does not consider the carrier as an *amin* and provides presumed fault liability hence the claimant does not need to prove the fault of the

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[245] See Art.384 of the Commercial Code.
[246] See Art.190 of the Civil Code.
[247] See Art.10 of the Civil Code.
[248] The general rules on contract (*aqd*) are provided in five chapters: the concept of contract; the validity of a transaction; the effect of contracts; the non-performance of contracts; and the termination of obligations. See Katuzian, *supra* note 126, at 10.
[249] The provisions of the Commercial Code generally apply to carriage of goods either by rail, sea or air provided that there is no specific law to that effect. Since the Iranian legislature has adopted the Warsaw-Hague Convention for international flights and the provisions of limited liability in the Warsaw-Hague Convention for domestic flights, so the related provisions have priority over the provisions of the Commercial Code.

defendant.[250] However, the carrier can prove that the loss or destruction of goods has been caused by its inherent defects or it has occurred because of the fault of the consignor or the consignee.[251] The Commercial Code states that a carrier is liable unless he proves that the loss, destruction or damage was due to the nature of the goods, or that it resulted from the fault of the consignor or the consignee, or that it was due to the instruction of one of them, or that it has been caused by events that no diligent carrier can avoid.[252] Thus, the burden of proof has shifted from the claimant to the carrier.[253]

The Commercial Code states that the carrier is obliged to deliver goods diligently to the consignee and he is liable in the case of breach.[254] As soon as the goods are delivered to the carrier, he is responsible for taking care of them and delivering them intact and on time to the consignee.[255]

The Commercial Code accepts presumed fault liability.[256] The carrier is liable for events happening during carriage whether he performs the carriage himself or delegates it to his agent. The carrier, besides being liable for events during a carriage, is liable for the acts of his agent, whether they are intentional or unintentional.[257] He is liable for his agent's acts against the customer, but then he can refer this back to his agent.[258]

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[250] This is identical to the position under Article 17 of the Warsaw Convention 1929.
[251] This is similar to Article 20 of the Warsaw Convention 1929. M.S. Rad, 'Manteq Garaei dar Hoqooq', (1376 A.H. 1997) 25 *Majalle Hoqooqi Dadgostari*, 105, at 108.
[252] See Art.386 of the Commercial Code.
[253] See Arts.386 and 387 of the Commercial Code. Since the Commercial Code and the Civil Code are in conflict with one another, different opinions were provided for what should be the principle of liability. It is submitted that where these two codes are in conflict on the liability of air carriers for baggage and cargo, the Commercial Code should be applied as it is regarded as specific law rather than the Civil Code, which is considered as general. B. Shahriar, 'Mseoliat -e- Motesaddi -y-Haml -e- Khareji dar Iran', (1378 A.H. 2000) 42 *Sanat -e- Haml -o- Naghl Journal* 48, at 53.
[254] See Art.386 of the Commercial Code.
[255] See Art.388 of the Commercial Code.
[256] See Art.377 of the Commercial Code.
[257] See Art.388 (1) of the Commercial Code.
[258] See Art.388 (2) of the Commercial Code.

If the consignee does not accept the goods, or refuses to pay the carriage costs or other rights of the carrier, or if the carrier does not have access to the consignee, he must inform the consignor and keep the goods temporarily or ask a third party to keep them temporarily.[259]

(ii) Defenses

The Iranian Commercial Code states that a carrier has to carry goods diligently, and he is liable for any defect, destruction or loss of goods or delay in delivery, unless he proves he has performed his obligation diligently and has taken all necessary measures to avoid the damage.[260] Thus, the carrier is liable if he cannot prove that non-performance had an external cause, which cannot be attributed to him.[261] If the carrier is prevented from performing his duty because of an event, which is out of his control, he is not liable.[262]

Consequently, *force majeure* applies when any cause that is not related to the carrier leads to non-performance;[263] and any event external to the carrier which cannot be attributed to him, brings exoneration.[264] *Force majeure* is defined as unexpected and unavoidable events, which cannot be attributed to the carrier.[265] Owing to such an event, the performance of obligations under the contract becomes completely impossible. Thus, externality, unavoidability and unpredictability are three necessary conditions for *force majeure*; and the existence of damage, the occurrence of an event, and the causal relationship between the damage and the event, are three elements of liability.[266]

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[259] See Art.384 of the Commercial Code.
[260] See Art.387 of the Commercial Code.
[261] See Art.277 of the Civil Code.
[262] See Art.229 of the Civil Code.
[263] For details about *force majeure* in Islamic jurisprudence and Iranian law, see 3.4.3 (Contractual liability), *supra*.
[264] S. Ghamami, *Maseoliat Madani -e- Hokomat* (1376 A.H. 1997), 107.
[265] See Katuzian, *supra* note 126, at 291-292.
[266] See Erfani, *supra* note 197, at 107.

(iii) Contractual Conditions

A carrier should pay full compensation when he is liable. However, the carrier can limit or exclude his liability in a contract of carriage. There is a dispute over whether a carrier can insert conditions in the contract that would exonerate or limit his liability.[267] Although there is no explicit reference to such conditions in Iranian law, their validity is justifiable since both the Commercial Code and the Civil Code accept contractual conditions.[268] The Civil Code provides that if a contract determines the level of compensation for non-performance, the court cannot order the obligator to pay an amount, which is higher or lower than the agreed remedy. The Commercial Code also provides that parties to a contract can agree on an amount, which is higher or lower than the actual damage.[269] Therefore, carriers can determine a cap for their liability. If the parties agree that the carrier just has to compensate based on limited liability in the event of non-performance, delay or damage, the claimant may receive compensation, which is higher or lower than the actual damages.[270]

However, the limited liability should not be inappropriate and unjust.[271] When parties conclude a contract, they display their intention. As long as it is not against public policy, they can insert any conditions in it. When liability is limited, the court cannot change that, even if actual compensation is more than that[272] unless law and regulations prohibit that condition or the carrier commits gross negligence.[273]

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[267] H. Afshar, *Hoqooq -e- Tatbiqi* (1380 A.H. 2001), 113; Katuzian, *supra* note 126, at 670.
[268] R. Eskini, 'Shart -e- Mojazat dar Qarardad -e- Beinolmelali', (1377 A.H. 1988) 9 *Majale Hoqooqi*, 45, at 68-69.
[269] See Art.230 of the Civil Code and Arts.386- 387 of the Commercial Code.
[270] Actual Damages are real damages to compensate for loss or injuries that have actually occurred. http://www.lectlaw.com.
[271] See Sotodeh Tehrani, *supra* note 3, at 77.
[272] R. Eskini, *supra* note 268, at 66-95.
[273] N. Katuzian, *Vaqaye -e- Hoqooqi* (1384 A.H. 2004), 290; Emami, *supra* note 168, at 247.

3.4.5 *Diyah*[274]

Liability and compensation for death or bodily injury is based on the Islamic concept of *Diyah*.[275] Rules of the *Diyah* cover liability and compensation. In a restricted legal sense, the *Diyah* means remedy payable in the case of death or bodily injury.[276] One definition says that the *Diyah* is a property (*māl*) which becomes obligatory (*vājeb*) due to homicide or bodily injury, no matter whether the *Shariah* has determined its amount or not.[277]

A new issue that can be discussed under the *Diyah* is death and bodily injuries that occur in air transport. At the international level, compensation for fatal accidents in air transport is moving towards unification.[278] Consequently, clarification of Islam's constant regulation such as the *Diyah* (and its flexibilities) is necessary.[279]

Generally, the *Shariah* regulations on civil liability in the case of death and bodily injuries are codified in the Islamic Criminal Code.[280] Therefore, the following subjects are identical in the *Shariah* and Iranian law. However, any deviation of Iranian law from the *Shariah* would be highlighted in the following discussion.

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[274] See Sarvestani, *supra* note 119, at 40.
[275] Ibid.
[276] The holy *Quran* says that, 'should the relatives of the slain forgive the killer; they must be reasonably and gratefully compensated' (*Sureh* 2:178-79). Thus, the practical operation of the institution of the *Diyah* was confined to the field of homicide. However, it was also extended to a certain number of injuries to the body. Ibid., at 112.
[277] *Diyah* is the name of a property, which became obligatory because of a crime to life or part of the body. See Najafi, *supra* note 154, at 2; Art.294 of Islamic Criminal Code.
[278] International flights introduce political, social, economic and legal complications to countries since they face a large number of people and aircrafts from various nationalities within their territory. Due to the huge increase in international flights and the presence of foreign elements in the civil law of international air transport, a large number of cases related to foreign citizens come to courts. If there are not uniform international regulations, court awards for air carrier's liability and damages for passengers differ from one country to another. They are severely under the impact of national legal systems. Thus a need for uniformity of regulations is felt. For details, see Chr. 4, *infra*.
[279] Ibid., at 9.
[280] Contrary to secular law, Iranian law following the *Shariah* discusses civil liability for death or bodily injury under Islamic criminal law.

3.4.5.1 Classification of Acts of Offender

In the case of death or bodily injury, the act of the offender is classified as follows:

1. Intentional offence or murder (*qatl-e-amd*) is an act in which the murderer has an intention of killing, or intends for an act that in itself is murderous, but does not have an intention to kill.[281] The punishment for intentional offence is retaliation (*qisas*).[282]

2. Quasi-intentional offences or homicide (*qatl-e-shebh-e-amd*) is an act in which the offender's intention is not murderous. He has no intention to kill and the victim is killed accidentally, e.g. the liability of a carrier in air accidents. In such cases, as soon as the act of offending occurs; the *Diyah* is due to the victim and his inheritors.[283]

3. Unintentional offence or homicide (*qatl khataii*) is an act in which the perpetrator has neither an intention to commit an offence against a victim nor an intention for the offending act itself.[284] Although this kind of killing is discussed under Islamic criminal law, it also includes the civil liability of wrongdoers for compensation.

The *Diyah* is sometimes optional and sometimes obligatory. It is obligatory in all cases except those of deliberate offences, which entail a right of vengeance or the *Diyah*.[285] They are optional in the case of offences committed deliberately (intentional offences). The claimant is entitled to request *qisas* or exempt the offender and accept compensation according to the agreement between the claimant and the defendant.[286] For quasi-intentional and unintentional offences, the claimant is only entitled to compensation.[287]

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[281] See Shahid Thani, *supra* note 208, at 418; Arts. 205 and 206 of Islamic Criminal Code.
[282] R. Peters, *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), at 44-48.
[283] See Art. 295 of Islamic Criminal Code.
[284] See Najafi, *supra* note 154, at 3-4
[285] Ibid., at 517.
[286] Ibid.
[287] K. Qeblei Khoei, *Qavaed -e- Hoqooq -e- Mojazat -e- Islami* (1385 A.H. 2006), 23.

Therefore in an intentional offence or murder (*qatl-e-amd*), the criminal liability of the wrongdoer is discussed and its punishment is *qisas*.[288] However, if the claimant forgives the wrongdoer, *qisas* punishment will be changed to the *Diyah*.[289] In the second type of quasi-intentional offence or homicide (*qatl-e-shebh-e-amd*), there are punishment and the *Diyah*. However, the third type, i.e. unintentional offence or homicide (*qatl khataii*), only includes the *Diyah*.[290]

3.4.5.2 The Nature of the *Diyah*

The nature of the *Diyah* is not very clear in Iranian law. It contains diverse and contradictory characteristics, which resulted from its origin, and subsequent developments. The Islamic Criminal Code asserts that the *Diyah* is a limited liability paid to the claimant in the case of death or bodily injury. The Code is silent about whether it is applicable to civil liability or whether it has a civil aspect. This ambiguity has led to diverse views on the nature of the *Diyah*. Should it be considered as a criminal liability, or a civil one, or does it have a dual nature?

If the *Diyah* is considered as a mere punishment and a criminal liability,[291] civil liability should not be accepted. However, where the *Diyah* also applies to cases where no crime has happened, its civil aspect is undeniable. Yet, if it is considered solely as a civil liability, other compensations should be disregarded since the *Shariah* has only recognized the *Diyah* for compensation. Whilst the adoption of any of these opinions would cause rigidity to the liability principles in the *Shariah* and any further compensation would be rejected, a close

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[288] See Khomeini, *supra* note 156, at 459; Art. 259 of Islamic Criminal Code.
[289] See Art. 298 of Islamic Criminal Code.
[290] See Khomeini, *supra* note 156, at 500; Art 306 of Islamic Criminal Code.; Peters, *supra* note 282, at 48.
[291] The *Diyah* is of a punitive nature; refuting any idea that it is a compensation for the damages. It is submitted that *ejtehād* is forbidden where there is an explicit *Sunnah*, especially in criminal laws where their interpretation is limited. R. Norbaha, *Hoqooq -e- Jazaie Omomi* (1377 A.H. 1998), 316.

study of the *Diyah* regulations together with other principles in the *Shariah* seem to indicate that the *Diyah* has a dual nature.

(i) The *Diyah* as a Punitive Damage

There is an opinion that the *Diyah* has a punitive nature. It is a kind of pecuniary punishment and paid as penalty for the offence. Its purpose is therefore to punish the offender and to serve as a lesson to others in the society.[292] On the other hand, it can be seen as a form of compensation to the victim.[293] In the *Shariah*, any action that harms the physical totality of a human being partially or totally, and causes an injury or death, is considered an offence or a crime.[294]

The *Diyah* shares common characteristics with criminal punishment. It is fixed by the Islamic Criminal Code and the court cannot increase or decrease its amount.[295]

It is claimed that the *Diyah* is an alternative for *qisas* and as the offender has to pay for it, it can be considered a punishment.[296] Comparing the Quranic verses on *qisas* and the *Diyah* makes it clear that the *Diyah* is a kind of punishment; either it comes from an intentional or unintentional fault.[297]

From ancient times, the *Diyah* has been considered as a private punishment.[298] When a murder occurs, public opinion considers the payment of the *Diyah* as a restraining force from

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[292] M.J. Husaini Amili, *Miftah al-Kiramah* Vol. I (1410 A.H. 1989), 2.
[293] It should be noted that whether we consider the *Diyah* as a punishment or compensation or a mixture of the two, we have to use this classification. F. Tarihi, *Majma al-Bahrain* Vol. I (1408 A.H. 1987), 416.
[294] F. Salehi, *Diyah ya Mojazat -e- Mali* (1376 A.H. 1997), 55.
[295] See Khomeini, *supra* note 156, at 521.
[296] See Shahid Thani, *supra* note 208, at 419.
[297] See Salehi, *supra* note 294, at 56.
[298] The holy *Quran*, *Sureh* 2:179.

similar crimes. *Foqahā* have discussed the *Diyah* in the same chapter as other punishments in their jurisprudence books.[299]

(ii) The *Diyah* as a Compensation

There is another opinion that the *Diyah* has a civil liability nature. It is argued that there is no reference to the *Diyah* as a punishment in Islamic sources (the *Quran* and the *Sunnah*). On the contrary, there are traditions that can be counter-examples to this claim. Proponents claim that the *Diyah* was established to compensate for death or bodily injuries. It is distinguished from compensation in tort liability or other systems for damages to properties.[300]

1. The *Diyah* is a compensation for death or bodily injury.[301] Therefore, it is not a punishment since the purpose of its payment is for compensating the bodily injuries or losses.[302] Court adjudicates it to cover the losses caused by offenders. If judge refuses such a judgment (*hokm*), losses to victim would be left uncompensated and this would be against the *la zarar* principle.[303] Whatever is paid to the victim is for compensating the loss and injury he had faced.[304]

2. Islamic punishments are always for sins and contain intention. However, in the majority of cases, in the *Diyah* there are fault-based acts or quasi-intentional acts, which lacked the factor of intention.[305]

3. For unintentional offences, the *āqele* and not the offender, is liable for the *Diyah*.[306] However, according to Islamic criminal law, punishments are personalized. *Āqele* who is

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[299] See Salehi, *supra* note 294, at 58.
[300] M.H. Marashi, *Didgah -e- Jdid dar Hoqooq -e- Jazai -e- Islami* Vol. I (1376 A.H. 1997), 43.
[301] See Art. 295 of Islamic Criminal Code.
[302] A. Edris, *Avaz*, (1377 A.H. 1998), 178.
[303] Ibid., at 179.
[304] A. Mahmoudi, *Hoqooq -e- Jazaie Islami* (1359 A.H. 1980), 55.
[305] See Edris, *supra* note 302, at 180.
[306] See Art. 305 of Islamic Criminal Code.

liable for paying the *Diyah* is relatives of the offender.[307] Thus, it is not meaningful to consider it as a punishment. Had it been stated that the *Diyah* is a punishment, it should be concluded that according to Islamic jurisprudence, innocent people have the capability to come under prosecution and punishment. As this offends against wisdom, the *Diyah* therefore has a civil nature.

(iii) The *Diyah* as an Integrated Special Entity

Regarding the conditions of the *Diyah*, considering it as an integrated special entity seems more realistic as compared with the previous idea which believed that all legal entities have to necessarily be put under one of the traditional dichotomies (i.e. civil or criminal liability). There is no sound reason to confine the *Diyah* to just one of them.[308]

The following are the most important reasons that support the dual nature of the *Diyah*, and in the mean time, recognizing it as a unique entity:

1. The *Diyah* is a pecuniary penalty. It is also compensation. It is a pecuniary penalty (fine) since there is a kind of hardship and grief for the offender and he will be deprived of some of his property. However, it is also like compensation, since the aim of the *Diyah* is to compensate the claimant.[309]

However, in some cases, it is different from a pecuniary penalty and compensation. A pecuniary penalty is in law a kind of public punishment, which deprives the offender of some of his property and his liberty like when he is given a prison sentence. The aim of punishment, either to his property or to his liberty, is to remove crime for the benefit of the public. A pecuniary penalty is the right of society, and the victim or his relatives do not have

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[307] See Art. 307 of Islamic Criminal Code.
[308] M. Ashouri, *Aein -e- Dadrasi-e- Jazaei* Vol. I (1385 A.H. 2006), 265.
[309] N. Katuzian, 'Mahiat va Qalamro -e- Diyah baray Khesarat', (1372 A.H. 1993) *Kanoon -e- Vokala Journal* 2, at 23.

a right to claim for it, but in the *Diyah* it is different. Firstly, the *Diyah* belongs to the victim and his heirs, and it is not transferred to the public treasury. Secondly, in most cases the *Diyah* payment is made not solely by the offender. His family or tribe contributes to this payment and the offender's share is like that of other members of the tribe. Thirdly, the *Diyah* is only for the benefit of the victim or his heirs. Therefore, it is not possible to consider it merely as a criminal punishment.[310]

2. The *Diyah* is not the only compensation, since there is a condition in consideration that states that the wrongdoer should cover the total compensation whether the damage or injury is material or immaterial, or is a combination of the two. However, the *Diyah* is a limited liability and it is not for all the damage caused by the offence.[311]

(iv) The *Diyah* as a Hybrid Nature

The author is of the opinion that the *Diyah* has a hybrid nature with specific characteristics. It has a dual face and an integrated nature that includes criminal and civil liabilities.[312] Under Islamic criminal law, intentional offences are punished by retaliation (*qisas*), so civil and criminal liabilities have no clear-cut borders. Therefore, efforts to categorize the *Diyah* as a civil remedy or a punishment in criminal liability do not seem necessary in a system in which the boundaries between civil and criminal liabilities are blurred. The *Diyah* is an integration of criminal and civil liabilities, rejecting the concept of standalone criminal or compensatory liability.

It can be argued that by conceiving the *Diyah* as an independent civil institution for compensating victims, this paves the way for legislators to set rules for liability in excess of

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[310] Ibid.
[311] M. Mirsaeidi, *Mahiat -e- Hoqooqi -e- Diyah* (1373 A.H. 1993), 54.
[312] See Ashouri, *supra* note 308, at 240.

the *Diyah* (unlimited liability). Hence legislators can codify laws and regulations that may contribute to the conditions and circumstances of national and international communities. Therefore, the author is of the opinion that the *Diyah* in *Shariah* law has two aspects. It is a punishment for crimes, and where there is no crime, it is compensation for the victim.[313] However, this compensation is the minimum remedy and if damage exceeds the *Diyah*, complete compensation should be made.

A discussion of the nature of the *Diyah* is important for air carrier liability. This is because if the *Diyah* is considered to have either a punitive or a civil nature, there will be a conflict between the international regime and the *Diyah*.[314] If it is assumed that it has either a punitive or a compensatory nature, it will not be possible to bring the *Shariah* and international conventions to a state of harmonious coexistence. This is owing to the fact that the *foqahā* do not accept principles other than what is explained by the *Shariah*. They would argue that such a principle is in explicit conflict with the *Shariah*. Those *foqahā* hold the *Diyah* as an unchangeable regulation so it is not possible to have liability in excess of the *Diyah* or unlimited liability. However, if a dual nature is conceived for the *Diyah*, there will be no obstacle in the effort to reconcile the *Shariah* and international regulations. By accepting a dual nature, it can be concluded that the *Shariah* is flexible and can be implemented alongside international regimes. The author will investigate the different interpretations.[315]

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[313] In deliberate and quasi-deliberate homicide, the *Diyah* contains a criminal aspect since the offender is liable for paying it. However, in other purely unintentional offences such as manslaughter; since the tribe (*āqele*) is liable for the payment of the *Diyah*, it contains a civil liability aspect.

[314] Discussing the nature of *Diyah* is important because of the impact it has on the feasibility of accepting a limitation of liability in excess of the *Diyah* such as what is mentioned in Article 22 of the Warsaw Convention 1929, or the coordination between liability under the *Diyah* and the principles of liability in the Warsaw Convention 1929. For details see 4.3, *infra*.

[315] See Chr. 4.3, *infra*.

3.4.5.3 The *Diyah* and Liability

(i) The *Diyah* and Tort liability

The *Diyah* is similar to compensation for civil liability, since in civil liability, the aim of payment is compensation. Malice has no place in it, especially in destruction cases. It is almost the same in the *Diyah*, since in quasi-intentional offences and unintentional offences, the payment of the *Diyah* is obligatory and malice is not a condition for its realization.

Foqahā have divided the *Diyah* like in the case of destruction (*etlāf*). Liability for death or bodily injury can be by direct or indirect involvement, due to the harmful results attributed to it.

1. For directly caused destructions, the general principle indicates that 'passing the passage of man is permissible (*mobāh*), provided that the result is safe'.[316] Passing included walking on foot, on animals, and nowadays in vehicles. The direct causation of death or bodily injury to persons can be directly attributed to the offender, i.e. he does an act with or without a tool in a way, that death is attributable to him.[317] Therefore, in this case, strict liability has been accepted.

2. For indirectly caused death or bodily injury (*tasbib*), the liability for death or bodily injury is based on fault. The wrongdoer has not been duly careful, and because of his carelessness, death or bodily injury was caused through acts like digging a well or putting stones in the passage of people. In these cases, the reason for injury is the person slipping and not acts like digging a well.[318] That is, he has not paid due attention to the foreseeable outcome of his act,

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[316] Islamic jurists have discussed different kinds of indirectly caused negligence under the topic of what a man creates in the public passages. They have resorted to the *la zarar* principle and the Prophet's tradition for substantiating liability in this case. See Khomeini, *supra* note 156, at 557.
[317] Ibid., at 560.
[318] See Najafi, *supra* note 154, at 95.

or acted in spite of knowing the outcome.[319] In indirect causation, two conditions make the payment of the *Diyah* obligatory: a) a relation between cause and damage, and b) fault.[320] The concept of fault is so broad that even if the act was taken for the public's benefit but accompanied with negligence and results in damage or harm, the one who has caused death or bodily injury is liable.[321]

However, there are some differences between destruction and the *Diyah*:

1. In destruction (*etlāf*), the property is damaged, but in the *Diyah*, the damage has caused death or injury to a person.

2. In *etlāf*, intention does not make a difference in the liability of the wrongdoer. However, if an offender has acted intentionally, the liability attributed to the act is not the *Diyah* but *qisas*.[322]

3. In civil liability, there is an intention to compensate equally and fully the damage. This requires delicacy in delimiting the damage and in calculating the amount payable for the damage. However, in the *Shariah* there is a fixed amount for the *Diyah*. In *etlāf*, liability is unlimited, and if one causes a defect in the property, he will be liable for the price of the defect.[323]

(ii) The *Diyah* and Contractual Liability

If breaching the obligations of a contract causes death or bodily injury, there will be contractual liability and the liable party has to pay compensation. Generally, contracts made among parties are either for something to be done or for reaching a certain result.[324]

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[319] See Emami, *supra* note 168, at 393.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] See Najafi, *supra* note 154, at 95.
[324] See Amin, *supra* note 132, at 16.

1. The *Diyah* and *obligation de résultat*

When a contracting party accepts liability for achieving a certain result, if the aimed result is not achieved, and because of it the other party encounters damage, there is a breach of contract and the party is liable for compensation. The *foqahā* believe that breach of the contract contents is enough for imposing liability, even though the liable party has not committed any fault in carrying out his undertakings.[325]

The author is of the opinion that if the carrier undertakes to carry safely passengers to their destination, but fails to do so successfully the mere existence of a causal relationship between the act of the carrier and the death or bodily injury of the passengers imposes an obligation on the *Diyah* on the carrier to pay.

2. The *Diyah* and *obligation de moyen*(s)

When a carrier obliges to merely provide his services to the best of his knowledge and belief, and it becomes clear that the carrier has not committed negligence or extravagancy, and has applied due diligence and caution, but in spite of his endeavors damage is suffered by the other party, he would not be considered liable.[326] In this kind of obligation, according to the contract law, the obligor should do all possible and necessary acts and cautions to get the concerned result.[327]

Therefore, according to the rules of breaching *obligation de moyen*(s), if a contracting party acts in accordance with his contractual obligation and is not negligent, yet somehow causes

[325] See Edris, *supra* note 302, at 126.
[326] Ibid.
[327] See Amin, *supra* note 132, at 20.

bodily injury or death, since it is not due to his fault and / or breach of his obligations, naturally there will not be a contractual obligation on him to pay damages.[328]

3.4.5.4 The *Diyah* and Limited and Unlimited Liability

(i) The *Diyah* and Limited Liability

There is a fixed tariff for the *Diyah*, unless another agreement is reached between the parties.[329] In principle, it consists of camels of different ages and sex. The *Diyah* for homicide is one hundred camels, split into five categories and equal in number: twenty four-year-old, twenty three-year-old, twenty two-year-old and twenty one-year-old female camels and twenty one-year-old male camels. This division is subject to divergent *foqahā* options. If the homicide is intentional or quasi-intentional, the value of the *Diyah* increases (*Diyah moghallezeh*), comprising now, and only female camels of the first four categories described. If an offence occurs in one of the *harām* months,[330] the offender, in addition to a full *Diyah*, has to pay another one third of the *Diyah* to the victim. There is a consensus over this rule.[331]

Although according to the original principle the *Diyah* consists of camels, it was very soon recognized that it, equally well, could be paid in gold coinage (1000 gold Dināars or 10,000 Derhams according to different versions).[332] As said, the *Diyah* may also consist of cattle (200), sheep (1000) or clothing (200 garments).[333]

As discussed previously, there is a fixed tariff on the *Diyah* which is payable, unless another agreement is reached between the parties. In principle, the *Diyah* is one hundred camels. If

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[328] See Esmaili, *supra* note 196, at 67.
[329] See Art. 297 of Islamic Criminal Code.
[330] I.e. the four months of *Rajab, Zelqade, Zelhaje* and *Moharam* of the Islamic lunar calendar. Art. 299 of Islamic Criminal Code.
[331] See Najafi, *supra* note 154, at 27.
[332] See Khomeini, *supra* note 156, at 504; Art. 297 of Islamic Criminal Code;Peters, *supra* note 282, at 51-53.
[333] See Najafi, *supra* note 154, at 28.

the homicide is intentional or quasi-intentional, the value of the *Diyah* increases.[334] Each year, the Iranian Ministry of Justice announces the *Diyah* in the Iranian currency. Courts and insurance companies use it in their judgments and payments. In 2011, the *Diyah* was set at 67,000,000 Tomans (appr. US $ 67,000).[335]

There are disputes over whether the mode of payment depends upon the agreement between the parties, or whether it depends on the decision of either the offender or the court, or whether a mode is obligatory depending on different circumstances and localities. In addition, whether the payment of the *Diyah* with camels is a fundamental obligation, which is modifiable only in circumstances where payment in this form is impossible. However, it appears that an offender has the right to choose from six kinds of *Diyah*,[336] and the victim's heirs have no right to refuse the *Diyah* that the offender has chosen.[337]

The amount of the *Diyah* is due in full only when the victim is a male Muslim.[338] In a majority of opinion, the amount varies according to gender and religion.[339] They believe that the *Diyah* of a woman is half that of a man.[340] This reduction to half is only applicable where the *Diyah* exceeds one third of the full *Diyah*; otherwise, the *Diyah* for men and women are equal.[341] The *Diyah* payable by a non-Muslim foreigner temporarily admitted to the Muslim territory is at the rate of one third or one-half in the opinion of the majority.[342]

However, *foqahā* such as Ayatollah Sanei believe that according to the major Islamic sources, i.e. the *Quran* and the *Sunnah*, there is no difference among men and women, and

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[334] See Mirsaeidi, *supra* note 311, at 42 -112
[335] http://www.dadiran.ir/.
[336] See Husaini al-Amili, *supra* note 292, at 357.
[337] See Najafi, *supra* note 154, at 15.
[338] See Amin, *supra* note 132, at 55
[339] Ibid.
[340] See Najafi, *supra* note 154, at 32.
[341] Ibid.
[342] Ibid.

Muslims and non-Muslims with regard to the *Diyah*. Likewise, according to the general rules of Islam, the *Diyah* is equal for women and men, or Muslims and non-Muslims.[343] They argue that the basic reasoning for variations has been a few special traditions and *ejmā* among *foqahā*. However, both of them are authentically refutable.[344]

Firstly, the traditions supporting variations are against the *Quran* and the *Sunnah*, and they are not authentic. Secondly, *ejmā* is not as authentic as a reason since some *foqahā* such as Ayatollah Sanei have expressed their doubt on it, and *ejmā* is not an independent reason. *Ejmā* is a proof where the *Quran* or the *Sunnah* has not provided a rule.[345] It is affected by unauthentic traditions, and since those traditions had been in conflict with the *Quran* and the general rules of Islam, they are therefore not reliable. Consequently, any *ejmā* based on them is not reliable either.[346]

As explained above, the *Diyah* regulations were directly adopted in Iranian law. However, their application in civil liability is still ambiguous. Among these cases, one can mention the nature of the *Diyah*, the unchangeable limited liability in the *Diyah*, and its application in tort and contractual liability. Since compensation based on the *Diyah* is the main conflict between *Shariah* regulations and the international system of air carrier liability, the author will analyze this issue below. Here the nature of the *Diyah* will be analyzed, and then studied in tort and contract.

(ii) The *Diyah* and Unlimited Liability

The *Diyah* for death, both in civil or criminal liability, is predetermined. It should be paid to the inheritors of the victim according to the *Shariah*. It means that neither the contracting

[343] Y. Sanei, *Nezarat -e- Qzaei* (1385 A.H. 2006), 5-22.
[344] Ibid.
[345] M.H. al-Amili, *Wasa'il al-Shia* (1421 A.H.2000), 177.
[346] Ibid.

parties nor even the legislature can agree on less than that fixed amount predetermined by the *Shariah*. However, compensation in excess of the *Diyah* in favor of the victim is a matter of dispute among the *foqahā*, which will be discussed below.

The dominant view is that the *Diyah* is a limited liability for the victim. Whilst a majority of *foqahā* is of the opinion that the *Diyah* was determined for death and bodily injury, an important question remains as to whether a claimant can claim unlimited liability in addition to the *Diyah*.[347] Did ratification of the *Diyah* law abolish the Civil Liability Act 1960?

Iran, according to the Civil Liability Act 1960, had accepted unlimited liability for death or bodily injury. However, the codification of the Islamic Criminal Code and its application by the courts has caused conflicts in the area of compensation for liability in excess of the *Diyah*. This issue surfaced in 1984 when the criminal courts posed the question to the Supreme Court. The Supreme Court responded by clarifying that courts could not condemn defendants to shoulder liability in excess of the *Diyah* for the costs of medical treatment or for incapacity to work.[348] Liability in excess of the *Diyah* is important in adjusting the *Diyah* to provisions of limited or unlimited liability in international air Conventions. Otherwise, it would lead to discrepancies in victims' compensation, especially where the limited liability provisions in international air Conventions become applicable to domestic flights. If liability in excess of the *Diyah* is accepted, this will reconcile domestic law with the Warsaw-Hague Convention. After posing this question, the *foqahā* and the courts in Iran elaborated on their opinions.[349] These opinions affected the judgments of courts and ended in non-uniformity.[350]

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[347] According to Art.1 of the Civil Liability Act of 1960, any damage whether physical or mental, imposes liability; and the offender is liable for compensation.
[348] Judgments of the Supreme Court, Civil Branches, No. 68.9.14.
[349] Ashouri, *supra* note 308, at 241.
[350] Judgments of the Supreme Court, Civil Branches, No. 75.4.5.

The author is of the opinion that the majority view, which is in favour of a limitation on the amount of compensation payable for death or bodily injury in the *Diyah*, is unacceptable in States like Iran. The following opinions support this claim, and indicate an inclination towards complete compensation.

1. Opinions of Prominent Contemporary (*foqahā*)

Since the *Diyah* is a legal entity of the *Shariah*, it is of great importance for both the legislators and the courts to refer to the opinions (*fatvā*) of prominent *foqahā* for its interpretation. Indeed, according to a prescription by the Constitutional Code,[351] where there is no explicit text of law on an issue, courts should refer to well-known *fatva* of prominent contemporary *foqahā*. Up to the present time, no explicit text of law has discussed the issue of compensation exceeding the *Diyah*. Courts therefore resort to fatwa when investigating such claims.

In the early stages of when the *Diyah* provisions were applied, religious scholars have investigated this issue and their responses indicated that it would be illegitimate for compensation to exceed the *Diyah*. Later on, however, liability in excess of the *Diyah* was limitedly accepted.

a) Ayatollah Golpayegani, in response to the following case, declared that the offender is not liable for any other cost except the *Diyah*, and the offender and the victim should compromise on medical treatment costs. The case was about a car accident in which the driver hit a boy and broke his leg. The boy was an orphan and has a guardian. The driver undertook to compensate for the leg injury and to pay for the medical treatment.[352]

[351] See Art.167 of the Constitutional Code of the I.R. Iran.
[352] M.R Golpayegani, *Majma al-Masa'il* Vol. III (1386 A.H. 2007), 249.

b) Ayatollah Makarem Shirazi, in response to another case, mentioned that the *Diyah* is imposed on a person who caused harm to another. If the victim needs medical treatment to recover, it is obligatory on the offender to pay the costs of medical treatment, in addition to the *Diyah*. If, because of the harm the victim suffers a pecuniary loss (e.g. if he cannot do his ordinary tasks or his job), this should also be compensated.[353]

c) According to another contemporary Ayatollah, Hossain Nori, where the costs of medical treatment exceed the *Diyah*, the offender should pay this excess cost in accordance with the principle of *la zarar*. The loss should be compensated for by the offender since he is the causer of that offence.[354]

2. Opinions of the Judiciary

When the courts were investigating liability for death or bodily injury in 1985, they asked the Commission of the Supreme Council of the Judiciary if claimants could claim for compensation according to the Civil Procedure Act. The Commission responded by stating that even when the damage or loss is more than the *Diyah*, the claimant can only claim for the *Diyah* and has no right for the total remedy. It is clear that the Supreme Court rejected any possibility for the claimant to exceed the *Diyah*.[355]

The Legal Office of the Judiciary, in response to a question about damages exceeding the *Diyah*, had initially stated that these are not compensable and that the defendant is only liable for the *Diyah*.[356] However, a clear change of attitude took place in 1997, when in response to several inquiries from the Research Center of the Judiciary Power, it stated that damages

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[353] N. M. Shirazi, *Rahnmon* Vol. IV (1373 A.H. 1994), 191.
[354] H. Noori Hamedani, *Tozihol Masael* (1376 A.H.1997), 603.
[355] Opinion of the Commission of the Supreme Judiciary Council Vol. II (1987), 34.
[356] According to this opinion, where an offender is found liable under the General Criminal Act of 1973, the claimant can claim for compensation for any damages, and the court can issue compensation based on the medical treatment documents. However, in relation to an offender who is liable under the *Diyah* law, there is no reason to claim for loss or damage related to death or bodily injury. See S.S. Shahri Jahromi, *Opinions of the Legal Office of the Judiciary in the Field of Criminal Cases* Vol. I (1378 A.H. 1999), 73.

exceeding the *Diyah* are compensable. The Office noted that when resorting to the *la zarar* (no harm) principle, where it is clear that because of an offender's act the victim has suffered an injury higher in value than the *Diyah*, a remedy in excess of the *Diyah* is acceptable.[357] In subsequent consultative opinions, the Legal Office repeated this opinion.[358] As a result, the Supreme Court in recent years has revised courts' decisions in line with this new opinion.[359]

In the early stage, different branches of the General Supreme Court had frequently rejected judgments awarded by lower courts in favor of compensation exceeding the *Diyah*. However, in 1995, the General Supreme Court (Civil Branch) confirmed that compensation could exceed the *Diyah* by referring to the *la zarar* principle.

Therefore, although the courts and the *foqahā* did not initially accept liability exceeding the *Diyah*, they gradually inclined towards applying liability that exceeds the *Diyah* and unlimited liability for death or bodily injury. This liability exceeding the *Diyah* can be a basis for the final reform of the *Diyah* regulations in the future.

The author is of the opinion that compensation in excess of the *Diyah* can be accepted since:

1. The *la zarar* principle allows total compensation.

2. *Foqahā* have recently accepted liability in excess of the *Diyah*.

3. The Civil Liability Act 1960 is still in force, which provides unlimited liability for death or bodily injury.[360]

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[357] The Opinion of the Legal Office of the Judiciary, No. 1376.127.4125.
[358] The Opinion of the Legal Office of the Judiciary, No.s. 1376277.4135 and 137697.4128.
[359] Y. Barzigar, *Hoqooq – Madani va Jazaei dar Ahkām -e- Dadgahha -e- Ali*(1379 A.H. 2001), *Criminal Cases* (1388 A.H. 2009), 146.
[360] It is submitted that by accepting liability in excess of the *Diyah*, this helps pave the way for the *Diyah* provisions to be harmonized with the provisions of the Conventions. For a comparative study of the *Diyah* and limited liability in the conventions, see 4.3, *infra*.

3.4.5.5 *Āqele* (Defendant)

There is a consensus (*ejmā*) among *foqahā* that in intentional and quasi-intentional murder, the offender should pay the *Diyah* from his property.[361] However, in unintentional homicide (*qatl khataii*), his *āqele* should pay the *Diyah* instead of the offender.[362] *Āqele* has no right to refer to the offender to ask what they have paid for the *Diyah*.[363] The *Diyah* should be paid by *āqele* provided that the unintentional homicide is proved by a reason. Therefore, if the offender confesses to it, or if he comes to an amicable settlement with the heirs of the victim, he should pay the *Diyah* or the amount of money agreed through the amicable settlement.[364]

In Islamic jurisprudence, the principle of collective liability was firmly maintained in theory. However, in practice it gradually weakened, and ultimately disappeared altogether.[365] *Āqele* who has previously been the primary creditor became subordinate to the offender. Consequently, through the disappearance of the tribal organization of the developed Islamic society, the place of *āqele* was taken by the State or insurance.[366]

In the Islamic Criminal Code, in unintentional homicide, *āqele* is still considered liable for the compensation.[367] However, access to *āqele* for compensation is difficult, and even if *āqele* can be contacted, they may be financially unable to pay the *Diyah*. This can cause lengthy litigations. Therefore, the legislators have preferred to introduce a new term to cover

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[361] See Art. 304 of Islamic Criminal Code.
[362] See Khomeini, *supra* note 156, at 502; Art. 305 of Islamic Criminal Code.
[363] There is a dispute among scholars with regard to *āqele*. Some are of the opinion that *āqele* are colleagues of the offender; others think that they are his family and tribe; whilst a number believe that they are the offender's paternal relatives (*osbe*). According to *Shia* scholars, *āqele* are the offender's paternal relatives be they children or adults. See Khomeini, *supra* note 156, at 499.
[364] Ibid.
[365] Ibid., at 503.
[366] Ibid.
[367] There is a difference here between unintentional homicide (*khataii*) and quasi-intentional acts. In a quasi-intentional offence or homicide, the offender himself should pay the *Diyah* while in an unintentional offence or manslaughter, it is the tribe (*āqele*) who should pay the *Diyah*. Ibid. at 505.

unintentional homicide together with negligent conduct.[368] This new term includes most unintentional homicides especially those involving non-observance of governmental regulations. According to this new regulation, the defendant is liable for the *Diyah*.[369] Its remit is expressed in Article 259 of the Islamic Criminal Code of 1996.

3.4.5.6 Claimant

The *Diyah* is a property, like other properties, which a man owns through a legal process. The first person who has a right to possess the *Diyah* is the victim. According to *Shariah* rules, if the victim dies, his *Diyah*, like other due property, should be given to his heir(s),[370] i.e. they are the legal owners of the *Diyah*.[371] Therefore, heir(s) can claim for compensation.[372] There is a consensus among *foqahā* that the *Diyah* is like any other of the dead person's property. It is divisible among his heirs according to *Shariah* rules.[373]

3.5 Iranian law and International Liability

Iran has ratified and given effect to the Warsaw Convention 1929, The Hague Protocol 1955, and the Guadalajara Protocol 1961 for international flights in 1975.[374] According to the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' in air transport accidents of domestic flights, Iran applies the provisions of limited liability in the Warsaw Convention 1929 and the Hague Protocol 1955.[375]

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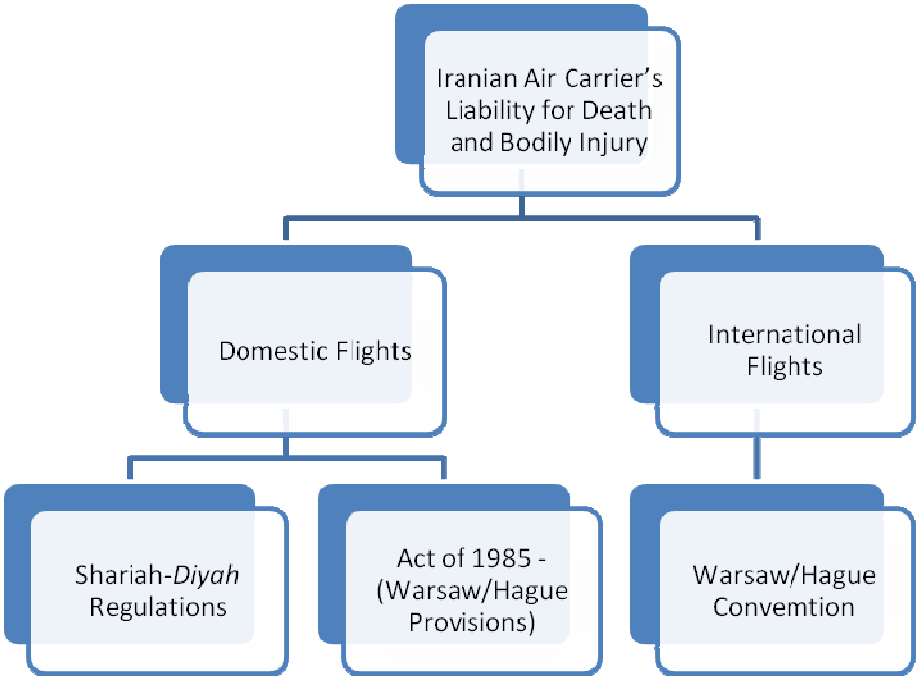
[368] See Arts.305-307 of the Islamic Criminal Code.
[369] See Art.259 of the Islamic Criminal Code.
[370] See Art. 307 of the Islamic Criminal Code.
[371] See Khomeini, *supra* note 156, at 504.
[372] The *Shariah* has identified the heirs of a victim in detail. See Arts. 861- 866 of the Civil Code.
[373] See Mirsaeidi, *supra* note 311, at 19.
[374] http://www.icao.int/icao/en/leb/StatusForms/iran_islamic_republic_of_en.pdf.
[375] *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

Figure 4: Provisions Governing Iranian Air Carrier's Liability for Death and Bodily Injury



3.5.1 International Flights

The treaties that are concluded between Iran and other States in accordance with the Constitutional Code enjoy the status of domestic law.[376] For an international treaty to become law in Iran, it must be signed by the plenipotentiary representative of the government. The treaty should then be translated officially, and finally sent to the Parliament for ratification.[377] The Parliament examines it and observes the same procedure used for ratifying domestic laws.[378]

[376] H. Enayat, '*Moahedat -e- Beinolmelali dar Hoqooq -e- Iran va Motale -y- Tatbiqi -e- Shariah va Hoqooq -e- Beinolmelal*', (1363 A.H.1985) 29, at 36.
[377] H. Enayat, 'Hoqooq -e- Moahedat dar Ghanoun -e- Iran' (1363 A.H. 1985) *Law Review* 2, at 42.
[378] Ibid., at 81.

Although the Constitutional Code has not explicitly mentioned the Guardian Council as a body in the ratification process, according to Article 94 of the Constitutional Code all enactments of the Parliament must be sent to the Guardian Council to examine their conformity with the *Shariah*, and the Constitutional Code. The Guardian Council should affirm the treaty. Otherwise, it will not be treated as law. If the Council finds the treaty to be contrary to the *Shariah*, the enactment is returned to the Parliament for review. Otherwise, it is applicable law.[379]

The contents of a treaty are applicable in courts insofar as they relate to the rights of persons and conflict of laws. According to the Constitutional system, private law conventions are incorporated into national law by an Act together with the translated treaty's text. The Farsi version is the one applied by the local courts. Thus, in this law, no action will lie in tort in respect of liability in international carriage, but an action will lie under the applicable Conventions.

3.5.2 Domestic Flights

The Iranian legislators approved a specific statute entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights'. According to this statute, air carrier liability should comply with the limited liability provisions of the Warsaw-Hague Convention.[380] Legislature also ratified the Islamic Criminal code. It contains regulations for limited liability against death that are in contradiction with the limited liability provisions for death under the Warsaw Hague convention.[381]

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[379] Ibid.
[380] *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.
[381] See 4.3*, infra*.

3.5.2.1 Air Carrier Liability for Baggage, Goods and Delay

As these principles are not in conflict with other laws in Iran, and they are not unchangeable principles of the *Shariah*, and, moreover, the legislators have clarified their application for the benefit of domestic customers and carriers, courts apply them without ambiguity to domestic flights.[382] Therefore, courts exclusively apply the provisions of the Warsaw-Hague Convention as implemented for damage to goods or delay on domestic flights.[383] In related cases they refer to Article 22 of the Warsaw-Hague Convention.[384]

3.5.2.2 Air Carrier Liability for Passenger's Death or Bodily Injury: Iran's Dual System of Liability

There are two types of regulations for Iranian air carrier's liability for passenger death and bodily injury. One is the *Diyah* that comes from the *Shariah* and is generally applicable for all Iranians including air passengers in domestic flights,[385] and the other one the Specific Act of 1985, which considers Warsaw-Hague regulations applicable in domestic flights.[386] This is the main point of conflict that the author has examined in this study.[387]

Iranian legislators approved in 1985 the aforementioned specific statute to determine the scope of liability of Iranian air carriers in domestic flights. According to this statute, air carrier liability should comply with the provisions of limited liability in the Warsaw-Hague Convention. However, this endorsement of the Warsaw-Hague Convention for domestic

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[382] See Case No. 1-74 -26.7.74 Trial Court, Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court. Case No. 31-154- 6.3.75 Appeal Court, Case No. 192-4675-872- 25.2.76 Appeal Court. Case No. 245-31-26.3 Appeal Court.

[383] See Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court.

[384] See 4.2.1.3 4*, infra*.

[385] See Art 306 of Islamic Criminal Code.

[386] *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

[387] See 4.3, *infra*.

flights has caused controversy in Iran. The principles of liability for death or bodily injury, which are based on the *Diyah*, operate differently from the limitation of liability in the Warsaw-Hague Convention.[388] After comparing the international principles with the *Shariah*, section 3 of Chapter 4 deals with this conflict and the question of whether the limited liability provisions in the Warsaw-Hague Convention govern the *Diyah* law in domestic flights or vice versa.

3.6 Concluding Remarks

Iranian law in general and carrier liability regulations in particular, have been under the influence of Islamic jurisprudence and the *Shariah*. The *Shariah* consists of principles and rules that *foqahā* provide according to Islamic jurisprudence from Islamic sources. There are diverse juristic opinions, and there may be different interpretations of the *Shariah* for an issue such as the *Diyah* which is limited or unlimited liability. However, in most cases there is a majority opinion that makes the dominant view. For example in the *Diyah*, the majority opinion is that it is a limited liability.[389]

This does not mean that the Islamic legislature has to follow the majority opinion. It can develop another view by referring to the conditions of its pertinent society. However, these principles are in the abstract. As long as they are not implemented through codified laws and regulations in Iran, usually they are not obligatory. Therefore, there are two kinds of laws and regulations in the *Shariah*.

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[388] Case No. 245-31-26.3.1377 Appeal Court.

[389] In *feqh*, there is a technical term called in the Persian sources '*qol -e- mashhoor*' that means a number of *foqahā* have the same opinion on a matter. Usually the books do not mention the name of those *foqahā* and only state '*qol -e- mashhoor*'. In this research, it is translated to 'majority opinoion'. Its opposite is '*qol -e- shaz*' that can be translated to 'minority opinion'.

1. If there is an explicit text and there is no need for interpretation, the *Shariah* as a source of law is usually immutable and infallible. For instance, the *Quran* contains provisions on inheritance law and compensation for death or bodily injury. As these are rules in the *Shariah*, legislators in Islamic States cannot modify them.

2. If there is no direct text on a particular matter, laws and regulations are usually flexible and changeable. The basic texts that inspire the *foqahā* are not followed universally and identically. From this, many schools of thought were born that understand the *Shariah* according to their ideas. For example, although the *Quran* generally explains liability for death or bodily injury, there is no explicit text that determines that limited liability is the only rule for compensation and that unlimited liability is unacceptable. As a result, there are different interpretations offered by the *foqahā*.

The *Shariah* has its independent principles for liability that can be summarized as follows:

1. In the *Shariah*, liability is based on compensation. It can be claimed that in tort, it is based on strict liability, i.e. as soon as a person harms another, he has to compensate even though he is not at fault. However, if the damage is indirect, the fault principle will apply.

2. The *Shariah* prescribes *amanat* regulations for contract of carriage. The main principle in *amanat* is based on fault. It means that if the carrier has not committed fault, he would not be liable and the burden of proof would be on the claimant.

3. The *Shariah* nevertheless has specific rules and regulations for death or bodily injury. Sometimes these principles are different from liability in tort and carrier liability. Liability principles in the *Diyah* are the same as *talaf* principles in tort. Consequently, liability is strict. That is, as soon as someone causes death or bodily injury to another person, he will be liable for compensation and if the cause is indirect, the fault principle will govern. Thus if the air carrier is considered as the direct cause of death or bodily injury to the passenger, it will be

subject to strict liability. It means that as soon as a relationship is established between the act of the carrier and the passenger's death or bodily injury, the carrier will be liable for compensation. However, if the causation is indirect, his liability will be based on fault and the burden of proof will be on the claimant.

According to the Constitutional Code of Iran, *Shariah* principles were codified by the Islamic legislature due to the demands of technological developments and the conditions of the Iranian society.

The Parliament is not the only legislative body. Authorities such as the Leader and the Guardian Council play important roles in codifying laws and regulations and their conformity with the *Shariah*.

The laws and regulations on air carrier liability in Iran are complex. When studying air carrier liability in Iran, attention should be paid to the principles of liability in the Civil Code, Commercial Code and Islamic Criminal Code, as well as applicable treaties as implemented in domestic law, and specific statutes. In addition to these, the opinions of *foqahā* and the Guardian Council should also be observed.[390]

The Civil Code considers a contract of carriage as an *ejāreh* and recognizes rules of liability based on *amanat*. The general rules in the Civil Code govern both carriage of goods and passengers. However, there are other general and special laws and regulations for goods and passengers, which influence the carriage provisions in the Civil Code.

The Commercial Code provides general principles of liability for goods. The provisions of the Commercial Code for liability towards cargo and delay are similar to those of the civil law since the legislature had adopted them from civil law States.

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[390] In other words, the principles of the *Shariah* enjoy the same status as the text of law. Where there is no explicit law text on a particular matter, the *Shariah* is considered as a formal source of law in Iran. See Art.167 of the Constitutional Code of the I.R. Iran.

The liability in the contract of carriage, according to the Commercial Code, is based on presumption of liability. Therefore, when the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' was ratified in 1985, the courts faced no difficulty applying the limited liability of the Warsaw Convention 1929, as amended by The Hague Protocol of 1955 to carriage of cargo and delay. In fact, the exact Warsaw-Hague Convention provisions were applied to domestic flights just as in the case of international flights.

For passenger's death or bodily injury, in addition to the general rules of the Civil Code and the Commercial Code, as well as the Specific Act of 1985 implementing the provisions of limited liability in the Warsaw-Hague Convention in Iranian law, one should refer to the Islamic Criminal Code. This Code, which follows the *Shariah*, provides special provisions for civil liability as well as criminal liability. This involves the inclusion of independent principles of liability for death and bodily injury (the *Diyah*) into the Islamic Criminal Code.[391]

The most important issue in this Code is the determination of liability limits for death and bodily injury, which is in contradiction with the limited liability and unlimited liability for death and bodily injury in the Warsaw-Hague regime.[392] Hence, the principles of liability for death or bodily injury in the Warsaw-Hague Convention and the *Shariah* collide in Iranian law. The next chapter discusses the liability principles of the Warsaw-Montreal regime. It will also include a comparison between the *Shariah* principles and the Warsaw-Montreal regime. Then the *Shariah* principles will be compared and contrasted with the international regime to reveal collision in practice in the investigation of an air accident in Iranian courts.

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[391] See Arts.294-297 of the Islamic Criminal Code.

[392] The *Diyah* is in contradiction with liability limits under article 20 of the Warsaw - Hague convention. For detailed discussion see 4.3, *infra*.