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CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5. 1 Reconciling Principles from Various Jurisdictions

To the best of the author's knowledge, no study has yet been carried out on air carrier's liability comparing the international liability system with Islamic law with a special focus on Iran. A study of the air carrier's liability in an Islamic State like Iran, and comparing it with other liability regimes, offer the drafters of international conventions new insights that could help them to appreciate the similarities and differences among the various foundations of liability. This innovative contribution to the knowledge in the field of air carrier's liability analyzes the compensation for death or bodily injury in air accidents from the perspective of Islamic law. In this thesis, old concepts of the *Shariah* have been explored and new avenues have been proposed for them.

The findings from this study are important for the drafters of international conventions, States that follow the *Shariah* like Iran, practitioners and air law researchers. The first group may use these findings in future amendments of the international regime of air carrier's liability to achieve more uniformity across different legal systems. This study helps the second and third group by showing them how an Islamic State has dealt with the air carrier liability regime and which solutions can harmonize domestic laws applying the *Shariah* with international regulations of air carrier's liability.

Air carrier's liabilities as regulated in the above legal regimes are based on various foundations, since the issue of liability towards others is a kind of social behavior. However, through compromises, many commonalities can be found. Since the 1920s, European States have provided regulations for air carrier's liability in private international air law. Such initiatives were based on the common grounds of liability rules in the two major legal systems

that is, the common law and civil law systems of those States. They have attempted to minimize legal conflicts relating to liability for the compensation of damages caused by accidents for air carriers, passengers, consignors and consignees by providing uniform regulations of certain aspects of air carrier's liability.

In addition to the principles of liability laid down in those two legal systems, the drafters of private international air law treaties implemented principles adopted from other conventions including but not limited to the international maritime and rail conventions. For instance, they adopted the idea of limited liability that was deemed appropriate for air carrier's liability. European States thereby recognized the economic, political and technical privileges of the unification of certain rules governing the liability of air carriers at the international level for the development of the air transport industry.

Yet, unlike the 1920s and the following decades, uniformity of international air carrier's liability is not solely a demand from European States. After the Second World War, new States emerged employing legal systems which differ from the two prevailing systems. For instance, although Islamic States in Asia and Africa engage in international air transport, they follow different legal, social and political principles. Disregarding the legal system of the Islam may in the long term harm the uniformity of international air carrier's liability. Islamic States may, for example, prefer to apply only their domestic laws and regulations whilst ignoring internationally agreed principles. Hence, one of the challenges confronting international private air law is the legal structure and legislation of Islamic States.

An important question that needs to be asked is: could Islamic States that have not been actively participating in the drafting of the Warsaw Convention 1929 as variously amended and the Montreal Convention 1999, hereinafter referred to as 'the Warsaw-Montreal regime', and whose legal system differs from the common law or civil law, accept the current

international regime of air carrier's liability? And do principles of the *Shariah* as codified in the legal system of such States, allow them to access the international principles?

To answer these questions, in addition to the two legal systems of common law and civil law and the Warsaw-Montreal regime, the author investigated the legal system of Iran, which follows the *Shariah*. After the 1979 Revolution, the Iranian Legislature, implemented both the *Shariah* and the Warsaw-Hague regulations for the regulation of international and domestic flights. However, there is a conflict between the liability principles under the *Shariah* and the Warsaw-Montreal regime on the limited liability for death or bodily injury to passengers.

The author's principal conclusion is based on the assumption that Iran, as an Islamic state, can adopt the Warsaw-Montreal regime on liability that occurs during its international flights and domestic flights and could also overlook the *Diyah* provisions for air passenger's death or bodily injury, which are in conflict with the Warsaw-Montreal regime even if the Guardian Council, as the official body that determines the conformity of regulations with the *Shariah*, provides a different opinion.

5.2 Common and Civil Law Principles of the International Regime Governing Air Carrier's Liability

As said the Warsaw-Montreal regime is a compromise of features of the civil law and the common law systems. These two systems have similarities and differences. States following the Warsaw-Montreal regime have disregarded the common law rule on the insertion of exemption conditions by carriers or unlimited liability for death or bodily injury to establish and successfully implement the international system. To verify this finding, Chapter 2 of the thesis investigated the principles of liability under civil law and common law. This investigation revealed a number of important points.

1. As the systems distanced themselves from common principles of liability which are based on fault and proceed towards liability based on the presumption of liability,¹ and in some cases such as hazardous activities accepted strict liability through specific statutes,² this trend had an impact on air carrier's liability in international instruments like the Warsaw Convention 1929³ and the Montreal Convention 1999.⁴ Air carrier's liability in the Warsaw Convention 1929 and the Montreal Convention 1999 is based on presumption of liability, which can be rebutted by the defendant by proving absence of negligence or fault.⁵ The presumption of liability under the Warsaw Convention 1929 was practically treated as strict liability in different jurisprudences such as United States jurisprudence.⁶ Hence, the Montreal Convention 1999 provides a strict liability regime.⁷ Fast settlement of claims and avoidance of lengthy and costly litigation were among the main reasons for adopting this new trend.⁸

The comparative law survey showed that international air carrier's liability systems do not opt exclusively for fault liability or strict liability, but adopt a more nuanced approach according to civil law and common law. This approach includes intermediate solutions such as shifting the burden of proof, using an objective standard of care, and distinguishing between carriage of goods and passengers.

¹ S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', (2009) 107 *Michigan Law Review* 1583, at 1584.

² M. Planiol and G. Ripert, *Treatise on the Civil Law* (2005), 468; and M. Arnheim, *Principles of the Common Law* (2004), 251.

³ R. Horner and D. Legers, *The Second International Conference on Private Aeronautical Law: Minutes Warsaw 1929* (1975), 12 (hereinafter referred to as "Minutes Warsaw 1929") at 15.

⁴ G.N. Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States from Warsaw 1929 to Montreal 1999* (2010), 5.

⁵ See Unpublished Note from Prof. Dr. P.C.C. Haanappel, 'What is in a Name', Appendix 1.

⁶ A.F. Lowenfeld and A.I. Mendelson, 'The United States and the Warsaw Convention', (1967) 80 *Harvard Law Review* 520, at 547; David Cohen, 'Happy Birthday: Agreement C.A.B. 18900, A Critical Review of the Montreal Interim Agreement and the Authority for its Implementation', (1982) VII *Air and Space Law* 70, at 558.

⁷ See Tompkins, *supra* note 4, at 27.

⁸ ICAO Doc. 9775-DC/2, at 116.

2. Differences in liability principles also confirm the conclusion that States like France and Germany, which have a civil law system and the United Kingdom and the United States, which use common law sometimes neglected their own specific principles for the sake of uniformity of international regulations. Not all of the international principles are identical with those from a national legal system. However, in the international arena, States should neglect their domestic specific principles, if they are constitutionally allowed to do so. For example when no contractual provisions regarding liability are expressly made, carrier's liability may, in common law, be established according to the rules of bailment.⁹ However, since the concept of bailment does not exist in civil law¹⁰ as well as Warsaw-Montreal regime, this must be established according to the rules of the general law of contract, provided that a contract can be implied.

5.3 Flexibility and Dynamism of the International Air Carrier Liability System

The international air carrier liability regime laid down in the Warsaw-Montreal regime, in addition to the common principles drawn up in the legal systems of common law and civil law, contains principles that have no precedence in either system, such as delimitation of liability and nullification of conditions limiting liability. However, these were adopted since they were in the interest of parties to a carriage contract, and uniformity in the international regulations of air carrier's liability. I conclude that the process of adopting principles has bestowed the international regime with dynamism and flexibility.

Flexibility and dynamism of the international air carrier liability regime can be noticed in the following issues:

⁹ N.E. Palmer, *Bailment* (1991), 3.

¹⁰ K. Freund and L. Rudden, *A Source-Book on French Law* (1991), 298-9.

1. The international air carrier liability system laid down in the Warsaw-Montreal regime is aimed at balancing the interests of carriers and customers in the following fashion.

In the 1920s, the trend was to support the nascent aviation industry by accepting limited liability.¹¹ Air carrier's liability established by the Warsaw Convention 1929 was limited to a fixed maximum for death or bodily injury of a passenger or his delay; or for damage, losses or delays of baggage and cargo.¹² This regime was aimed at maintaining a balance between the interests of air carriers and passengers. The unification of international air carrier's liability rules in relation to limitation of liability also helped air carriers to insure their liabilities. The introduction of the limitation of liability was an essential departure from total compensation. It was a common point among States whose airlines engaged in international air transportation, whether or not their legal system accepted unlimited liability.¹³

In the course of the 20th century States tried to increase the amount of limited liability to respond to economic and social conditions worldwide through various amendments of the Warsaw Convention 1929.¹⁴ Finally, whereas limitation of liability was contrary to the legal systems of the common law and civil law, and to economic conditions, the Montreal Convention 1999 provided unlimited liability for passengers' death or bodily injury. However, it maintained limitation of liability for cargo, baggage, delayed baggage, and delay sustaining damage.¹⁵ This is because limitation of liability on international carriage by air was useful for insurance purposes and could deliver fast and low cost litigation.¹⁶

¹¹ J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts', (1932) *Journal of Air Law* 27, at 29.

¹² See Art. 22 of the Warsaw Convention 1929.

¹³ W. Guldimann, *Air Transport in International Law – Possibilities and Limits in International Unification* (1982), 164. Lowenfeld and Mendelson, *supra* note 6, at 559-560.

¹⁴ K. Beaumont, 'Proposed the Protocol to the Warsaw Convention of 1929', (1953) *Journal of Air Law and Commerce* 264, at 264-265.

¹⁵ See Tompkins, *supra* note 4, at 209.

¹⁶ ICAO Doc. 9775-DC/2, at 21.

2. The Warsaw-Montreal regime does not expressly determine who is entitled to be a ‘claimant’. Although Article 24(1) and Article 29 of the Montreal Convention 1999 ensure that they preempt over national laws, the group of entitled claimants is not uniformly and equally defined in the different legal systems. The right of persons other than the passenger or his or her personal representative to claim, should firstly be decided according to the substantive law of the forum, which includes relevant rules of conflict of laws. Secondly, those rights should accord with the liability limits of the Warsaw Convention 1929.¹⁷

3. The Warsaw-Montreal regime does not provide a definition of key terms such as the definition of ‘accident’, ‘embarking’, ‘disembarking’, and ‘bodily injury’. These terms have been defined and interpreted by courts and have become clear for air carriers and passengers. The key terms were left for the courts to interpret, i.e. they can interpret applicable agreements in accordance with their legal systems and circumstances.¹⁸

The exclusivity of remedy under the Warsaw-Montreal regime can play an important role in the broad definition of the key terms. Since compensation should be made exclusively within the framework of the applicable conventions, courts should try to prevent an injured party from staying uncompensated as much as possible by giving broad definitions, interpretations of terms.¹⁹

5.4 Impacts of the *Shariah* on Air Carrier’s Liability in Iran

Next to the civil and common law systems, the *Shariah* too has its specific principles. However, it has equally been flexible and can modify itself to meet the requirements of the

¹⁷ P.P.C. Haanappel, ‘The Right to Sue in Death Cases under the Warsaw Convention’, (1981) *Air and Space Law* 66, at 69-75.

¹⁸ P. Martin et.al, *Shawcross and Beaumont on Air Law* Vol. VII (4th Ed.), 705 (hereinafter referred to as ‘*Shawcross and Beaumont on Air Law*’); *MacDonald v. Air Canada* 439 F. 2d. 1402 (1st Cir. 1971) and see: *Air France v. Saks* 724 F.2d 1383 (9th Cir. 1984), rev'd 470 U.S. 392 (1985).

¹⁹ See 4.2.2.5, *supra*.

current era and international law. The author concludes that Islamic jurists can resort to Islamic jurisprudence and Islamic sources, which provide flexible rules for contemporary situations in their society. For instance, liability limits for death or bodily injury in the *Diyah* regulations were set by the Prophet of Islam in accordance with the social conditions of his era. However, they underwent changes after his passing away.

The principles of liability in the *Shariah* that impact on air carrier's liability in Iran are the following:

1. There is a general principle called *la zarar* that can be used for regulating liabilities for death, bodily injury and damage to property. This principle is extracted from the Prophetic saying '*la zarar va la zerara fil Islam*', which means that there is not any harm in Islam.²⁰ Where the *Shariah* does not provide a direct reference to the liability of air carriers, this rule can be used for claiming compensation for passengers' death or bodily injury.²¹
2. The principle of destruction (*etlāf*) mentioned in most Islamic jurisprudence discussions, is applied by jurists when a destruction or loss occurs to baggage or cargo in transportation. If a person directly destroys the property of another person or the interests pertaining to it either intentionally or ignorantly, he is liable for compensation. According to this principle, the destructor is strictly liable.²²
3. Islamic jurists study the contract of carriage in the framework of *amanat* and impose the principles of liability from it on the contract of carriage.²³ An *amin*²⁴ should do his best to maintain the property as if it belongs to him. If the property is damaged or lost, provided that

²⁰S.J. Zehni Tehrani, *Tashrih al-Matalib*, (1371 A.H.1992), 421.

²¹ See 3.4.1, *supra*

²² R. Khomeini, *Tahrir al-Wasilah Vol. II* (1384 A.H. 2005), 189.

²³ Shahid Thani (Al Amili), *al-Rozat al-Bahiyya' (Sharh al-Lum'ah)* (1365 A.h. 1986), 385.

²⁴ *Amanat* in the *Shariah* is a specific contract 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*. See 3.4.4.1, *supra*.

he accomplished his duty well, the *amin* (holder) is not liable and he is protected by law.²⁵

However, according to the Commercial Code, the contract of carriage is an independent contract of *amanat*. It accepts a presumption of liability. The Commercial Code has also adopted defences such as *force majeure*.²⁶

4. Liability for death and bodily injury in the *Shariah* is based on the *Diyah*.²⁷ The *Diyah* prescribes limited liability for death or bodily injury even where the wrongdoer is not at fault. Therefore, the *Diyah* imposes strict and limited liability.

5.5 Reconciling Conflicts between the *Shariah* and International principles

Liability for death or bodily injury is the point of conflict between the *Shariah* and international principles. Limited liability under the *Diyah* stands in contrast to the liability outlined in Articles 20, 22 and 25 of the Warsaw Convention 1929 and in Article of 21 of the Montreal Convention 1999. This study therefore investigated whether this conflict is solvable, or if the *Shariah* is impeding the attainment of uniform international regulations.

In order to illustrate the points of collision between the *Shariah* and the international regime of air carrier's liability, the author investigated the laws relating to air carrier's liability in Iran. Iran, as an Islamic State, has concurrently implemented liability under the *Shariah* and the international regime. After the Islamic Revolution in 1979, domestic air accidents were investigated under the Islamic Criminal Code (*Diyah*) and the Specific Act of 1985 entitled "Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights". According to this Specific Act, limited liability of air carrier for baggage, cargo, delay and passengers'

²⁵ See Art. 4 of the Civil Code.

²⁶ See Art.377 of the Commercial Code.

²⁷ E. Shafei Sarvestani, 'Diyah Va Khesarathay -e- Nashi as Sadamat -e- Badani', (1379 A.H. 2001) VII *Pagoresh Va Hozeh* 35, at 16.

death or bodily injury should be in compliance with the provisions of the Warsaw-Hague Convention.²⁸

Later on, the Guardian Council as a body responsible for supervising the laws' compliance with the *Shariah* in its interpretive opinion of the Specific Act of 1985, declared that the *Diyah* regulations should be applied to all Iranian citizens including death or bodily injury in domestic flights and the Warsaw-Hague Convention to be in force just in international flights.²⁹ However, courts have made different decisions based on this interpretive opinion. Some courts have accepted it and awarded compensation according to the *Diyah*,³⁰ while others have focused on the Specific Act of 1985, which considers the Warsaw-Hague Convention to be in force and applied Article 22 of the Warsaw-Hague Convention to domestic flights and international flights.³¹ The latter courts argue that the Guardian Council did not provide an opinion about the conformity of the the Specific Act of 1985 with the *Shariah*. In so doing, it went beyond its jurisdiction and interpreted an ordinary law (i.e. the Specific Act of 1985) as according to the Constitutional Code, the Council should only interpret Constitutional Articles.³² It is not clear why the Guardian Council disregarded its jurisdiction by interpreting an ordinary law and provided such an unexpected interpretation.³³ Meanwhile, the author concludes that conflicting cases can be resolved through the application of a specific statute such as the Specific Act of 1985 and the *la zarar* principle, pursuant to the following approaches:

²⁸ See 4.3, *supra*.

²⁹ Opinion of the Guardian Council, No. 1191 (1995).

³⁰ See Case No. 1-74 -26.7.74 the Trial Court.

³¹ Case No. 245-31-26.3.1377 Appeal Court.

³² Art. 73 of the Constitutional Code of the I.R. Iran.

³³ Art. 73 of the Constitutional Code of the I.R. Iran indicates that it is the duty of the Islamic Assembly to interpret ordinary laws. In fact, the legislature, more than any other authority, is aware of the objective of any particular law and it is they who could provide its correct meaning. See N. Katuzian, *Introduction of Legal Science and Iranian Legal System* (1382 A.H. 2003), 45.

1. The law of Iran, which is adopted from the *Shariah*, faces no obstacle in accepting limited liability of the Warsaw-Hague Convention or unlimited liability of the Montreal Convention 1999. Islamic jurists and courts are today paying attention to damages exceeding the *Diyah*. It is submitted that restricting compensation merely to the *Diyah* principles is not in favour of the injured party. Hence, it is against Islamic principles such as *la zarar*.

2. Since the legislators have approved the Warsaw-Hague Convention for domestic flights in the Specific Act of 1985, and the Guardian Council as a supervisory authority has affirmed the statute and subsequently has not explicitly declared provisions of the Convention to be contrary to the *Shariah*, it can be inferred that it is possible to determine liability limits other than the *Diyah*. Thus liability for passengers' death or bodily injury sustained on domestic flights is also subject to the Convention's Article 22 on limitation of liability.

It can therefore be concluded that in Iran as an Islamic State, not only is there no obstacle to applying the Warsaw-Montreal regime to international flights, but the regime can also be made applicable to domestic flights. The Iranian legislature may interpret the regulation in a manner that would help pave the way for a uniform application of international regulations that balances the interests of the contracting parties. This can be a step towards uniformity of carrier's liability in international carriage by air.

5.6 Recommendations

Based on the conclusions explained above, the author puts forward the following proposals:

1. The drafters of private international air treaties should research different jurisdictions before submitting their reports and final drafts. The uniformity of treaties would be enhanced if they provide provisions and principles that include the common points of different jurisdictions and jurisprudences in order to achieve coherence of liability principles. In the past, the drafters of the international air carrier's liability regime such as the *CITEJA* on the

Warsaw Convention 1929 and the Secretariat Study Group of ICAO on the Montreal Convention 1999 proceeded from legal principles of civil and common law States. They disregarded other legal systems such as those of Islamic States, which also have special principles. One of the factors impeding the global uniformity of international rules governing air carrier's liability was the tendency to overlook the principles of liability in Islamic States that follow the *Shariah*. This could lead to inconsistency in air carrier's liability at the international level. It is therefore appropriate and important for the drafters to consider other jurisprudences, such as Islamic Law, in the future.

2. This study analyzed the Warsaw 1929-Montreal 1999 air carrier's liability regime and the *Shariah* in Iranian law. The *Shariah* is applied by different Islamic States, each of which has developed its own case law. It is therefore recommended that academic researchers study the principles of liability in other Islamic states in order to clarify their similarities and differences with the international system and to standardize international rules in the future pursuant to this approach.

3. The treaties had initially balanced the interests of carriers with those of passengers while bringing together the legal principles of States and overlooking differences between the various jurisdictions in order to achieve uniformity. They also attempted to develop international agreements to unify their conflict of laws in the interest of developing the air transport industry, which is beneficial for the same States. This makes it appropriate for the Islamic legislators to give priority to international provisions when there is a conflict between local law and international law depending on constitutional provisions regarding the implementation of international agreements, whether based on monism or dualism.³⁴ It is

³⁴ The terms monism and dualism are used to describe two different theories of the relationship between international law and national law. Monists accept that the internal and international legal systems form a unity.

therefore recommended that legislators of Islamic States such as the Parliament and the Guardian Council in Iran be more flexible when they approve and interpret private international air agreements.

4. Since the Specific Act of 1985 explicitly determines the limits of Iranian air carrier's liability for the operation of domestic flights which was based on the limits approved for international flights by the Warsaw-Hague Convention on the one hand, and compensation according to the *Diyah* provisions for all Iranian people on the other hand, there are contradicting points of view in Iranian jurisprudence. In practice, such conflicts have caused problems for the courts, claimants and airlines when determining liability for domestic air accidents. They were in doubt as to exclusivity of the Specific Act of 1985 for death or bodily injury. It seems to me that it is appropriate for the Iranian Parliament to amend the Specific Act of 1985. It is therefore recommended that the amended Act clearly states that it *exclusively* adopts the limited liability provisions stipulated in the Warsaw-Hague Convention and that this prevails over the *Diyah* regulation. Alternatively, the Parliament is recommended to abolish the Specific Act of 1985 and only apply the *Diyah* regulations to domestic flights.

The Parliament can remove the present ambiguity of the Act through either of the above-mentioned proposals. However, the author would give priority to the first proposal since the

In a pure monist State, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of national law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. However, Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. A. Cassese, *International Law in a Divided World* (1992), 27; M. Akehurst, *A Modern Interdiction to International Law* (1990), 45.

application of international regulations to domestic flights is a step towards uniformity of regulations throughout the world.

5. With reference to Chapter 4 where the author analyzed the Montreal Convention 1999 and the application of the *Shariah* in Iranian air carrier's liability, it is proposed that Iran adopts this Convention. This is for four reasons. Firstly, the development of air transport in the international arena is achieved by observing uniform international regulations. Secondly, it updates the Warsaw System and develops private international air law for air carrier's liability in accordance with technical, social and economic developments. Thirdly, up to 2011, 103 States have ratified it. Fourthly, the study confirmed that conflict between the provisions of the Montreal Convention 1999 and the *Shariah* can be resolved through the application of a specific statute by the Parliament such as the Specific Act of 1985. As a result, if Iran wishes to develop its air transport, it is advisable that the international Conventions, especially the Montreal Convention 1999, be incorporated in to domestic Iranian law.