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Carrier Responsibility Basis in Islamic Law

By Ebrahim Taghizadeh
Payame Noor University, Tehran, Iran

Abstract - - Carrier liability in Islamic law is investigated in the present work. The liability systems are classified into four distinct systems: system based on the proved fault, system based on fault supposition, system based on the supposition of responsibility, and system of absolute or mere responsibility. All above systems are observed in Islamic law and there are viewpoint differences among jurisprudents as well as lawyers in the subject of carrier liability. However the dominant idea is on the carrier liability, i.e. the carrier is responsible and the only way to get rid of responsibility is to declare the damage cause and the loss cannot be related to the carrier. Damage assessment in Islamic law is also investigated.

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I. Civil Responsibility Concept

Once damage is caused to someone and is distinguished as an illegitimate action not only by the having lost but also by the society, it follows a social reaction and the cause of loss has to compensate. The civil responsibility is the legal obligation and commitment of one to compensate the loss originated from his harmful action to the other [1].Therefore the three following provisions are to be integrated to fulfill the civil responsibility:

1. Loss realization which means to cause a loss or waste to the properties, to lose a certain benefit or damage to health, respect, and feelings.
2. Commitment a harmful action which must be abnormal from the society viewpoint.
3. Causal relationship between the loss and the harmful action, so that the custom declares the damage originated from the harmful action although the loss does not relate to a single cause [2]. Some of lawyers have stated in the responsibility definition that the civil society is the commitment of compensation in the law language except in special cases [3]. Some believe that the commitment to the improvement of caused resultant loss is associated to the civil responsibility [4]. Some state that in the cases one has to compensate the loss of the other it is said that he is in a civil responsibility position [5]. Some others believe that the civil responsibility is the commitment of one to the compensation for the loss of the other and when someone indemnifies rights of the other without legal permission and as a result causes loss to the other then the civil responsibility is entered [6].

Author : *Department of Law, Payame Noor University P. O. Box 19395-4697, Tehran, Iran.*

The concept of civil responsibility in general is the commitment to compensate the loss caused to the other whether the loss originated from a crime or a tort, a contract or quasi contract, non performance of contract or the law [7]. Some of lawyers believe that the contractual civil responsibility is excluded from the civil responsibility. If this idea is accepted, then there is civil responsibility in its special concept. In general concept however is classified into two categories: contractual and non- contractual [8].

II. Kinds of Responsibility

Harmful action is one of the provisions of the civil responsibility to be realized. The harmful action is unlawful when it is followed by the breach of one of the promises that public rules and law in general concept (law, custom, judicial process, and doctrine) knows one in charge or the two parties accept in mutual relations with others (contractual commitments). Therefore the civil responsibility can be classified into contractual and non-contractual [9].

a) Contractual responsibility

The contractual responsibility is fulfilled when the damage is a result of non-performance of contract which links the having lost to the causing loss [10]. The commitment to be originated from the contract it is not necessary that belongs to the common intent of the two parties, once the obligated commitment be considered as an agreement whether the obligation be of the custom or legal kind then the commitment is said to be originated from the contract [11]. In other words the contractual responsibility is the obligation to compensate the caused losses as a result of non performance of the contract by the promise [12].

b) Non- contractual responsibility (coercive)

The non-contractual responsibility is fulfilled when the damage caused to the other is not originated from non performance of the contract or violation of contractual commitment. The root of this kind of responsibility is not the contract between the carrier and the having lost, but it is in the breach of legal duties that exist for all.

III. Carrier Responsibility Requirements

The relation between the carrier and the having lost is analyzed based on the contract. Therefore the transportation responsibility is of the contractual responsibility kind. In the contractual responsibility the having lost must prove the loss

entrance, breach of promise, and the causal relationship between breach of promise and loss entrance. In carrier responsibility however, the having lost does not have to prove the breach of promise and the causal relationship between breach of promise and loss entrance and once the loss is proved the existence of two other pillars is assumed [13].

IV. Fault Proof

The lawyers are agreed that two conditions are necessary for the responsibility to be fulfilled: a loss is caused, and there is a relation between loss and the action of the actor. Some of lawyers believe that any action which is illegal and is intended to cause damage even if it is legal leads to responsibility. They call these kinds of actions 'errors' or 'faults' and state that one is responsible when commits a fault and the claimant of the detriment prove the fault existence. [14]. In contrast some other lawyers believe that the existence of the fault and the relation between the loss and the having lost is enough for responsibility realization and it is not necessary that the action to be illegal. The first theory which assumes the responsibility basis on the fault existence is called 'fault theory and the second theory which assumes the responsibility basis on the loss entrance to the other is called 'risk theory'. According to the fault theory the claimant of the damage in addition to the loss proof must prove the fault of the causing the loss, otherwise cannot claim the detriment from the causing loss. Fault is the declination from the normal human behavior in the same accident entrance conditions. Fault may be intentional or non- intentional. Distinction between these two kinds of faults is of importance because if the provisions of non responsibility or limitation of responsibility have been declared in the contract then occurrence of an intended error leads to the exclusion of agreed advantages (responsibility limitation), while non-intentional fault does not disappear these advantages. Therefore in the case of an intentional error commitment the causing loss must compensate all of the loss entered to the having lost [15].

a) Fault proof in contractual responsibility

When one is obligated to perform an action as a result of a contract, then intentionally or carelessly avoid performing the, an illegal action has been committed. Therefore to prove the fault in contractual responsibilities where the provisions of the contract quietly or partly are not performed non performance of the contract and breach of the promise merely is enough and is considered as fault. In other words if the promise is not performed it is assumed that the violation has been done as a result of an illegal action.

b) Fault proof in non-contractual responsibility

As a result of error or an intention one may cause a loss to the other. In this case the causing loss must compensate the caused loss. In this kind of responsibility in addition to the loss burden proof and the relation between the loss and its actor the claimant must prove that the loss has been caused as a result of one's fault. The problem which sometimes leads to disapprove the claimant's claim is that the fault is the major violation and one cannot prove the fault of the causing loss [16].

V. Carrier Responsibility Basis in Islamic law

In Islamic religious jurisprudence the goods transportation in the form of a lease contract is investigated. In this kind of the lease contract the hired worker is committed to perform an identified action for an identified wage. Goods transportation from one to another place also stands in the same form of contract. Therefore to investigate the carrier responsibility basis in Islamic law, the hired worker responsibility with respect to the property should be investigated. In the case of hired worker responsibility the guarantee liability rules which are based on wasting govern as the public rules of compensation [17]. As a public rule whoever dominates the property of the other is obligated to give it back. However one of the cases excludes from this is permission, i.e. whenever the liability possessor has the permission with respect to possession of the property will not be guarantor. Permission however cannot always prevent the liability that there is the liability in addition to the owner permission [Mohammadi, 1994]. According to this some of authors like “author of 'Anavin' “distinguished between permission and trust. Trustee is not the only guarantor and since not every authorized is trustee, they argued with respect to the criterion distinguishing permission from trust that it is trust just when the permission in possession is only for the owner interest and when the interest of the liability possessor or both of them is considered it is not trust.

According to the above argument about carrier liability it can be noted that the carrier takes wage for goods transportation and therefore their interest is considered and their liability on this basis is not fiduciary liability and they are the guarantor of the loss to the property. Some of hadiths also confirm this point. The criterion that the “author of 'Anavin' “ stated has been criticized by many jurisprudents since it does not work in all cases [18]. Accordingly some of the authors following the public rules assume the hired worker as fiduciary liability and only in the case of the infringement and resort proof the hired worker will be assumed as responsible. Some of other authors in the investigation of hired worker responsibility (artisan, tailor, dyer, mariner, carrier, and so on) using the fundamentals of wasting and destruction distinguish between wasting and of the property loss.

By 'wasting' we mean the case that the loss caused to the property is originated from the hired worker action and is documented to it. By ' loss' we mean the action of liability owner has no interference in the occurrence of damage.

In the first case i.e. the cases the goods has been wasted by the action of liability owner, most of jurisprudents have distinguished the liability and even in the 'Jameolmaghased' and 'Masalek' there has been consensus lawsuit. The author of 'Sharaye' in the fifth problem from the lease provisions states that whether the hired worker is a trustee or not, whether he has committed infringement or resort or not, that does not make any difference. [19]. Some others believe that if the hired worker is skilful and has not committed infringement or resort he will not be a guarantor since the goods may prone to corruption. Accordingly "Mullah Ahmad " gathering these ideas stated that if the owner of the property admits or the hired worker proves that the waste or loss of the goods has been resulted from the properties and qualities, and then he will not be guarantor [20]. The author of 'Javaher' assumes this subject is out of discussion since basically in such a case wasting is not documented to the action of hired worker .

Several hadiths confirm this and argue on the reason of guarantee that the permission is in the modification not in the corruption and in other literatures the reason of guarantee has been assumed as caution in property [21].

If the goods are wasted in hired worker's hands so that it is not documented to his action then the majority of votes are that if he has not committed infringement and resort he will not be the guarantor since he is trustee and the assumption is on non guarantee. Some others like "S. Mortaza " believe the absolute guarantee of the hired worker unless he prove that the waste of the property has been due to something that has been unavoidable and so he is guarantor in the case of wasting even if he has not committed infringement and resort . There are differences among those believe in non guarantee of the hired worker, with respect to the question that whom will be the burden of proof. Some like the author of 'Sharaye' and the author of 'Javaher' believe that if the manufacturer and sailor claim that there is wasting without infringement and resort and the owner repudiates, then the hired worker is obligated to give a reason to waste the goods without infringement and resort. In fact he must prove that wasting the goods is by no means related to his action, but the properties have been wasted without his infringement and resort. Others believe that in this case the statement of the hired worker in the case of oath is preferred.

In the above statements it does not make difference that the hired worker is common or special, the owner is present or absent, while in the general religious jurisprudence there are distinctions between these cases. In the "Hanbali religion", the common hired worker will be the guarantor while the special hired worker is the guarantor only in the case of infringement and resort proof. Accordingly if the common hired worker gets the actions to staff done, in the case of wasting the goods he will be guarantor versus the lease, while his staff will not be guarantors.

In the common guarantee the hired worker the absence of the property owner through the action is also necessary. Accordingly if the property owner is with the property the sailor will not be guarantor. They argue that in this case the owner liability has not been lost. In "Zaherieh religion" however there is no difference between the common and special hired worker [22]. Generally speaking the law disciplines of countries have different ideas in the field of carrier responsibility basis. Latin law discipline assumes it contractual i.e. the basis is the sabotage in the obligation and its direct influence on the output realization quality. The Anglo-Saxon law discipline however makes distinguish between general and special carrier responsibility; the general carrier is someone who is committed for getting wage to be responsible to any transportation request without making distinction. The special carrier however is someone who is committed to transportation without any obligation with respect to accepting the transportation.

The general carrier responsibility is based on the assumed fault. The special carrier responsibility however is based on the faultmust beproved [Altayayaranaltejari law, 1994].

VI. Different Kinds of Responsibility Systems

To prove the non performance of the commitment the provisions and domain of the commitments should be investigated. The most important classification that is associated with the provisions and domain of the commitments is into promise to result and promise to means. In the promise to means the promisor should do his best to achieve the desired result. In this assumption he should behave in a standard manner in his special conditions. Therefore the promisee should prove that the promisor has not had the standard nature and has failed to provide the means for the agreed and in other words the promisor has committed a fault to demonstrate the breach of contract. However the degree of fault that provokes the promisor responsibility is not the same in all cases but it depends on the promise provisions and the agreement of the two parties.

In promise to result in cases where there is a high probability to achieve the desired result usually the promisor undertakes obtaining the result and providing means for promise performance is a preliminary provision for obligation. To prove the promise breach in this type of promise it is only sufficient to demonstrate that the desired result has not been achieved. However if it is proved that a force majeure event has prevented the contract performance then the promisor is exempted from responsibility. In the case that the promisor has

guaranteed obtaining the desired result proving any event cannot make him irresponsible (absolute responsibility) [23]. The carrier is promisor for both cargo and passenger safety. In other words safety promise is also included in the carrier promises. This promise in the case of goods transportation may be either a promise to result or means.

The carrier liability depends on how he has accepted the promise and/or legislator has assumed in the position of the two parties' decisions. Therefore the problem analysis should be considered different depending on the safety promise consideration of (a) promise to means (b) promise to result.

a) Safety promise is a promise to means

In this case the carrier commits to do the standard cares to save the cargo i.e. the carrier should provide the necessary standard transportation means and applies his best qualifications in this field. The carrier has responsibility only when it is proved that the detriment is due to his fault. There are two states in burden of proof of this fault. First on the basis of public rules the burden commits to the claimant or loss. Second the legislator has assumed the carrier fault ease for loss and obliges him to defend and ejection of circumstantial evidence of the fault.

b) Safety promise is a promise to result

In this assumption the carrier commits to convey the cargo safely and he is responsible for not attaining the desired result (safely conveying the cargo to destination) and the followed detriments unless he prove that an unavoidable force majeure has prevented from attaining the desired result. In other words the caused detriment to the cargo is not attributed to him. Hence in this case the burden of proof that the carrier has not promisor a fault is not a way to make him irresponsible. [24].

Albeit in this assumption if the carrier has guaranteed the cargo safety or such a promise has been imposed on him by Act then he is responsible for any detriment although it is an external force majeure factor. In this assumption the carrier regardless of any fault or precaution he has taken he is responsible for the detriments caused by not attaining the desired result. So there are four different responsibility systems:

1. The system based on the proved fault
2. The system based on the fault assumption: which is removed by proving of non committing fault or proving of doing common efforts by carrier
3. The system based on the responsibility assumption: which can be ejected by proving of detriment cause or non-performing the promise and that it cannot be attributed to the carrier.
4. Absolute responsibility system. [25].

In addition to the way of the carrier defense the difference of systems (2) and (3) can also be observed in the detriment caused by unknown factors. According to the system based on the fault assumption in the case of detriments caused by unknown factors the carrier can easily defend himself and make oneself irresponsible since it is only sufficient to prove that he has not promisor the fault while in the system based on responsibility assumption the carrier becomes responsible in this case and cannot make oneself irresponsible because to be exempted he should prove the cause of detriment and that it cannot be attributable to him while in this assumption the detriment cause is unknown and that is impossible.

VII. Carrier Responsibility In Islamic Law

All the above systems are observed In the Islamic law. As some of jurisprudents believe If the carrier is assumed to have the trustee liability then he will not be responsible unless the owner prove his aggression and failing short (a system based on the proved fault). It should be noted that in the religious jurisprudence the aggression and failing short of the trustee has lost the property of the trust and then the trustee like an appropriator will be the guarantor of any damage caused to the goods even if the damage has been resulted from an external and unavoidable cause. In the system based on the proved fault however, the carrier fault will result in his responsibility only when the fault has caused the damage. The similarity criterion of these two disciplines is that the burden of proof is on the owner to prove the aggression and failing short of the carrier or the trustee in both disciplines.

If we accept the idea of the author of 'Anavin' about the gurantee liability of the carrier, then the carrier will be responsible in any case and this is the absolute responsibility system. According to the authorization concept with respect to the author of 'Anavin' if the carrier claims that the property has been lost then he should prove the loss of the property without aggression and failing short. This is exactly the system based on the fault assumption. The concept of authorization according to “Sayyed Mortaza” however assumes the carrier as the guarantor unless he proves that the loss of the property has been due to an unavoidable accident and as a result we tend to the system based on the responsibility assumption.

VIII. Damage Assessment In Islamic Law

In Islamic law the public rule about the time and the place of damage assessment of the pricey properties is that the guarantor is obligated to pay for the price of the lost property in the time and the place of wasting. In the case of the likely properties since the promisor is obligated to pay for the replacement, the problem of assessment is considered when

reclamation of the replacement back is not impossible. In this case the current price ,and demand will be the criteria [Mohammadi, 1994]. In the case that the carrier or the sailor is the guarantor of causing loss there are different point of views among religious jurisprudences with respect to assessment time and place of the price of goods. Some of religious jurisprudences believe that in this case that the owner has the authority to assume the hired worker as the guarantor of the property price in the place the property has been given to him and does not give him the wage or to assume him as the guarantor of property price in the place the property has been lost. On the other hand the hired worker deserves the wage to carry the goods to that place. Some believe that in this situation the authority of the owner is not the case but the answer is that he will be the guarantor of the price at the time of loss and deserves the wage to carry the goods to that place. Some others assume that the owner has the authority to assume the hired worker as the guarantor of the property price in the place that has handed it over to him or assume him as the guarantor of the property price in the arrival place and deserves the wage [Jamal Abdalnaser, 1990].

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