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Delictual Liability of the State under Saudi Law

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Submitted for the Degree of Doctor of Philosophy

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September 2011

Dedicated

With utmost love and gratitude to

My Mother, Father, Wife and my Son Abdullah

Abstract

There is an increasing recognition within the international system, of the need to understand Islamic law and legal system. This is due to the realisation that it either underpins or at least influences to some degree not only the legal but also the socio-cultural outlook of about a quarter of the world's population. In line with this reality, this study investigates delictual liability of the state under Saudi law. It evaluates what is the position of the Saudi courts in determining the liability of public authorities for delict and the extent to which the applications of the current principles of delictual liability are useful and sufficient for effectively tackling the growing number of cases that are confronting the public bodies in the Kingdom of Saudi Arabia.

A focal point of this study is the focus on a system of law which claims universal applicability, even more, a law for all times. For Muslims, the *Shar'iah* is a code that covers all aspects of life and is applicable to all situations. It governs individual and social relations and as such is claimed to be applied, to various degrees, all across the Muslim world and beyond even where Muslims live as minorities. However, a persistent concern, with advocates and sceptics of the system, remains the viability of a legal system steeped in a specific historical and even contextual setting, in societies and climes across the world. This study has sought to engage an aspect of that issue; namely the applicability of *Shar'iah* principles to state liability for delictual conduct through an interrogation of the experience in Saudi Arabia, commonly perceived to be a conservative Islamic society. The exploration in this study hopefully provides a useful insight on the veracity or otherwise of the adaptability of Islamic law to all aspects of life and in the contemporary period. The position argued in this study is that *Shari'ah* does contain mechanisms that make its application viable even in complex areas of law like the delictual liability of the state.

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Chapter One: Introduction

This study investigates the delictual liability of the state under Saudi law. There is an increasing recognition within the international system, of the need to understand Islamic law and legal system. This is due to the realisation that it either underpins or at least influences to some degree not only the legal but also the socio-cultural outlook of about a quarter of the world's population. This study follows the developing practice in recent decades of scholarship that engages not just the theory and doctrines of Islamic law, but also everyday life, especially the practice of the courts. In this regard, a cardinal objective of this study is to contribute to the understanding of Islamic law.

Specifically, it is a study of the non-contractual liability of the state for civil wrongs, i.e. the field of law known in Scots law as 'delict' and in English law as 'tort'. The choice of delict/tort as an area of study is of particular significance, the Islamic law of civil wrongs is one of the least studied and understood particularly in the contemporary period. The specific focus of the study on state liability for delict in Islamic law is of even greater significance in an era of globalisation where the world has in the estimation of many people, become a village in which not only natural disasters, but also issues of governance, have effects beyond national borders.

The focus on Saudi Arabia is particularly apposite since despite its well-known status as the world's largest oil exporter, not much is known about its governance and the interaction of the state with its citizens. What is popularly known though is its claim of adherence to Islamic law which plays a fundamental role in its religion, constitution, history, governance, law and society. This study which investigates state liability for delict engages these areas of the corporate existence of the modern Saudi state with a view to presenting a coherent picture of the role of the Saudi Board of Grievances in dispensing justice in claims against the state for delictual liability.

Aims of the Study

The aims of this research are as follows:

- To demonstrate the existence of the concept of state liability for delict under Saudi Law

- To show the importance of the concept of state liability for delict in the Saudi legal system
- To present a systematic analysis of the dimensions of state liability for delict under Saudi Law
- To provide a systematic analysis of the principles guiding the determination of state liability for delict under Saudi Law through critical evaluation of judgements of the Board of Grievances
- To establish the presence (or absence) of any consistent jurisprudential approach in the decisions of the Board of Grievances on state liability for delict under Saudi Law
- To highlight comparative aspects of the Kingdom of Saudi Arabia's law and practice and that of the UK where applicable
- To facilitate a better understanding of the legal principles guiding the work of the judiciary in Saudi Arabia in general and the Board of Grievances in particular.

Approach and Method

The research is not designed to be primarily comparative, however, wherever appropriate, references will be made to relevant aspects of Scots and English law. Given the major contextual differences including cultural, religious, political and legal systems, care must be taken in using concepts derived from Scots and English law in analysing and understanding the Saudi legal system of state liability. However, provided such care is taken Scots and English law and academic literature provide valuable sources of experience of grappling with issues of state liability and possible frameworks for analysing state liability. Therefore, this study adopts a referential rather than full-scale comparative approach to the issue of state liability for delict. It is the view of the researcher that a full-scale approach will be a much larger task and will not assist with achieving the main objective of the study, which is to provide a systematic account of Saudi legal system in relation to delictual liability of the state. The aim of this referential comparative approach is to explore the similarities and differences between the two legal systems in this area of the law where relevant for clarity of presentation.

While a comprehensive comparative approach would be quite valuable, it is the view of the researcher that a full-scale comparative approach would be best if a systematised account of the nature of delictual liability in Islamic law and the law of Saudi Arabia exists in the literature. Further, it would also be important to have at least some reliable literature on the

nature of state liability for delict in Islamic law. However, there is paucity of materials on both counts. This necessitates research that will first address these gaps before conducting a feasible investigation of a full-scale comparison of Islamic law and any other legal system (s). This research aims essentially at addressing some of these lacunae.

Both the Kingdom of Saudi Arabia and the United Kingdom face the challenge of regulating the public authority, addressing claims for their delictual conduct, and paying compensation where legally required. This study affords an opportunity for an exploratory critical analysis of how similar or different the operation of the two systems can be with regard to a specific shared value of balancing the public and private or individual interests in an area of sometimes, inevitable tension. While the scope or ambit of certain relevant concepts and jurisprudential preferences on the issue of state liability for delict are different, nonetheless, relevant similarities can be identified, a few of which have been specifically selected for this study. These include parallels between the basic elements of delict within both systems and the concern with the need to ensure compensation for harm brought about by public authorities. The analysis around these and other relevant issues, doctrines and principles supports the referential comparative approach adopted in this research.

However, in view of the recognition of important differences between the two systems, this research does not claim it is possible nor in fact is it intended to embark on a full-scale comparison between the two. Rather, the study proposes an analytical approach for the evaluation of delictual liability of public authorities in Saudi Arabia with a limited, what is referred to as a 'referential,' comparison in this study, with the UK. By this is meant that the study proposes to identify congruencies between the two systems where possible to facilitate clear understanding of the discussion. This, though a basic point, is an important one, considering the fact that Islamic law is either not usually a familiar subject, or somewhat difficult to understand for those not trained in it.

There are specific aspects of Scots and English law of delict that are quite relevant to the development of Saudi law on delictual liability of public authorities that support the adoption of the referential approach proposed in this study. In this regard, at least two broad areas have been identified through a preliminary investigation of the liability of public authorities in the UK. These are case law and literature.

First, there is the case law. Here Saudi legal system stands to benefit from the experience of UK's developed case law on delictual liability of public authorities. The former's developing jurisprudence on public authority liability can take benefit, albeit to a limited extent, of the reported cases and judicial opinions of UK courts developed over time in meeting the growing challenges of claims on public authority liability for delict in the Saudi jurisdiction. This is particularly so in view of the absence of a law reporting system. Certain types of situations have never yet arisen in the decisions of the Board of Grievances but they have come up for determination before UK courts. They could be a source of ideas for resolving such cases where the applied principles are not incompatible with the *Shari'ah*. For example, so far there have been no cases in Saudi law that involve the scope of a relevant public authority's duty to take a child into care. It is logical to expect this could happen in the future. This could come about for instance in the work of the Ministry of Social Affairs which has a Department for Juvenile Affairs charged with the care of orphans and vulnerable children; powers which can lead to the same set of challenges that have arisen in a case like *X v Bedfordshire*.¹ Scots and English law could be useful in providing ideas and guidance to the Board for deciding such issues. Further, UK's developed case-reporting system is in fact relevant not only at the jurisprudential level, but also at a more basic methodological level. This latter point is now important because the judicial authorities in Saudi Arabia have most recently initiated a policy of law-reporting for the Board of Grievances. The Scots and English law-reporting system with centuries of experience is an attractive reference point for this project.

A second possible source of learning is provided by the abundance of legal literature which provides both descriptive and analytical material on this aspect of Scots and English law. The academic literature in the UK is more developed and that can be used as a source of ideas. Scots and English law is recognised as a well-defined system and has been grappling with the liability of public authorities in delict for a long time. There are extensive discussions and substantial debates in the literature that might be a source of ideas for shaping Saudi jurisprudence in this area of law. Here again, the legal scholarship constitutes valuable comparative reference material on this unsettled aspect of law. This is particularly useful for a developing system like Saudi Arabia, which has over time developed into a welfare-regulatory state like the UK, faced with the challenges of addressing public authority liability in contemporary times. A likely question arises on the foregoing propositions. The question is the plausibility of such a legal cross-fertilisation

¹ (1995) 2AC 633.

considering the identified differences between the two systems which in the view of some are diametrically opposed to each other. It is contended that the seeming problematic divide can be bridged through internal mechanisms of Islamic, and by extension, Saudi law. This can be achieved through the instrumentality of *Fiqh*. As will be made clear, the mechanism of *Fiqh*, Islamic jurisprudence, is key to the application and development of the *Shari'ah*. This is a point often missed in consideration and analyses of the Islamic legal system but which is crucial to the understanding of the system.

Cases

It is relevant to briefly comment on the decisions of the Board (and of the General courts)² considered in this study. This is as regards the representativeness of the decisions made by the courts and, therefore, of their approach to questions of delictual liability. While it cannot be proven in a scientific manner that these cases are completely typical of the cases decided by the Board, considerable effort was made to obtain the spectrum of available cases. So far as the researcher is aware, there is no reason to claim that the cases considered are atypical. The research, it must be noted, faced a serious challenge in this important area. The system of Saudi Arabia is not a common law system; there is no rule of precedents or a system of law reporting.³ The option available has been to search courts' archives for records of cases and judgements on this slowly developing area of law in the Saudi jurisdiction. This was supplemented with numerous visits to various judges to secure judgements and records of their previous, recent decisions or even (in few instances) current cases. In short, it is submitted that in the circumstances, the cases discussed in this study represent what the courts are doing in practice.

On a related note, since there is no law of precedent in Saudi Arabia, judges are not obliged to decide consistently with earlier cases. Each case exists independently and is judged on the merits of its adherence to the Saudi constitution and Islamic law. In theory, the decisions in cases ought to be consistent with one another because all judges are applying the same laws, but there is no mechanism analogous to precedent in common law systems for ensuring that they do so. Therefore, rather than assuming that the courts are taking a consistent approach it is important to test this. The approach taken in this research has been

² All references here and throughout this thesis to the 'general courts' or to 'ordinary courts' are references to the *Shari'ah* courts.

³ In 2008, the Board of Grievances has recently published the first ever compendium of the cases decided in 2006/2007. However, not surprisingly, less than five percent of the cases are on delictual liability. Thus even this report was not of much help in real terms to this study.

one of collecting a sample of cases from various judges to gain an understanding of how the courts are arriving at judgements and operate in practice, and in particular how they apply the laws relevant to state liability for delict.

Terminology and Translation

In this thesis I will refer throughout to the law of ‘delict’ to indicate the field of study except where the context makes the use of other terms appropriate, for example, referring to the law of ‘tort’ when summarising the views of persons writing about English law. It is also relevant to clarify that the decisions of the Board of Grievances, in line with the official language of Saudi Arabia, were delivered in Arabic and there are no English versions of the cases. I have translated these decisions myself with some support from professional translators. I have also similarly translated most of the references to Islamic principles and texts which are available only in Arabic but indicated these at relevant points in the thesis. There are many translations of the Qur’an in English language but I have preferred not to rely on any one though I consulted a number in rendering translations of the Qur’an. Here also, as with most cases of the Hadith; sayings of the Prophet, I have provided translations of the texts. Any exceptions to this (and there are few) have been appropriately referenced.

Structure of the Thesis

This study is roughly divided into two parts. Chapters two and three provide a background to the work while chapters four, five and six constitute the analyses of the key chapters of the study. Chapter Two provides account of aspects of the administration and conduct of governance in Saudi Arabia in as much as it constitutes the background to the incidence of delictual liability of the state in the country. This chapter provides the contextual background to this study. It offers an insight into government and governance of Saudi Arabia by describing the nature and functioning of its institutions. The chapter starts with an overview of the historical and political background of the state. This is followed by a description of the nature of the legal system. The chapter then moves to an examination of the structure of the state and some basic functions of governance. Here, it briefly describes the public services and regulatory activities provided by government ministries and departments. It explains changes in the functions of the state and the way they are performed. It gives also an explanation on how the activities of government are funded.

The nature of the study requires an understanding of the legal system in Saudi Arabia and in particular, the court vested with jurisdiction on the central issue of delictual liability of the state. Chapter Three introduces the recently reconstituted Administrative Court, *Diwan al-Madhalim*, the Board of Grievances which is the judicial body vested with jurisdiction over claims on state liability in the country. The chapter includes a discussion of the constitutional basis, composition, jurisdiction, powers and working methods of the Board.

At the heart of this study is the nature of delictual liability in the Saudi jurisdiction. Chapter Four sets out the main principles of delictual liability under Saudi Law. This part of the study is crucial for understanding the liability of public authorities in Saudi Arabia that will be considered in detail in the following chapter. This chapter discusses the concept of delict under Saudi law in terms of its definition, nature, general rule, limitations, types and elements. The chapter further draws some comparison between Saudi and Scots law.

Chapter Five provides an analysis of the jurisprudence of the Board of Grievances with regard to the liability of public authorities for delict. The chapter proceeds by examining the nature of the liability of public authorities both in the UK and Saudi Arabia. A critical analysis of a number of cases is provided by adopting taxonomy from Scots and English law. The taxonomy is constructed in order to provide a categorisation and sub-categorisation of forms of liability as well as forms of harm which will be discussed in the following chapter.

The Board's practice regarding compensation for state liability for delict is evaluated in Chapter Six. The focus in this chapter is on the Board's approach to the assessment of the categories of harm which merit compensation and of the appropriate amount of compensation for them. It discusses the nature and relevance of compensation for harm under Saudi Law. The chapter sets out the types of damage that considered as harm for the establishing a right to compensation. Two auxiliary issues relating to the assessment of damages, contributory negligence and the use of expert witnesses for calculating damages in making compensation awards are also briefly discussed in this chapter. Chapter Seven presents the conclusion of the study.

Chapter two: Government and Governance in Saudi State

2.1 Introduction

Not much is known about the nature and structure of government and governance of the Kingdom of Saudi Arabia. The nature of this study with its focus on the delictual liability of the state in Saudi Arabia requires knowledge and understanding of both issues as a background matter. In other words, a proper appreciation of which persons and institutions constitute the state and what their activities are is imperative in engaging with delictual liability of the state as envisaged in this study. It is also necessary to explain some basic features of the legal system. The description of the foregoing is the focus of this chapter.

The chapter begins with a brief summary of the historical and political background of the state. This is followed by a description of the nature of the legal system. The discussion then moves to an examination of the structure of the state and some basic functions of governance. Here, it briefly describes the services and regulatory activities provided by government ministries and departments. Finally, the chapter outlines some new trends in Governance.

2.2 Saudi Arabia: A Brief Historical and Political Background

What is now known as the Kingdom of Saudi Arabia has its origins in the religious and political cooperation between Sheikh Muhammad bin ‘Abdulwahab (d.1791) and Muhammad bin Saud (d.1765). In the early part of the 18th century, Sheikh Muhammad bin ‘Abdulwahab started a movement calling on Muslims to return to the pristine principles of their religion in the Najd area of the Arabian Peninsula. His call was resisted initially and he faced serious persecution until he found support and protection with the ruler of the town of Diriyah, Muhammad bin Saud.¹

By the early 19th century, the Al-Saud family ruled most parts of the Arabian Peninsula. While the Al-Saud maintained political power, bin ‘Abdulwahab was granted spiritual

¹ Royal Embassy of Saudi Arabia, London “Country Profile” available at: <http://www.mofa.gov.sa/Detail.asp?InSectionID=1545&InNewsItemID=24408> (Site visited 10 March 2009).

leadership.² The growing power and influence of the Al-Saud was a great source of concern to the Ottoman Empire. The empire then sent its armies to counter the influence of the Al-Saud. This led eventually to the take-over of Diriyah. The capture of Diriyah by the Ottomans marked the end of the first Saudi State in 1818.³ However, by 1824, the Al-Saud family had returned to power in the Arabian Peninsula. In 1901, after some further political setbacks, including exile to Kuwait, Abdulaziz bin Abdulrahman Al-Saud left Kuwait and recaptured Riyadh in 1902. This takeover of Riyadh which he established as his capital marked the beginning of the formation of the modern state of Saudi Arabia. From his capital in Riyadh, Abdulaziz took over Hijaz which covers the territories of the two Holy cities of Muslims, Makkah and Al-Madinah and unified it with Najd in 1924. He then became King of Najd and Hijaz. King Abdulaziz then went on gradually to unite the all different regions into one nation. The country was named the Kingdom of Saudi Arabia on 23 September, 1932.⁴

The historical factor of the partnership between an Islamic movement (led by Sheikh Muhammad bin ‘Abdulwahab) and political power (represented by Muhammad bin Saud) in the establishment of the first Saudi state is remarkable. As will be seen throughout discussions of the legal system in Saudi Arabia, it has left an abiding influence on Saudi society. One of the most important and commonly known effects of this union is the adoption of Islamic Law as state law in the Kingdom of Saudi Arabia.

2.3 Sources and Principles of Saudi Law

The Kingdom of Saudi Arabia was never colonised by one of the Western powers.⁵ Islamic law is traditionally, the law of the land. This historical factor has led to the situation where, unlike most other Muslim societies, the ‘essential core of the Saudi legal system’ never witnessed an invasion by western conceptions of law.⁶ As Vogel noted, most of the people regard Islamic law as their ‘indigenous law, natural and inevitable.’⁷ With regard to the centrality of the *Shari’ah* in the life of Muslims generally, and in the Middle-East in particular, Al-Rimawi has observed that:

² F E Vogel *Islamic Law and Legal System- Studies of Saudi Arabia* (Koninklijke Brill NV Leiden the Netherlands 2000) xv.

³ Royal Embassy of Saudi Arabia, London note 1 supra.

⁴ Ibid.

⁵ There was a brief period of Ottoman control of parts of what is now Saudi Arabia.

⁶ Vogel note 2 supra at xiv.

⁷ Ibid.

Owing to the belief that the principal source of its moral juridical precepts is revelation rather than reason, much of *Shari'a*'s fundamental legal principles have remained impervious to change. Additionally, unlike Western legal systems, which long separated canon and secular laws, *Shari'a* principles still continue to constitute an important source of legislation in the majority of Arab countries.⁸

This position on the significance of the *Shari'ah* in society is perhaps nowhere more pronounced in its dominance as an organising principle than in Saudi Arabia. It is more accurate to say in the specific case of Saudi Arabia, as a number of writers had noted, that Islamic law remains *the* law of the country.⁹

Following the unification of Najd and Hijaz in 1924, King Abdulaziz passed a Royal Decree in September 1924, setting out the *Shari'ah* as the groundnorm and basis of governance. The Decree further provided that governance in the country is based on *Shurah*, consultation. The sources of legislation are the Qur'an, the *Sunnah*, the traditions of Prophet Muhammad, and *Fiqh* (Islamic jurisprudence).¹⁰ The Decree committed the state to be governed by the principles of Islamic Law and all legislation to be in accordance with it.

This was followed by another Royal Decree in December 1924 which proclaimed the general law to be *Shari'ah*. The four orthodox (*Sunni*), most representative jurists and their schools of thought (Hanafi, Hanbali, Maliki and Shafi') were the examples to follow.¹¹ The status of *Shari'ah* in the law and governance of Saudi Arabia was further confirmed in several other Royal Decrees.¹²

⁸ L M Al-Rimawi 'Relevance of Shari'a in Arab Securities Regulation with Particular Emphasis on Jordan as an Arab Regulatory Model' (2006) 27 (8) Company Lawyer 227, 227.

⁹ See for example Vogel note 2 supra at xiv, A A Al-Ghadyan 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 235, 235, I Al-Hudaithy 'Historical Review of Saudi Administrative Contracts' (2002) 3 Public Procurement Law Review 186, 186 and W M Ballantyne 'The States of the GCC; Sources of Law, the Shari'a and the Extent to which it Applies' (1985-1986) 1 Arab Law Quarterly 3,3-4.

¹⁰ *Umm al-Qura* Gazette, 12 September, 1924.

¹¹ *Umm al-Qura* Gazette, 19 December 1924. It is fundamental to note that though there are other schools of Islamic thought or jurisprudence, all references to Islamic law and jurisprudence in this thesis will be limited to the four stated above for two reasons. First is the fact of their being the most representative. Second and even more important to this research, they are the generally recognised ones in administration and legislation in the Kingdom of Saudi Arabia, the major focus of this research.

¹² See for instance *Umm al-Qura* Gazette 6 November 1925.

The primacy of *Shari'ah* in Saudi Arabia was restated in the constitutional reforms carried out by the late ruler of the country, King Fahd bin Abdulaziz. This is reflected in the *Nidham Al-Assasy Lil Hukm*, the Basic Law of Governance (the Basic Law),¹³ promulgated on 1st March 1992. Specifically, the importance of *Shari'ah* is restated in the 'General Principles' and 'System of Governance' provisions of the Basic Law. Articles 1 and 7 respectively of the Basic Law provide:

Article 1

The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and *its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him*. Its language shall be Arabic and its capital shall be the city of Riyadh¹⁴

Article 7

Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the *Sunnah* of his Messenger, both of which govern this Basic Law and all the laws of the State.

Thus, the effect of Article 1 is that the Qur'an and the Sunnah, the sources of Islamic Law, rather than the Basic Law itself, remain the constitution of Saudi Arabia. The Qur'an and the Sunnah are the sources of Islamic Law and all the other methods and principles are based on and must conform to these sources to be valid.¹⁵ This is a very important point to note as Islamic law, methods and principles have to be taken into consideration in the making of legislation. Considering the centrality of Islamic Law in governance and legislation in Saudi Arabia, it important to briefly consider the nature of Islamic Law and how it will be understood in this study.

¹³ Royal Decree No. 91/A. See *Umm al-Qura* Gazette No. 3397, 5 March 1992. The Basic Law, like other laws of the Kingdom of Saudi Arabia is now available in English on the official website of the Bureau of Experts of the Council of Ministers available at: <http://www.boe.gov.sa/English/saudilaws1.html> (Site visited 9 March 2009).

¹⁴ Emphasis mine.

¹⁵ I A K Nyazee *Outline of Islamic Jurisprudence* (Advanced Legal Studies Institute Pakistan 2000) 100.

2.3.1 The Nature of Islamic Law

There is usually some confusion as to what Islamic Law is and there is thus the need for a brief clarification about the use of the term. According to Baderin, there is ‘a traditional misconception about Islamic law being wholly divine and immutable.’¹⁶ The source of this misconception he further notes is the failure to distinguish between the *sources* and *methods* of Islamic Law. For a proper understanding of the nature of Islamic Law, it is important to distinguish between *Shari’ah* and *Fiqh*. It is commonly the case that both these terms are referred to as Islamic Law but from the technical point of view, they are not synonyms.

Literally, *Shari’ah* means ‘a path to be followed’ or ‘right path.’ *Shari’ah* refers basically to the sources of Islamic Law. Further, it is to be noted that *Shar’iah* includes not just legal prescriptions but also principles of faith, ‘*Al-Aqeedah*. *Fiqh* on the other hand means ‘understanding.’ *Fiqh*, as Nyazee explains, is essentially, the jurisprudence of *Shari’ah*.¹⁷ While *Shari’ah* is immutable deriving from the sources of Islamic Law, *Fiqh* is subject to change depending on circumstances.¹⁸ As Baderin usefully notes:

The term *Sharī ah* can also be used in a general legal sense in reference to the Islamic legal system as a distinct legal system with its own sources, methods, principles and procedures, separate from other legal systems such as the common law and civil law.¹⁹

The distinction between *Shari’ah* and *Fiqh* is very important in the understanding, application and development of law in the context of the legal system in Muslim countries. Failure to make the distinction between *Shari’ah* and *Fiqh* in discussions about the Islamic legal system leads to serious confusion. This is because it leads to ‘the tendency to perceive the whole Islamic legal system as completely divine and thereby to (mis) represent the whole system as inflexible and unchangeable.’²⁰ Indeed, the representation of *Shari’ah* as ‘Islamic law’ is only partially correct. It is correct to the extent that the sources of *law* are derived from the *Shari’ah* but the *Shari’ah* is better understood as a *system* rather than just *law* in the western sense. It will be argued later that *Fiqh* is of particular importance in the

¹⁶ M A Baderin *International Human Rights and Islamic Law* (Oxford University Press Oxford 2003) 33.

¹⁷ Nyazee note 15 supra at 39.

¹⁸ Ibid. at 33-34. See also A I Doi *Shari’ah: The Islamic Law* (TaHa Publishers London 1997) 2.

¹⁹ M Baderin ‘Understanding Islamic Law in Theory and Practice’ (2009) 9 *Legal Information Management* 186, 187.

²⁰ Ibid.

development of the law of delict especially as it relates to the liability of public authorities in countries whose legal systems are based on Islamic Law like Saudi Arabia, the primary focus of this study.

Some authors state that Islamic law has secondary sources but it has been noted that this is rather a misrepresentation particularly from a western perspective.²¹ It is more accurate to say that what is presented as ‘secondary sources’ constitute juristic methods and principles. So the terminology, ‘Islamic law’ commonly used in the literature discussing the *Shari’ah* is best understood as ‘consisting of three main elements, namely, sources, methods and principles.’²² It is with this in mind that the term *Islamic law* is used throughout this study as distinct from *Shari’ah*. In what follows, the discussion will turn to the aforementioned elements of Islamic law.

2.3.2 Sources of Islamic Law

Islamic law has two divine sources, namely, the Qur’an and the *Sunnah* of the Prophet, both of which are, to Muslims, literally immutable.²³ These are transmitted sources that are taken to be definitive. They are further discussed below:

a. Qur’an: This is the word of God revealed to His Prophet. Muslims are united in the belief that the Qur’an is the non-imitable and direct words of Allah which have remained preserved from the point and time of revelation up to the present day. It contains provisions covering spiritual, moral and secular affairs (from the western prospective). It makes provisions on purely religious matters (such as prayer, fasting and charity) as well as ethical and moral issues like care and respect for parents, courtesy and so on. More germane to the context of this study, the Qur’an further contains ‘legal-specific’ provisions on temporal affairs like contract, trade and crimes. These provisions incorporate the public, private, international and domestic aspects of societal life.²⁴ A few ‘legal-specific’ provisions in the Qur’an are in the nature of statutory provisions but most are of a constitutional nature. These are verses which make clear provisions on aspects of personal or community life like the law of bequests and the payment of tax on wealth by the wealthy. The Qur’an is divided into 114 chapters and was revealed over a 22 year period

²¹ Ibid. at 187-190.

²² Ibid.

²³ Baderin note 19 supra at 187.

²⁴ Ibid at 188.

between 610 and 632 AD. For Muslims, it is a complete code for living both as individuals and as a society.²⁵

b. Sunnah: The literal meaning of *Sunnah* is ‘the well-known’ or ‘well-trodden path.’²⁶ The technical meaning which is relevant in this context is the collected and transmitted words, actions, and approval (of the conduct of others) of Prophet Muhammad.²⁷ There are disciplines in the Islamic sciences that are concerned with validation and legal interpretation of such reports. Many such transmissions are also *tawatur* (mass-transmitted) thereby forming key legislative instruments. Much of the Sunnah relates to personal law, and law of interactions (financial transactions, marriage, behaviour, speech etc) within communities.²⁸

2.3.3 Methods of Islamic Law

The methods discussed here are confusingly referred to as ‘secondary sources’ because they derive their legitimacy in the Islamic legal system from the primary sources.²⁹ However, as stated earlier, they are best referred to, and considered as, methods of juristic reasoning rather than sources of law. In other words, these are rational methods used for extending the rules and principles stated in the sources mentioned above to meet the needs and challenges of new situations.³⁰ They have been described as the ‘vehicles’ utilised by jurists to ‘transport the *Shari’ah* into the future.’³¹ They are:

a. Ijma’: It is the consensus of independent jurists from the Muslim *ummah* (nation) after the demise of the Prophet within a defined period upon a rule of Islamic Law. It has to fulfil certain conditions for its validity including that the agreement or consensus must take place among the mujtahids or independent jurists of the four Islamic Schools of thought (mentioned earlier) and that the agreement must be unanimous that is, based on a consensus of all independent jurists.³² *Ijma’* seeks to establish rules or principles based on consensus of scholars who have to seek authority or foundation for those rules in the

²⁵ Vogel note 2 supra at 3-4, Doi note 18 supra at 21-22 and Nyazee note 15 supra at 130-132.

²⁶ Nyazee note 15 supra at 132.

²⁷ Ibid. at 133.

²⁸ Ibid. at 132-139. See also

²⁹ See for instance Ibid. at 146-147 and Doi note 18 supra at 64.

³⁰ Nyazee note 15 supra at 146.

³¹ Baderin note 19 supra at 189.

³² Nyazee note 15 supra at 141-144.

Qur'an and Sunnah, judicial authorities are subsequently required to abide by the *Ijma'*.³³

b. Qiyas: This means analogical deduction. It refers to the process of using analogies between cases in order to reach legal decisions about cases which are new (by nature) to jurists. More technically, it means 'measuring or estimating one thing in terms of another'.³⁴ It applies by drawing similarities between two cases to see how they can be made 'equal' and applying a known decision of one case to the other (sometimes with uncertainty attached).³⁵ In other words, *Qiyas* is the legal method introduced to derive 'a logical conclusion of a certain law on a certain issue that has to do with the welfare of Muslims'.³⁶

A crucial principle in the application of *Qiyas* is that it must be in accordance with the Qur'an, *Sunnah* and *Ijma'*.³⁷ Three conditions must be observed in the application of *Qiyas*. The first condition is that there must be an *Asl*, an original case which is provided for or covered by the Qur'an or *Sunnah*. The analogy has to be based on this *Asl*. The second condition is the *Far'*, the new case on which a decision or ruling is required but for which there is no specific mention or coverage in either the Qur'an or *Sunnah*. The '*Illah*, the effective link is the third required condition. The proper determination of the '*illah* is very critical in the process of *Qiyas*. As Moghul explained, the '*illah* is the reason for why any particular law or rule is believed to have been legislated by the Lawgiver. It is thus essential to know the '*illah* in order to understand the law itself and to determine the scope and applicability of the law'.³⁸ Knowledge of the '*illah* is essential to Muslim jurists and society in their desire to conform to the dictates of their religion and its law even in the experience of changed or changing circumstances.³⁹ There must be an effective link between the *Asl*, original case and the *Far'*, the new case. On satisfaction of these conditions, a *Hukm*, ruling on the original case can then be applied to the new case by analogy.

A classic example of *Qiyas* is the prohibition of narcotic drugs in contemporary times under Islamic law even though they are not specifically mentioned in the Qur'an or

³³ Ibid. at 144.

³⁴ Ibid. at 146.

³⁵ Ibid. at 146-147.

³⁶ Doi note 18 supra at 70.

³⁷ Ibid. and Nyazee note 15 supra at 146.

³⁸ U F Moghul 'Approximating Certainty in Ratiocination: How to Ascertain the Illah (Effective Cause) in the Islamic Legal System and How to Determine the Ratio Decidendi in the Anglo-American Common Law' (199) 4 Journal of Islamic Law 125, 131.

³⁹ Ibid at 131-132.

Sunnah. The prohibition is by analogy to the prohibition of *Khamr*, intoxicants because narcotic drugs have the same intoxicating effect as liquor (or alcohol) as alluded to in chapter 5 verse 90 of the Qur'an. On the example, the *Asl* here is the *Khamr* while the *Far'* is narcotic drugs. The *'Illah* is intoxication resulting from the use of both. Thus, the new ruling on prohibition of narcotics is derived from the specific similar ruling on *Khamr*.⁴⁰

2.3.4 Principles of Islamic Law

There are a number of principles that are taken into consideration in deriving specific rules or arriving at judgments either in the context of rule-making (in the private sphere), legislation or judicial determinations. The most notable are:

a. Istihsan: Literally, this means to consider something good. In the field of Islamic Law, it means juristic preference and it refers to the legal principle of giving up a weaker authority for a stronger one. To do this, two valid references from the sources are considered and compared and the stronger one is chosen over the weaker one. It may also operate through the restriction of one reference by another.⁴¹ It has been suggested by Zahraa that Istihsan is 'a method of identifying a ruling and assigning it to a new event through the interaction between *Shari'ah* texts and factual reality'⁴² but there is no doubt that the literature on the matter regard it as a principle considered in juristic reasoning. An example of *Istihsan* is that Islam places considerable importance on female modesty and proper dressing of a women (*satrau al'aurah*). Further to this, no man except her husband is allowed to view certain parts of her body. However, a physician is allowed on account of medical necessity to examine and diagnose a woman in the interest of saving her life and protecting her health.⁴³ The preference here is for saving life over protecting modesty and privacy in view of the emphasis on preservation of life as one of the cardinal objectives of Islamic law. Thus, the rule on privacy will be dropped for the need to preserve life as a foremost objective in the circumstances.

⁴⁰ Baderin note 19 supra at 188 – 189.

⁴¹ Nyazee note 15 supra at 150-151.

⁴² M Zahraa 'Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research' (2003)18 Arab LQ 215, 238-239.

⁴³ Doi note 18 supra at 82-83.

b. Istishab (*Presumption of continuity*): The existing laws of a community are recognised to be consistent with *Shari'ah* unless something comes to light that would suggest that existing laws (of personal conduct, governance etc) are not consistent with *Shari'ah* and, therefore, illegal. It means that everything is assumed to be permissible in that society unless there is a specific provision in *Shari'ah* to the contrary. In other words, it refers to maintenance of the *status quo* in a society as long as it does not violate any of the *Shari'ah* provisions. This principle is responsible for taking into account the '*urf* and '*adaat*, culture and customs of a people and integrating it into the Islamic law that is applied to those people. In this way Islamic law differs according to where it was applied except in its central principles and thereby allows the indigenous culture of the people and place to grow naturally albeit with a stronger moral focus.⁴⁴

c. Al-Maslaha Al-Mursalah: In a general sense, *al-Maslaha al-Mursalah* has a meaning similar to public interest in western legal discourse. According to Nyazee, the literal meaning is the acquisition of benefit or the repulsion of injury/harm. Technically however, it refers to 'the preservation of the purposes of Islamic law in the settlement of legal issues.'⁴⁵ It is the 'systematic consideration and evaluation of the various interests that have public and general effect on the Muslim Community.'⁴⁶ However, it is relevant to point out that *al-Maslaha al-Mursalah* is a little different from western conceptions of 'public interest'. While it clearly allows for and promotes consideration of some of the arguments that would be put forward as public interest arguments in countries like the UK and USA, it does not necessarily contrast with private interest. In some cases it would in fact do so but not in others, since its overarching purpose is to preserve the purposes of Islamic law which in a good number of cases will be independent of any sort of private interest.

Scholars such as Doi and Zahraa have stated that preservation of the public interest is recognised as an important basis for, or source of, law in the Islamic legal system.⁴⁷ However, in line with what has been stated above, it is accurate to assert that this is an important principle in legal rationalisation in the Islamic legal system which can play an important role in law and policy making in Muslim states. This may be in legislation or judicial interpretation from time to time. As a contemporary author, Izzi Dien elaborates:

⁴⁴ Ibid. at 83-84.

⁴⁵ Nyazee note 15 supra at 154.

⁴⁶ Zahraa note 42 supra at 239.

⁴⁷ Ibid. at 238-239 and Doi note 18 supra at 81.

The concept of public welfare and interest in Islamic law occupies a central position in the formation of legal opinion and the interpretation of the legal texts. It acts as a 'key turner' that harmonises all sources of the law...it carries with it a wider sense than just serving the public since it includes every cause and effect that contributes to the betterment of life and faith in Islam.⁴⁸

An example of the operation of this principle can be made in the socio-economic realm. In the Islamic socio-economic system, special taxes may not ordinarily be levied as the state is expected to fund public services through the imposition and collection of the *Zakat*, the general tax on wealth through which the privileged support the less privileged. However, the imposition of new taxes by the state can be legislated if it does not have the funds to enable it to provide security for the people like policing and defence costs for example, a fundamental obligation of the state under Islamic law. The principle of *al-Maslaha al-Mursalah* or promotion of public welfare and prevention of harm is very important to the organisation and governance of the state under the Islamic system. A liberal construction of the mechanism may also provide a viable basis for the development of appropriate principles in the challenging and ever-expanding area of delictual liability of public authorities.

It is noteworthy that the Board of Grievances does not directly refer to the principle of *al-Maslaha al-Mursalah* very often in its judgements. However, there are some decisions that implicitly reflect the adoption of the principle such as *S v Civil Defence Corps*, *Z & 29 Ors v Municipality of Riyadh* and *B v Municipality of Abha* (discussed in chapter five). In fact the whole idea of risk-based liability, which will be discussed in chapter five, is an application of this principle. In the case of *S v Civil Defence Corps* for instance, the Board, it can be argued, is implicitly applying the principle of *al-Maslaha al-Mursalah*. It did not interfere in the work of a public body (fire-fighting) which aimed to preserve the public interest in the safety of life and property. At the same time, it did not leave the claimant who suffered unjustified loss in his property as a result of such work without compensation. This approach that seeks to balance between the public interest and individual rights, it is argued, can be taken forward in dealing with complex cases in the future and find legitimation within the broad principles of Islamic law.

⁴⁸ Mawil Izzi Dien *Islamic Law from Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 69.

d. Saad Al-Dhari'ah: A related concept to the above is that of blocking the lawful means to an unlawful end. This principle is used in juristic determination (and legislation) to address situations where an act is ordinarily lawful but doing it may result in an unlawful end. The need and uses of this principle varies according to time and place. For example, the planting of poppy seeds is ordinarily considered a lawful act under Islamic Law. However, it has been adjudged an unlawful act in current times if it leads directly to the production of hard drugs because the latter are dangerous to human health and such substances are generally banned under Islamic Law. In view of the public interest element implicit in this principle, some scholars regard it as a variant of *al-Maslaha al-Mursalah*.⁴⁹

On the whole, the sources are those that generally agreed upon, transmitted and definitive. Importantly, extensions of the law can be based upon them. The methods and principles on the other hand (usually, but inappropriately, referred to as 'secondary sources') are mechanisms for achieving such extensions and the continued applicability and flexibility of Islamic law. Before leaving this issue of the nature of Islamic law, it is relevant to briefly comment on the 'Schools of Thought' or 'Schools of Islamic Jurisprudence.'⁵⁰

2.3.5 Schools of Islamic Jurisprudence

As Baderin has noted, one of the most common features of Islamic Law is its 'complexity.'⁵¹ By this is meant the realisation that it is not a 'monolithic' system.⁵² Islamic jurisprudence thrives on a plurality within a unity based on the recognition of the diversity of human society.⁵³ This is reflected in the acceptance of the validity of schools of Islamic jurisprudence which are considered a fundamental blessing to the Islamic legal system in that they are 'different manifestations of the divine will.'⁵⁴ There is admittedly some divergence of opinion on certain legal issues amongst these different schools of Islamic jurisprudence. However, rather than constituting a source of confusion in the operation of Islamic Law the schools of jurisprudence represent 'a diversity within unity.'⁵⁵ Although hundreds of schools of jurisprudence initially developed, four Sunni Schools; Hanafi, Maliki, Shafi'i and Hanabali have endured through the centuries.

⁴⁹ Ibid. at 81-83 and Nyazee note 15 supra at 155-156.

⁵⁰ For a lucid discussion of the evolution of the Schools of Thought see A B Philips *The Evolution of Fiqh* (3rd ed International Islamic Publishing House Riyadh 2005).

⁵¹ Baderin note 16 supra at 32.

⁵² Ibid.

⁵³ Ibid. at 32-33.

⁵⁴ H M Kamali *Principles of Islamic Jurisprudence* (Islamic Texts Society Cambridge University Press 1991) 169.

⁵⁵ Ibid.

2.3.6 Legislation as a Source of Law

Apart from the above, there are several legal instruments that are used principally in the administration of the state in Saudi Arabia as with all other system which adopts Islamic law. All of these instruments must conform to the sources discussed earlier. These are regulations which include *Marsoom Malaki* (Royal Decree), *Amr Malaki* (Royal Order), *Lawaah-wa-Qararat* (Council of Minister's Regulations) and Ministerial Regulations.⁵⁶ The economic boom and increasing contact with other parts of the world has led to the need for more legislative enactments to govern foreign and domestic commercial activities. However, such legislation was designed to supplement but not to contradict the *Shari'ah*.⁵⁷

It is further relevant to any study of the laws and legal system of Saudi Arabia to examine the Basic Law. This is because as mentioned earlier, the Basic Law now forms the major point of reference for any discussion of the law and legal system of Saudi Arabia. However, before going further to examine the Basic Law, it is appropriate to make a brief comment on the codification of laws in Saudi Arabia.

2.3.6.1 Codification of Saudi Laws

Formerly, a good part of what can be regarded as Saudi Law was not codified. However, in the recent past, the government has initiated an ongoing policy of codification of laws 'that appear modern and western'⁵⁸ relating to various aspects of life in the country. This is why, as mentioned above, there is now a growing body of legal instruments in the administration of the state. This has been traced to a process of modernisation which has taken root in the country deriving presumably from what Vogel describes as 'an extensive exchange' between Saudi Arabia and the 'West.'⁵⁹ Thus, laws relating to the media and publishing, culture, national security, criminal laws and civil status have now been codified. The same applies to legislation on commerce, investment and economy, education and science as well as health, social care and labour laws.⁶⁰ Some of these laws have been revised and reformed over the years subsequent to their codification.

Furthermore, the codification project is quite significant for any informed observer of the legal and political system of the country. More than that, it is important, in the context of this work that the process of codification (at least indirectly) furthers attempts to provide a

⁵⁶ Al-Hudaithy note 9 supra at 186-189.

⁵⁷ R Aba-Namay 'The Recent Constitutional Reforms in Saudi Arabia' (1993) 24 (2) I.C.L.Q 295, 318.

⁵⁸ Vogel note 2 supra at xiv.

⁵⁹ Ibid.

⁶⁰ See note 13 supra.

systematic presentation of the principles of delict. This is the case inasmuch as the various laws potentially map out in some primary way, the foundations of delict as it relates to public authorities thus providing further guidance for judicial officers in the task of adjudicating delictual claims against the state. It is apt at this point to consider the Basic Law of Governance and certain (limited) constitutional changes that have been constituted in Saudi Arabia.

2.3.6.2 The Basic Law of Governance and Constitutional Changes

Interestingly, until 1992, the Kingdom of Saudi Arabia, like the United Kingdom, had no written constitution, at least not in terms of the modern western conception of it.⁶¹ The founder of the state and his immediate successors ruled for decades without a written constitution, political party, electoral system or organised labour or even professional associations. This was due, as Aba-Namay noted, to the nature of the royal family's claim to leadership; 'it alone had the political and moral qualities to rule the state.'⁶² However, there had been longstanding opinion that there should be a clear statement of the powers of the state and the structure of government both from within certain elements in the royal family itself and outside of it.⁶³

External factors like conflict with Yemen and Egypt in the early 1960s and the Iranian Revolution in the 1979 prompted successive rulers to promise reforms of the legal and political system with little or no positive action in the period leading up to 1992. However, the economic boom from oil revenues and the transformation of the state to a wealthy and educated one made the need for political change, albeit limited, inevitable. The country was fast integrating into the global community and could no longer resist the need to be identified as a modern state. There was not only the consideration of the ever-growing number of pilgrims from all over the world visiting the country for the annual Muslim rites of *Hajj*, but pressure from the international community, particularly its economic allies in the West and elsewhere, for the establishment of the mechanisms of a modern state.

The democratisation wave of the 1980 and 1990s as well as the Gulf War and heightened tensions in the middle-east (which have recently escalated) all acted as immediate impetus for the 1992 reforms. These developments appear to have encouraged the expression of

⁶¹ Aba-Namay note 57 *supra* at 295.

⁶² *Ibid.* at 296.

⁶³ A H Al-Fahad 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30 *Yale Journal of International Law* 375, 377-378.

discontent with the political arrangements in the country with various groups, including sections of the religious scholars, academics and women groups either making written representations or staging public protests to express one form of socio-political demand or the other.⁶⁴ Due to these varied political, social and economic challenges facing the country, the Basic Law along with two major pieces of legislation, the Law of the *Shura* Council and the Law of the Provinces, was enacted on 1st March 1992 to herald what were expected to be major constitutional changes in Saudi Arabia.⁶⁵

Although it is stated in the Basic Law that the constitution of the Kingdom of Saudi Arabia shall be the Qur'an and Sunnah, it should be noted that the Basic Law is formulated according to the structure of modern constitutional law. Thus, the Basic Law makes provisions for the system of governance, identity of the state and the organisation of the three branches of government identified as the 'judicial,' 'executive' and 'regulatory.'⁶⁶ It further makes provisions for state-citizen relations, the rights and duties of citizens, the powers of the Monarchy as well as the economic and financial system. The final provision of the Basic Law is the amendment procedure.

The Basic law has been welcomed by some as being an exercise in constitutional reforms that has 'introduced a major change in the state's organic institutions' which 'may well break significant new ground in constitutional terms.'⁶⁷ Others have expressed the critical view that the Basic law is merely an exercise in 'ornamental constitutionalism.'⁶⁸ It is simply a very 'modest...step' and 'realistic document' that 'faithfully reflects the state of the relative power of the governing elite and society.'⁶⁹ Critics of the constitutional changes have pointed out that the constitutional changes are not nearly far reaching enough. In their view, almost sixty years of waiting has produced a document that for the most part, is of ornamental, rather than real value in demarcating and separating the powers of the executive, judicial and regulatory (legislative) branches of government. In the words of Al-Fahad:

the Saudi Basic Law signifies, if anything, a qualified rejection of the standard notions of constitutionalism in terms of rights and freedoms, while

⁶⁴ Aba-Namay note 57 supra at 297-303.

⁶⁵ Ibid and Al-Fahad note 63 supra at 376-384.

⁶⁶ Article 44 of the Basic Law.

⁶⁷ Aba-Namay note 57 supra at 295.

⁶⁸ Al-Fahad note 63 supra at 376.

⁶⁹ Ibid. at 395.

ratifying a powerful executive circumscribed only by historical practices and Islamic ideas of governance.⁷⁰

In the view of critics of the changes, in reality, the changes have left the political landscape much as it was before the introduction of the Basic Law; the royal family, and particularly the King still concentrates state powers in his hands. The King for instance still has wide and mostly final powers over executive, judicial and legislative matters in the country through appointments of members to the relevant branches and consent to or approval of their decisions. For instance, the *de facto* legislative assembly members are all appointees of the King. Article 3 of the Law of the *Shura* Council provides that it shall consist of a chairman and one hundred and twenty members chosen by the King from amongst scholars, experts and specialists.⁷¹

2.3.6.3 Some Implications of the Basic Law of Governance on the Liability of the State

Whatever the position taken on the nature of the constitutional reforms which the Basic Law represents, as briefly discussed above, one of its major positive contributions would appear to be its introduction of clarity on certain aspects of the relationship between the state and the citizens in Saudi Arabia. Foremost is how it gives clear expression to the (incredibly wide) powers of the King. For instance, it stipulates the powers of the monarch to constitute the *Shura* Council and even amend the Basic Law.⁷² A number of provisions of the Basic Law which are also relevant to this study in that they deal with the rights of citizens and residents against the state and the liability of public authorities. These provisions will be discussed as applicable in the course of this research.

Suffice it to say at this point that they make provisions for and reinforce the position that Islamic Law generally, and its application in Saudi Arabia specifically, recognises and regards as important the liability of public authorities. They include specific provisions on the liability of the state (Article 43), a guarantee of the right of access to court and litigation (Article 47), extensive jurisdiction of the courts (Article 49). Of special interest and significance to this study is the constitutional recognition of the Board of Grievances

⁷⁰ Ibid at 376.

⁷¹ This was initially 60 and has been progressively increased over time through various Royal Orders. It now stands at 150 members.

⁷² Article 83 of the Basic Law.

provided for in Article 53 of the Basic Law. As if the foregoing is not enough to demonstrate the commitment of the state to the recognition of the principle of state liability, the Basic Law further provides:

The regulatory authority shall have the power to formulate laws and rules conducive to the *realization of the wellbeing or protection from harm of the State* in accordance with the principles of the Islamic *Shari'ah*.⁷³

From the historical point of view, it is significant to note that part of the specific provisions of Article 43, to wit 'Every individual shall have the right to address public authorities in matters of concern to him' conforms to the 1926 proclamation made by King Abdulaziz, the founder of modern Saudi Arabia, wherein he declared:

His Majesty proclaims to his people that anyone who suffers from injustice which is inflicted on him by whomever – a junior or senior official – and hides it, then he is responsible for his suffering. Moreover, anyone who has a complaint can submit it through a Complaint Box which is placed at the government headquarters and whose key is with His Majesty the King. The complainant should be sure that no one will harm him because of his complaint of injustice which was inflicted on him by any official.⁷⁴

Thus, clearly, there is a serious case for investigating the law of Saudi Arabia as it relates to the liability of public authorities in delict since it has indeed been elevated to a constitutional issue.

2.4 Governance in Saudi Arabia

2.4.1 State Structure and Political System - Division of Powers and Tiers of Government

The Basic Law as stated above, was promulgated in 1992. It makes provisions for the system of governance, identity of the state and the organisation of the three branches of

⁷³ Article 67, the Basic Law. Emphasis mine.

⁷⁴ See *Umm al-Qura* Gazette December 1926. See also G N Sfeir 'An Islamic Conseil D'état: Saudi Arabia's Board of Grievance' (1989) 4 Arab Law Quarterly 128, 129.

government identified as the ‘judicial,’ ‘executive’ and ‘regulatory.’⁷⁵ The regulatory term used here is meant to indicate the legislative function. This is made explicit by Article 67 mentioned earlier.

It is clear that the framers of the Basic Law intended to avoid using the term ‘legislative’ or ‘parliament.’ Commenting on this issue, Aba-Namay observes that Muslims generally take exception to *Tashri*, the concept of legislation. From a traditional point of view, it is considered alien to Islam. God is regarded as the Supreme Legislator and ‘human beings can only interpret God’s law, not make their own.’⁷⁶ Indeed, this approach is customary in Saudi Arabia. As Aba-Namay iterates, throughout its statehood, ‘the government has never claimed the right to legislate, only to ‘regulate’ in order to supplement, though not contradict, the *Shari’ah*.’⁷⁷

Saudi Arabia is a unitary state. There is a central government headed directly by the King who is also the Prime Minister. The King is vested with the power to declare a state of emergency as well as war. He is assisted by an executive cabinet which comprises two deputy Prime Ministers and ministers each heading a department of state referred to as a ministry. The structure of the state and the political system are set out in what are officially referred to as the ‘basic laws.’ These are four in number: the Basic Law of Governance (discussed above), Law of the Provinces, Law of the *Shura* (Consultative) Council and the Law of the Council of Ministers. Together, they define the parameters of government and governance in Saudi Arabia. As already mentioned, the King retains ‘his hold on the main levers of power’ with executive and legislative functions under his control.⁷⁸ This is in addition to occasional judicial authority exercised for instance through his ability to grant amnesty. Article 44 of the Basic Law says that:

The authorities of the state shall consist of: Judicial Authority, Executive Authority, Regulatory Authority. These authorities cooperate in the discharge of their functions in accordance with this Law and other laws. The King shall be their final authority.

Administration of the country is conducted at three levels, central, provincial and municipal. The country is divided into 13 regions each headed by a Governor appointed by

⁷⁵ Article 44 of the Basic Law.

⁷⁶ Aba-Namay note 57 *supra* at 309.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 305-306.

the King and accountable to the Minister of the Interior. Within each region there are municipalities of varying sizes. The municipality is the basic or local unit of governance and the closest to the people. The provincial government supervises the local offices of the central government in the discharge of their public duties.

2.4.1.1 Central Government

Governance in Saudi Arabia remains, to a large extent, organised around a powerful monarchy. The King is both head of state and head of government with the central government directly under his control. The King, as Prime Minister, rules with his Cabinet, the Council of Ministers, first established in 1953. The Council of Ministers, appointed by the King, advises on the formulation of general policy and directs the activities of government business.

The country has a growing bureaucracy represented by the public service and the various ministries are headed by individual ministers. This is in accordance with Article 24 of the Law of Council of Ministers⁷⁹ which provides that the Council of Ministers as the 'direct executive authority' has full power over all executive and administrative affairs. The executive powers of the Council of Ministers include monitoring the implementation of laws, regulations and resolutions as well as establishing and organising public institutions.

The Council of Ministers, apart from being an executive body, also exercises some legislative functions. In some ways, it acts like an upper arm of the legislature particularly in view of the establishment of a formal legislative body, the Council of *Shura*. The Council of Ministers issues 'Resolutions' which have the force of law once signed by the King, the President of the Council.

As previously mentioned, the principle of consulting with citizens in affairs of governance is an important part of Islamic socio-political principles and the law creating the *Shura* Council is one of the most important statutes in Saudi Arabia. It establishes the *Shura* Council as a legislative branch of government with the wide ranging powers which legislatures customarily have but which are in some ways circumscribed by the centralisation of governance and power around the monarchy as earlier mentioned. The members are appointed in the first place by the King for a four year term.

⁷⁹ Royal Order No. 13/A (1993).

Although the new law of the *Shura* Council came into effect in 1992, the first session was held in 1994 consisting of a speaker and 60 members. Now in its fifth session, the membership has grown to a hundred and fifty members. In the past, the *Shura* Council was rendered largely dormant by the monarchy but the situation has gradually changed with the attempt to reconstitute the institutions of the state starting from 1992. This has been in response to national and international calls for a more representative and modern system of governance in the country.

In line with its constitutional mandate in the Basic Law, the *Shura* Council now plays a more active role in governance in the country. It not only performs legislative functions, it also scrutinises executive actions, inviting ministers to report on their ministries' activities, discussing government policies as well as considering reports of the administrative court, the Board of Grievances.

As in every modern state, Saudi Arabia has a judiciary for resolution of disputes. Judicial independence is emphasised by Article 46 of the Basic Law. A dual court system handles disputes as provided by Articles 49 and 53 of the Basic Law. Disputes between individuals and corporations are under the wide jurisdiction of the General Courts while disputes between private individuals and the state are under the exclusive jurisdiction of *Diwan al-Madhalim*, (the Board of Grievances) except cases involving real estate which are also determined by the General Courts. The work of the *Diwan al-Madhalim* is of particular relevance to this study and it will be discussed in the next chapter.

The central government is directly responsible for defence, security, policing, emergency services, and international relations. It also has full responsibility for education at all levels. Health matters also come under the exclusive jurisdiction of the central government. In addition, the central government also provides housing finance and construction though physical planning issues are the concern of the municipal governments.

2.4.1.2 Provincial Government⁸⁰

In discussing decentralisation of powers in administration, Cohen and Peterson identify three types; deconcentration, devolution and delegation. Deconcentration, a rather weak form of decentralisation, refers to redistribution of the central authority's decision making

⁸⁰ The alternative term 'regional government' is also used in Saudi Arabia with reference to the provincial administration.

powers only to different levels of the central authority itself.⁸¹ In other words, the responsibilities of the central authority are shifted to its offices in the provincial or municipal areas. There is no devolution of such powers to autonomous units at any other level of governance. In this way, the central government maintains control over every aspect of public administration through a unified structure. Devolution on the other hand refers to a system of governance in which the authority for decision making, finance and management is transferred to semi-autonomous levels of government like regional bodies. Delegation is a more extensive form of deconcentration through which central governments transfer responsibility for decision making as well as administration of public functions to semi autonomous organisations which are not wholly owned or controlled by government. Such services may be related to transportation, health or education for instance. Governments delegate some of their responsibilities when they create public corporations and semi-autonomous companies, housing authorities, transport authorities and so on.⁸²

The distribution of state powers in Saudi Arabia appears to follow a model of administrative decentralisation which can be described as quasi-devolution but not ‘de-concentration.’ Quasi-devolution as used here refers to a mixed system of government which shares elements of de-concentration with devolution in varying degrees. In the Saudi context, quasi-devolution refers to the creation and recognition of autonomous units in form of provincial governments which have over time been granted some powers and control over their respective areas. Most of the functions of the provincial government revolve around monitoring and ensuring the proper functioning of the central administration’s departments and agencies within their geographical jurisdiction. The departments and agencies remain primarily accountable to the central government (their respective ministries) in the discharge of their public services. However, the provincial administration has the duty to supervise their activities and report as appropriate to the ministry or controlling body at the centre.

The Saudi state is divided into regional and provincial units as mentioned earlier. The provincial government also oversees the activities of the officials of the various municipal governments under its jurisdiction. A key aspect of the work of provincial government is to

⁸¹ J M Cohen and S B Peterson ‘Administrative Decentralisation: A New Framework for Improved Governance, Accountability, and Performance’ available at: <http://www.cid.harvard.edu/hiid/582.pdf> (Site visited 12 December 2009).

⁸² D A Rondinelli and G S Cheema *Reinventing Government for the Twenty-First Century: State Capacity in a Globalizing Society* (Kumarian Press Inc. Bloomfield CT 2003) 50.

maintain security of lives and property and ensure stability in the provinces. Also of interest here is the duty of the provinces to ensure compliance with, and enforcement of court judgments relating to either private individuals or public bodies. Another important function of the provincial government is to ensure the protection and guarantee of rights and freedom of individuals as recognised by the *Shari'ah* and subsidiary legislation. In addition, the provincial government is empowered to protect and prevent infringement on State property and assets.⁸³

The Law of the Provinces creates local consultative councils for each province consisting of ten citizens appointed by Governors in consultation with the Minister of Interior. The Law of the Provinces confers extensive autonomy on the Governors and the local authorities (see municipal government below) in deciding development and economic planning and budget matters with reference to the respective provinces. The Governors are accountable directly to the Minister of the Interior under the law.

The operation of the provincial government is strongly-centred on the person of the governor. In contrast with the two other levels, what should be stated as functions of the government are expressly stipulated as functions of the governor in Article 7 of the Law of Provinces. Thus, in theory and practice, the provincial governor is a prefect over the municipal government with (apart from, notably, security) policy and supervisory role in governance in the Kingdom.

2.4.1.3 Municipal Government

As stated earlier, municipal government is the lowest level of administration in Saudi Arabia. Municipalities have quite a number of important functions as provided by the Municipalities and Rural Areas Law (Municipalities Law).⁸⁴ According to the Municipalities Law, a municipality is a legal entity which enjoys financial and administrative independence. Municipalities are established for virtually every city or town in the country, some large, some small. Functions of a municipality include organising, reforming and beautifying the city or town and maintaining its general health, safety and well-being. Thus, municipalities control layout and physical planning of their municipal areas. They have regulatory powers for issuing licenses for physical development and supervision of all construction works.

⁸³ See generally Article 7 of the Law of Provinces, Royal Order No. 91/A (1992).

⁸⁴ The Law of Municipalities and Rural Areas, Royal Decree No. 5/M (1977).

Municipal authorities also have the duty to dispose of refuse and keep their public areas clean. They build and maintain public parks, gardens, water fountains, public swimming pools, and related amenities. Environmental protection is another part of the functions of municipal authorities. Municipalities further have the obligation to monitor food and consumer goods and ensure compliance with government standards by goods and services providers. In addition, municipal governments are responsible for price-control of goods and services as well as weights and measures in conjunction with other relevant agencies.

Other functions of municipal authorities are the construction and operation of abattoirs, creation of markets and the designation of sales outlets, issuing licences for the practice of various professions, occupations and crafts. Moreover, they are charged with cooperating with other relevant agencies on the provision of emergency, fire and rescues services. It is equally relevant to note that municipal authorities are responsible for operating local transportation in co-operation with relevant authorities. Additional functions of municipal government are expropriation of real estate for public benefit, protection of ancient buildings and archaeological sites and promotion of cultural, sport and leisure activities in cooperation with other bodies. They also establish and maintain cemeteries.

The municipal authorities receive subsidies, grants and allowances from the central government which constitute the bulk of their income. They also raise revenue through fees and fines collected directly by the municipality, and a share from fees collected by the government as allocated for the municipality in the system. Other sources of income include bequests from wills and gifts and fees imposed by special schemes to cover exceptional emergency expenses.⁸⁵

2.5 Administration and Functions of the State

This part briefly examines the functioning of government and general administration as it relates to the specific issue of direct service provisions or regulation of the provision of public goods by the private sector. This examination will be limited essentially to the most important public services and public necessities and it is not intended to constitute a comprehensive account of government functions in Saudi Arabia.

Government business is conducted through ministries and agencies, bodies referred to in this study as ‘public authorities.’ Saudi Arabia has largely become a welfare/regulatory

⁸⁵ Ibid.

state with government occupying a central position in the provision of services and in some cases, maintaining a regulatory role. The state provides social services in the fields of education, health and social care, food and agriculture as well as transport and other areas. For the purpose of the subject of this research, namely state liability for delict, it is proposed to limit the description of the administration to these main areas since they are the main points of contact between citizen and state.

2.5.1 Education

When the state was established in 1932, education was the privilege of very few people, mostly children of wealthy families living in the major urban centres. However, the state has put in place a system of public education that provides formal and vocational education and training from pre-primary through tertiary and university education. The government has built tens of thousands of schools around the country and it currently has 14 universities. Tuition, books and relevant materials are all provided free in the country's schools, colleges and universities in all areas of learning in the fields of commerce, arts and sciences.

The institutions of learning are run, funded and managed by the Ministries of Education and Higher Education. It is important to note that public universities⁸⁶ are autonomous legal bodies though under the general supervision of the Ministry of Higher Education.⁸⁷ Every University has a special independent budget that is approved by a royal decree defining its revenues and expenditures and it is subjected in its implementation to the monitor of the General Auditing Bureau.⁸⁸

Educational facilities are provided by the government for pupils and students with special needs like the blind, deaf, other categories of physical and mental handicap.⁸⁹ Adult education is similarly provided by government. The Ministry of Education has established and runs a large number of adult education centres. In collaboration with the Ministry of Labour, it manages most of the Kingdom's vocational training centres and higher institutes of technical education. The Ministry of Education also sets and monitors overall standards for education in the public and now, the gradually developing, private education sector.

⁸⁶ At least two private universities have now been established in the country.

⁸⁷ Article 2 of the Law of Higher and Universities Education issued by Royal Order No. 8/M (1994) provides that every university shall have an autonomous legal identity and personality for all required purposes.

⁸⁸ Article 50 of Law of the Higher and Universities Education.

⁸⁹ Kingdom of Saudi Arabia 'Ministry of Education: A Brief Introduction' available at: http://www.moe.gov.sa/openshare/englishcon/Introducti/history.htm_cvt.htm (Site visited 30 October 2009).

2.5.2 Health

As part of its welfare programmes, government provides free health care services to the public, citizens, residents and visitors alike (especially pilgrims). The health care network is administered by the Ministry of Health which employs medical and ancillary personnel for, as well as provides required facilities. Initially, the emphasis was more on establishing the necessary medical infrastructure: hospitals, clinics, pharmacies, laboratories and research facilities and so on. After the facilities were put in place, the focus has in recent years shifted to improving the quality of medical care and services. The Ministry of Health provides comprehensive medical services. These include preventive and surgical care across the full range of medical needs covering primary health care, community health and specialized medical facilities. Some government agencies, including the Ministries of Education and Defence, the National Guard and the Public Security Administration, have their own hospitals and clinics. According to the Law of Health⁹⁰ the health care services are financed by the general budget of the state, donations, wills, bequests, gifts, and the revenues of Cooperative Health Insurance.⁹¹

The government has also encouraged private sector participation in health care and put in place a number of incentives to facilitate this.⁹² The Ministry of Health regulates the activities of private health-service providers through a number of mechanism including licensing and facilities inspection and general supervision to ensure compliance with appropriate standards. Training of private-sector health care providers is supervised and supported by the Ministry.

2.5.3 Social Services

The recently created Ministry of Social Affairs is responsible for delivery of social care and citizens' welfare. It provides a wide range of social welfare programs: social security pensions and benefits; relief assistance to the disabled, elderly, orphans and widows without income. The Ministry provides facilities for the treatment and social rehabilitation of the mentally and physically challenged. It has established Centres throughout the

⁹⁰ Royal Order No. 11/M (2003).

⁹¹ Article 10 of the Law of Health.

⁹² According to official estimates, as of 1990, the private sector accounted for 27 percent of Saudi health care services. Royal Embassy of Saudi Arabia Washington, DC Available at: http://www.saudiembassy.net/about/country-information/health_and_social_services/ (Site visited 23 May 2011) It is relevant to note that this figure is quite old. However, the number presumably has increased over time due to the growing tendency in government towards privatisation as will be discussed below.

country to teach the mentally and physically impaired social, educational and vocational skills so that they can enter society as independent, productive individuals. There are also special education institutes for the blind and the deaf throughout Saudi Arabia, as well as centres for disabled children.

In pursuit of a policy of ensuring a decent standard of living for citizens in line with Islamic principles, the government established the General Organization for Social Insurance (GOSI).⁹³ It administers a number of key programs to support workers or their families in cases of disability, retirement and death. In 1982, it launched a programme to cover employees who suffer occupational hazards and has since helped millions of workers.

The government has also been active in housing development. The Ministry of Housing engages in direct construction and provision of housing which are then sold to members of the public on long-term instalment repayment basis. In addition, it provides interest-free mortgage for personal use and these are an important and long-standing aspect of the work of the government social-service bodies. The Real Estate Development Fund has been particularly noted for this. Financing of housing construction has been directed especially at low-income Saudis, public employees and students. Companies also benefit from the financing arrangements.

2.5.4 Transport and Aviation

Apart from meeting the domestic transportation needs for the movement of goods and people, the government also faces the challenge of ensuring the smooth movement of the Muslim faithful on annual pilgrimage. The figure has now grown to over 2 million a year. The Transport Ministry is responsible for the construction and maintenance of the wide road network in the country. The public road transport system is dominated by the Saudi Public Transport Company (SAPTCO) a public limited liability company. The company's fleet of over 2,000 buses carry passengers across various intra and inter-city routes. The Transport Ministry also has responsibility for licensing and supervising the operations of private sector operators engaged in transporting passengers across the country.

The Kingdom's ports are operated by the Saudi Ports Authority, which supplies equipment and building piers while maintenance is provided mostly by private companies. The

⁹³ Pursuant to Royal Decree No. 22/M (1969).

Ministry of Defence and Aviation on the other hand is in charge of the construction and operation of airports. The national airline, Saudi Arabian Airlines (SAA) with its large fleet of aircrafts, is in the process of being privatised.⁹⁴

2.6 New Trends in Governance – Privatisation, Regulation and Outsourcing

In line with global trends of economic liberalisation and globalisation, the role of the state in Saudi Arabia appears set for change in three main ways. These are increased privatisation of state assets, increased regulation and increased use of outsourcing in public service delivery. The Saudi government has recognised the importance of privatisation as one of the most critical measures for securing the growth and transformation of the Saudi economy. On the one hand, government has emphasised its commitment to the welfare of the people; on the other it has made known plans for achieving this through a public-private sector partnership. Government strategy for the promotion of this program of action is aimed at ‘invigorating privatisation policies’ along with the development of the relevant ‘regulatory and monitoring framework’.⁹⁵

In pursuit of its economic liberalisation program, the government has established some regulatory authorities like the Saudi Foods and Drugs Agency, the Telecommunications and Information Technology Authority and Electricity Regulatory Authority responsible for the regulation and control of foods and drugs, regulation of the telecommunications industry and electricity industry respectively. These last two sectors of the economy have recently undergone some privatisation of state utilities.⁹⁶

Similarly, government has divested some of its holdings in the country’s national insurance company to the private sector and established a regulatory body for the insurance sector. Joint private and public sector activity has also been gradually developed in the important sectors of mining and mineral resources as well postal services, seaports and shipping management, aviation (as stated earlier) and the railways, all sectors formerly under complete control of the state. The government has also been out-sourcing some

⁹⁴ Arab news newspaper “Five Ministries restructured” 23 February 2009 available at: <http://www.arabnews.com/?page=1§ion=0&article=119510&d=23&m=2&y=2009> (Site visited 19 December 2009)

⁹⁵ Ministry of Economy & Planning ‘The Eighth Development Plan 2005-2009’ available at: <http://www.mep.gov.sa/index.jsp?sessionid=4FDAED4BF0E96AF57082602A021AB89C.beta?event=ArticleView&Article.ObjectID=3> (Site visited 19 December 2009).

⁹⁶ Ibid.

public services. Thus some public hospitals are now operated by private companies under operation and management contracts.⁹⁷

Furthermore, under the country's Eighth Development Plan (2005-2009), the government sets out its privatisation plans for various strategic public utilities, services and activities as well as liberalisation of the economy. The government also set out in the plan, a determination to focus on further developing the regulatory role of the State. The plan highlighted a program of action on further administrative restructuring of government agencies to improving their efficiency among other related measures.⁹⁸

Recently, the government launched the country's Ninth Development Plan (2010-2014). This plan not only states the future government plans, but provides sketchy information about the current state of privatisation in the country. It states for instance that there has been progressive privatisation of the electricity, gas and water sector under the Eight National Development Plan. In this regard, the private sector has been allowed to participate in electricity generation and transmission services, under the umbrella of the Saudi Electricity Company (such as Rabigh on the Red Sea coast, and the eleventh generation plant in Riyadh).⁹⁹

The report further indicates that the government had offered for public subscription, 50% of the state-owned shares in the National Company for Cooperative Insurance. Ports facilities concessioning were also completed in some ports, such as the general cargo and the bulk grain terminals at King Fahd Industrial Port as well as the container terminal and cargo berths at Jubail Commercial Port and other ports in the Kingdom. The government has finalised plans to privatise the country's national airline, Saudi Arabian Airlines. There are ongoing privatisation of telecommunications and a joint-stock company for the construction and operation of the country's railway system is well underway.

There is still much to be done in the area of regulation. In furtherance of government's functions, the Agency for Classification of Contractors of the Ministry of Municipal and Rural Affairs classifies contracting companies every three years according to their financial and technical capacity. This classification has been made a requisite for participation in public sector bidding and tendering.¹⁰⁰

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ministry of Economy & Planning 'The Ninth Development Plan 2010-2014' 143-144. Available at: <http://www.mep.gov.sa/index.jsp?sessionId=7045315B506BF2D18189610962AEA86F.alfa?event=ArticleView&Article.Object> (Site visited 25 May 2011).

¹⁰⁰ Ibid. at 227-228.

In sum, it is possible to hazard that apart from economic efficiency, government plan and current programs are ostensibly geared towards better public-service delivery. It suffices to say that implementation of these measures may have an impact one way or the other on state liability for delict. The current programs of government clearly indicate a preference for moving away from its virtual dominance in the direct provision of infrastructural services and public goods. The regulatory authorities are still very much in their infancy. The private sector is slowly taking on more aspects of public service delivery across the various sectors. However, these initial steps towards privatisation, the relatively thin (in terms of numbers of authorities and their experience) regulatory regime and a low-level of public awareness of the implications of these changes do not appear to have led to a significant increase in the volume of litigation on state liability for delict in the interim. Thus, despite the foregoing, it is noteworthy that at the end of the 8th Development Plan (2005-2009), the state still dominates the arena in terms of provision of public services.

2.7 Conclusion

Like any modern state, the aspiration of the Saudi Government is to ensure a comfortable life for its citizens. This is to be achieved within the framework of its cultural allegiance to the Islamic system. Its laws and the mechanism of state governance ostensibly operate to deliver and maintain social and infrastructural services to the society under a welfare approach. Thus, the institutions of governance and government departments are in the forefront of the provision of services.

In some cases, public agencies and departments promote government's welfare policies through encouraging private-sector participation in the provision of services. In this regard, government has become increasingly aware of, and has been involved in regulating private-sector activities particularly as they have an impact on the well-being of citizens. However, government remains the dominant player in the provision of infrastructure and public goods through the operations of the various ministerial and extra-ministerial bodies. At all events, it remains necessarily involved, even if indirectly, in virtually every aspect of life in the country, at the very least through its regulatory function. The recent restructuring of the Administrative Court, *Diwan al-Madhalim*, including its historical significance within the classic Islamic system as well as the entrenchment of its special status in the Basic Law are very important to this study. Together with the foregoing insights on governance in Saudi Arabia, they provide an interesting and fertile context for engaging the theme of state liability for delict investigated in this study.

Chapter Three: The Board of Grievances as an Administrative Court

3.1 Introduction

The structures of government and governance of the contemporary Saudi state were presented in the previous chapter. It emerges from the discussion that in the welfarist aspirations of the state, the government remains the dominant player in the provision, management and regulation of social services with implications for state liability for delict. As stated earlier, the welfarist outlook of the Saudi state is arguably rooted in the classic Islamic system. Under the Islamic political system (as in others), public authorities act on the authority of the state and are thus bound by the principles that bind the state. One such fundamental principle is that which prohibits oppression and misuse of power or privilege. There are several verses of the Quran as well as the Sunnah, the sources of Islamic Law that touch on this issue. One very important reference is from the narration of the Prophet where Allah said:

‘O my servants, I have forbidden *dhulm*, oppression/wrongdoing to Myself and made it prohibited among you; do not oppress one another!’¹

The concept of oppression and wrongdoing are quite wide in the Islamic social order and extends to not providing a remedy where unjustified harm has been committed. It arguably extends to situations where a wrongdoer fails to provide redress for delictual conduct to the victim. This largely explains the concurrence of a compensation regime alongside a punitive one in Islamic criminal law. Thus, as will be discussed in some detail later, at the inception of the Islamic state, the liability of state or public authorities was established as a fundamental principle of the social system and enforced. That principle is connected to the subsequent development of *Nidham al-Madhalim*, the system of adjudicating grievances against the state, or in the context of this research, public authorities as an integral part of governance in the Islamic state. The system of redress from the actions (or even decisions) of public bodies has evolved over time. This chapter focuses on that evolution with specific

¹ This type of narration, *Hadith Qudsi* has eminent authority in the Islamic socio-legal order. *Hadith Qudsi* are revelations of Allah to the Prophet which are not contained in the Qur'an. They are separate from the Qur'an only because they are articulated in the words of the Prophet. They are superior to the other types of sayings of the Prophet which are simply *Hadith Nabawiyy*. See J Zarabozo *Commentary on The Forty Hadith of Al-Nawawi* Vol 2 (Al-Basheer Company for Publication and Translation Boulder U.S.A 1999) 900, and Qur'an Chapter 42:42 and Chapter 25:19.

reference to Saudi Arabia where the system of adjudicating grievances against the state has evolved into the creation of an institution specifically for that purpose; *Diwan al-Madhalim*.

The chapter, therefore, introduces the recently reconstituted Administrative Court, *Diwan al-Madhalim*, the Board of Grievances which is the judicial body vested with jurisdiction over claims of state liability in Saudi Arabia. This is a hybrid body which has both powers of judicial review and the powers of a regular court that awards damages. Thus, it is a type of administrative as well as regular court for redress in administrative disputes. The work of the Board of Grievances is central to this research. This chapter includes a discussion of the constitutional basis, composition, jurisdiction, powers and working methods of the Board. Setting out the nature of the Board in this way is essential to an understanding of the liability of the state for delict in Saudi Arabia.

3.2 The Grievances Jurisdiction - Adjudicating Claims against the State in Islam

In order to understand the nature of the system of adjudicating grievances against the state in Islam and Saudi Arabia, it is relevant to consider the foundations laid down by the Prophet during the inception of Islam. When he migrated to Al-Madinah from Makkah, he established the Islamic State. The Prophet is considered by Islamic scholars as not only the head of religious affairs but also the head of the judiciary. In the early period of Islam, all decisions and rulings were made by the Prophet. This was logistically possible as the Islamic community during this period was relatively small. As the number of people embracing Islam grew and the territory expanded in the Arabian Peninsula, the Prophet delegated judicial authority to a number of people. Specially chosen personnel acted as judges in certain provinces to which the Prophet was unable to physically gain access.²

The Caliphate generations (in successive periods following the demise of the Prophet) were able to apply this notion of delegation of power. Although the head of State (the Caliph, in this case) had both executive and judicial powers, he was able to delegate the judicial powers, one of his main functions, to whoever he considered competent. This point can be illustrated during the rule of Umar Ibn Al-Khattab, the second Caliph in Islam (634-644). The major expansion of the Islamic empire which took place during his Caliphate meant

² Thus for example, he appointed Maudh bin Jabal, a trusted companion as judge for the newly converted Muslims in Yemen, see S Abu Dawud *Sunan Abi Dawud* (Makatabah Ibn Hajir Damascus 2004) 334-335.

that Umar was unable to carry out all his judicial obligations personally. He then appointed a number of judges in several regions in the rapidly growing Islamic state to deal with these functions. It is interesting to note, for example, that there was a judge by the name of Zayd bin Thabit appointed to Al-Madinah, the capital of the Islamic state at the time when Umar was exercising his authority as the Head of the state from Al-Madinah itself.³ This highlights the progression of separating the executive and judicial powers of the state despite overall state powers being vested in the Caliph.

During the early period of Islam, grievances against governmental officials were capably dealt with by the ruler. As previously stated, the Prophet was the legislator, judge and executive, and grievances were dealt with by him. Payment of levying and collection of *Zakat* (Islamic tax on wealth) constitutes one of the functions of the Islamic state. Thus, the state, under the leadership of the Prophet employed Zakat-collectors. It is recorded that one of the workers commissioned by the Prophet in his position as the head of the Islamic state, Abu Jahm, in a fit of anger threw a hard object at an uncooperative Zakat-payer injuring the latter on his head. The injured individual complained to the Prophet demanding retaliation. The Prophet refused this demand. However, he ordered that the claimant be compensated from the public treasury for the injury he sustained.⁴

Such recognition of state liability for the conduct of public officials is also demonstrated during the early Caliphate. For example, Umar Ibn Al-Khattab used to closely monitor governors and officials for any grievances or complaints made against them. On one occasion, one of Umar's military leaders led an army expedition. As this army approached a river, the commander ordered one of the soldiers to search for a shallow part of the river so the rest of the army could cross. The soldier argued that the river was too cold and that it would endanger his life. Ignoring this plea, the commander forced the soldier to cross and this order led to the soldier's death. Once Umar learnt of this incident, he dismissed the commander and ordered that compensation be given to the soldier's family.⁵

The early period of Islamic history furnished similar examples highlighting the role of the ruler in dealing with grievances against the state. From the Umayyad era onwards, the Islamic state had grown to such an extent that it led to an exponential rise in governmental functions. Naturally, with the increase of the population and territories, there was an

³ A Ibn Khaldun *Al-Muqaddimah* (Dar al-Qalam Beirut 1984) 453.

⁴ Abu Dawud note 2 supra at 900-901.

⁵ A Al-Refa' ai *Al-Qada al-Idari bayn al-Shar'iah wal al-Qanuun* (Dar Al-Fikr Damascus 1989) 121.

increase in the number of grievances from the public against government. For instance, during the rule of the Umayyad Caliph, Abdulmalik bin Marwan (685-705), one can see a marked difference in how grievances were dealt with.

According to the renowned jurist, Al-Mawardi, in his *al-Ahkam al-Sultaniyyah*,⁶ (which is regarded as one of the earliest and authoritative writings on the judiciary in the Islamic system) Abdulmalik was the first to assign a specific day in which all grievances against officials were examined in his palace. This served as a 'clearing house' on such matters. On such days, he initially examined all grievances and then referred those he considered required adjudication to his judge, Abu Idris Al-Awdi. The judge then dealt with these cases in the presence of Abdulmalik bin Marwan who ordered the enforcement of such judgements.⁷ This can be considered an important, albeit not definitive, step towards the ultimate separation of the *Shari'ah* and grievances courts. It is also on record that during the caliphacy of Umayyad ruler Umar Ibn Abdulaziz (716-719), a complaint was made against a government official who had usurped land from an individual. The case was examined by a Judge supervised by the Caliph, which led to the land being returned together with compensation given to the claimant.⁸

The approach of the Umayyads as the previously mentioned instances of the practice in the early period of the Islamic state shows that no separate judicial body was given exclusive jurisdiction over claims against the state, albeit there was some delegation of judicial functions by the Caliphs. The central feature of the system at the time was for the head of the executive to be closely involved in the adjudication of a grievance against the government. The expansion of the Islamic empire, however, led to a need for decentralisation of state power and the appointment of officials around the various territories for effective administration. This included judicial power which had hitherto been largely exercised by the Caliph from the centre hence the progressive appointment of judges for the resolution of claims not only against individuals, but also the state.

Importantly, despite the power of the Caliph, he never had immunity against the grievance jurisdiction. There were instances of complaints being made by individuals against the ruling Caliph. For example, during the rule of the Abbasid Caliph Haroun Al-Rasheed (786 - 809), he was the subject of a complaint made by an individual regarding the ownership

⁶ A Al-Mawardi *Al-Ahkam al-Sultaniyyah wa al-Wilayaat al-Deeniyyah* (Dar Ibn Qutaybah Kuwait 1989)

⁷ Ibid. at 104.

⁸ M Shaybat Al-Hamd, *Al-Wilaya al-Qadaiya li Diwan al-Madhalim fi al-Mamlakah al-A'arabiah al-Sa'udiyah* Vol. 1 (Mataba'a Al-Salah Jeddah 2006) 254-255.

rights of a piece of land. The judge dealing with the complaint, Abu Yusuf, who had been appointed to the position by Haroun Al-Rasheed, summoned the claimant and the Caliph for a hearing. The claimant alleged that the Caliph had usurped a piece of land from him but the Caliph argued that it was land inherited from one of his relatives. The claimant could not provide proof that the land was his and he asked the Caliph to take an oath that the land was his. The Caliph duly obliged and the case was closed.⁹

It is relevant to identify the reason (s) for the creation of *Diwan al-Madhalim* as a separate institution from the ordinary courts. According to Khadduri, the development of *al-Madhalim* jurisdiction is somewhat analogous to the equity jurisdiction in Roman or Common law. The grievance jurisdiction has developed into a distinct institution in order to foster the dispensation of justice on matters not covered by the letters of the *Shari'ah*.¹⁰ He notes the ostensible paradox in asserting that *al-Madhalim* jurisdiction developed as a 'higher form of justice' sometimes ascribed to the equity jurisdiction in a system of law which is regarded as the 'embodiment of Divine Justice.' However, he emphasises, quite rightly, that 'in reality, the standard of justice embodied in all law is not always applicable in all situations.'¹¹

For Kamali, the origin of the jurisdiction can be traced back to the time of the Prophet when, as stated earlier, he dealt with complaints against government officials. This is evident from the fact that he appointed Rashid bin Abdullah to adjudicate such complaints. Such complaints against government officials were adjudicated in the presence of the caliph under the Umayyads. However, this changed under the Abbasid period when *al-Madhalim* was separated from the office of the Caliph. According to Kamali, *Diwan al-Madhalim* served two functions, one of which was to adjudicate complaints against government officials while the other was to serve as an appellate court to review the decisions of the *Shari'ah* court.¹²

Most authors agree with Kamali and firmly locate the formal creation of *Diwan al-Madhalim* jurisdiction in the Abbasid era. During this period, according to various accounts, adjudication of grievances flourished and started to evolve into a separate

⁹ Ibid.

¹⁰ M Khadduri *The Islamic Conception of Justice* (John Hopkins University Press 1984) 156.

¹¹ Ibid. at 155-156.

¹² M H Kamali 'Appellate Review and Judicial Independence in Islamic Law' in C Mallat *Islam and Public Law* (Graham & Trotman Limited London 1993) 49, 62.

entity.¹³ The grievances against government officials in this period were heard by an assembly of sorts with a judge designated to adjudicate them.¹⁴ It can be deduced that the intention was to assure the public that these matters were taken seriously and also that there was a reasonable level of supervision of the state officials.

It has been noted that the power and jurisdiction of *al-Madhalim* court was immense. In the words of Al-Mawardi, it combined under its jurisdiction 'the justice of the judge with the power of the sovereign.'¹⁵ Of special interest to this study on the jurisdiction of *al-Madhalim* is the insight that historically, 'the Mazalim procedure was applied to all torts, caused not only by an individual, a group or an administrative body to another individual, but many other diverse means, when the victim is an individual.'¹⁶ However, it is clear from the work of Al-Mawardi that complaints against state officials or organs constituted the jurisdiction of the court.¹⁷ The *Madhalim* court dealt with cases of the abuse of power by governors, extortions by tax collectors and usurpation of land by state officials or even powerful neighbours among others.¹⁸ In general, the focus of *al-Madhalim* jurisdiction was to 'ensure government under the rule of law in that abuse of power by influential persons and state dignitaries did not escape the law due mainly to their capacity at resisting it.'¹⁹

Whether it was simply an appellate jurisdiction over and above the *Shari'ah* courts and/or, a court to deal with issues not covered expressly in the *Shari'ah*, it remains an important historical point that the grievances jurisdiction as discussed above originated from fundamental principles of social justice in the moderation of the powers of rulers. What appears fairly certain - as contemporary authors, Shaybat Al-Hamd and Al-Refa'ai, inform us - is the continuous existence of the grievances jurisdiction, as distinct from the *Shar'iah* courts, through succeeding Islamic governments in the Muslim territories over the centuries.²⁰ Thus, it has been reported that Sultan Nur-ul-deen Zingi (1146-1174), for example, established a court in Damascus where grievances were heard and adjudicated. It

¹³ See for instance S Zubaida *Law and Power in the Islamic World* (2nd ed I. B Tauris and Co Ltd 2005) 52 and M A Baderin 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 (2) *The International Human Rights* 72. 97.

¹⁴ H Abdul-Mun'im, *Diwan al-Madhalim fee al-Islam*. (Dar Al-Sharuq Beirut 1983) 81-87.

¹⁵ Kamali note 12 supra at 62, Baderin note 13 supra at 98, and Zubaida note 13 supra at 51-52.

¹⁶ E Tyan 'Judicial Organisation' in M Khadduri and H G Lierbensity (eds.) *Law in the Middle East* Vol. I (Middle East Institute Washington 1955) 235.

¹⁷ E Hill 'Majlis al Dawla: The Administrative Courts of Egypt and Administrative Law' in C Mallat (ed.) *Islam and Public Law- Classical and Contemporary Studies* (Graham and Trotman Ltd London 1993) 213-218.

¹⁸ Ibid. at 214 and Zubaida note 13 supra at 54.

¹⁹ Kamali note 12 supra at 62.

²⁰ Shaybat Al-Hamd note 8 supra Vol. 1 at 267 and Al-Refa'ai note 5 supra at 135.

was called *Dar al-‘Adl* or the Centre (or House) of Justice.²¹ It is relevant to note that while not all Muslim rulers down the ages instituted the *Madhalim* jurisdiction, it does appear that many did. Thus, the literature records the use and recognition of the *Madhalim* jurisdiction in Muslim India between 1210-1526²² where the head of the judiciary was also the head of the *Madhalim* court.²³

Similar references have been made to the establishment of the *Madhalim* jurisdiction first under the Fatimids in Egypt (circa 969-1171) and their successors, the Mamluks (circa 1250-1517). The Chief Judges of the *Shari’ah* courts were also appointed the *Sahib-al-Madhalim*, Complaints Officer with the latter office considered distinct, even more prestigious than the former.²⁴ The *Madhalim* jurisdiction was ‘institutionalised and bureaucratised’ with some degree of pomp and pageantry attending the sittings of the *Madhalim* courts. The ruler sometimes attended the sittings of the court with key officials of state and a full complement of security guards on designated days in very spacious assembly halls.²⁵ Zubaida notes that in many of those courts, *Sahib-al-Madhalim* exercised ‘an extra-ordinary jurisdiction’ which included not only complaints against powerful state officials, but also private individuals though they sometimes sent complaints to the *Shari’ah* court for adjudication when they considered such cases a waste of time of their important jurisdiction.²⁶

In sum, it is fairly clear that the grievance jurisdiction has endured from its informal origins in the practice of the Prophet and his immediate successors, through the centuries, to its formal establishment and operation in successive Muslim states to recent times. There are substantial records for instance that show that the Ottoman Empire established and operated *Diwan al-Madhalim* in various parts of its provinces. Ursinus for instance has done work which shows that the Ottoman province of Sofia in the 18th century did have such a court.²⁷ Indeed, it has been suggested that it was in operation in parts of the Muslim world in the 18th century and reinstituted in Egypt in the 19th century. In addition, it has been observed that the *Madhalim* jurisdiction was an important contributory influence to

²¹ Al-Refa’i note 5 supra at 131.

²² See The New World Encyclopedia ‘Delhi Sultanate’ available at http://www.newworldencyclopedia.org/entry/Delhi_Sultanate. (Site visited June 2011).

²³ Encyclopedia of Islam Vol. II at 336 cited in W Hallaq ‘The Qadi’s Diwan (Sijjil) before the Ottomans’ (1998) 61 (3) Bulletin of the School of Oriental and African Studies, University of London 415, 421.

²⁴ Zubaida note 13 supra at 53-54.

²⁵ Ibid.

²⁶ Ibid. at 54.

²⁷ M Ursinus *Grievance Administration (Sikayet) in an Ottoman Province* (Routledge Curzon Abingdon-Oxon 2005).

the establishment of Egypt's *Majlis al-Dawlah*, the Administrative Court first proposed in 1879 but created in 1946.²⁸ Finally, it is interesting to note the suggestion by Zubaida that the *Madhalim* jurisdiction is linked to the operation of *shakwa*, literally, 'petition' or 'complaint' system in early 20th century in Yemen.²⁹

3.3 Adjudicating Claims against the State - the Case of Saudi Arabia

The recognition of the system of redress against the state in the context of Saudi Arabia as a state is practically as old as the state itself. In the early period following the establishment of the state of Saudi Arabia, King Abdulaziz the founder of the country regularly dealt with grievances against public authorities directly.³⁰ As mentioned in the previous chapter, he issued a proclamation in 1926 where he urged people who had complaints against government officials to submit their claims through a complaints box whose key was in his sole possession. This evidently showed the King's willingness to maintain and promote justice by giving value to grievances against those in power. However, as the number of complainants increased it became impracticable to take care of complaints directly and personally. Consequently, there was a need for a specialised organisation, taking constant measures, investigating cases and addressing weaknesses. As a result, *Shu'bah al-Madhalim*, Bureau of Grievances (the Bureau) was first established in Saudi Arabia in 1953.³¹

Article 19 of the Council of Ministers Act 1953 established the Bureau as one of four bureaux of the Council of Ministers. Articles 17-24 of the Regulations of the Bureaux of the Council of Ministers outlined the structure and functions of the Bureau. It was headed by an appointee of the King who was directly responsible to him. The jurisdiction of the Bureau was however quite vague; power to investigate 'all complaints' and make recommendations to the King. The Bureau was not independent as it was more or less regarded as a department of the Council of Ministers. These factors may have accounted for the virtual absence of any account or report of the work of the Bureau.

²⁸ Hill note 17 supra at 213-218.

²⁹ Zubaida note 13 supra at 54.

³⁰ G N Sfeir 'An Islamic Conseil D'état: Saudi Arabia's Board of Grievance' (1989) 4 Arab Law Quarterly 128, 129.

³¹ Article 19 of the Council of Ministers' Regulation Law, 1953.

In 1955, following a Royal Decree, the Bureau was separated from the council of Ministers and renamed as the Board of Grievances (the Board) which had its own president and procedures. In the early period of its existence, the Board had essentially the same investigatory role as the Bureau. At that time, it had some form of quasi-judicial status. The Board only had power to recommend a solution rather than make a binding decision and it was subject to the King's approval.

The Royal Decree provided that the Board would be presided over by an appointee of the King. Again, the President of the Board was directly responsible to the King. The Board had the power to investigate any complaints that were brought before it and to prepare a report, including the fact of the complaint and the result of any investigation and the proposed remedy that the Board would recommend. It also provided that the President of the Board would forward the report to the Minister concerned and a copy of it to the King. The Minister concerned should inform the Board within two weeks of his implementation of the proposed/suggested remedy or his objection to it and in that event, justify the decision to reject such recommendation. Then the President of the Board would send that to the King who would give his instructions regarding the matter.³²

What can be regarded as an important development in the evolution of the Board took place in 1967. A case was filed before the *Shari'ah* court by a claimant against the Ministry of Health claiming damages for wrongful termination of a contract. The acceptance of the case by the *Shari'ah* court and its order that the Minister appear before it was resisted by the executive but the court was adamant. After several exchanges of correspondence between the King and the Chief Justice, the King issued a Royal Order to the effect that *Shari'ah* court should not hear any case against a public body without obtaining the consent of the King.³³ This case constituted in the affirmation of the exclusive nature of the Board on claims against the state. In 1976, a Royal Order was passed to broaden the jurisdiction of the Board. It was granted jurisdiction over cases involving claims for administrative acts which had resulted in damage to contractors.³⁴

The Board was formally constituted into an independent judicial body in 1982. Article 1 of the Law of Board 1982³⁵ provided that 'The Board of Grievances is an independent administrative judicial body affiliated directly with His Majesty the King'. The Board is

³² Articles 1 and 2 of the Board's Law 1955. Royal Decree No. 2/13/8759.

³³ Royal Order No. 20941 (1967).

³⁴ Council of Ministers Resolution No. 818 /1976.

³⁵ Royal Decree No. 51/M (1982).

regarded as the most important administrative tribunal in Saudi Arabia.³⁶ In addition to its jurisdiction as the judicial authority over disputes between citizens and the state, it also had jurisdiction over several commercial matters, civil service disciplinary matters, and claims and pension matters of civil servants.³⁷

The Board of Grievances has recently been reconstituted by law in 2007³⁸ with a jurisdiction now limited to: (i) civil service pensions, (ii) review of administrative decisions and (iii) liability of public authorities. The implications of these changes will be examined below. Suffice it to say at this point that this development underscores the growing relevance of the issue of the liability of public authorities in Saudi Arabia.

3.4 Composition and Structure of the Board

The Board consists of a President of the rank of a minister and one or more vice presidents appointed by Royal Order.³⁹ In addition to a number of assistant vice presidents and a number of judges, the Board employs a number of technical and administrative employees and other personnel 'attached' to the Board members for the discharge of their functions.⁴⁰

The President's accountability to the King raises questions about the issue of the independence of the Board. Al-Jerba examined this through interviews he conducted with some judges of the Board. According to them, the authority to appoint is within the powers of the King due to the fact that the head of the Islamic state has judicial authority. Consequently, the King is able to delegate the judicial power that he has to another person and naturally this person will be accountable to him.⁴¹

The Explanatory memorandum provided with the 1982 Act justifies this by stating that 'The Board's direct affiliation to His Majesty the King is natural because His Majesty is the Ruler.' The power to appoint however, does not give the King authority to intervene in the Board's decisions. In reality, the King's role is to oversee the administrative functioning of the Board. Article 20 of the law of the Board 2007 states that:

³⁶ Sfeir note 30 supra at 130.

³⁷ Article 8 of the Law of the Board 1982.

³⁸ Royal Decree No 78/M (2007).

³⁹ Articles 2 and 3 of the Board's Law 2007.

⁴⁰ Article 2 of the Board's Law 2007.

⁴¹ M Al-Jerba *The Board of Grievances: A Study of the Institution of Diwan Al-Madhalim of Saudi Arabia with Particular Emphasis on its Administrative Jurisdiction* (PhD law Thesis University of Essex November 1992) 149.

At the end of each year, the administrative judicial council shall prepare a comprehensive report of the Board's activities including any accomplishments, obstacles, observations and recommendations. The President of the Board shall present this report before the King.

The above justification has precedents in the historical practice of the Islamic state where the Head of State was the Prophet and he appointed judges who were accountable to him. The (four) immediate Successors of the Prophet were then appointed by consultation from those perceived to be from the most pious and knowledgeable from among his companions. They also followed the Prophets' practice of being the Head of State as well as Chief Judge. Scrutiny was thus effected by the head of state in accounting for the actions of judges, and by consultation among advisors as to the appointment of the new head of state. As mentioned earlier, the Caliphate generations were able to delegate their judicial powers to other to act as judges and their practice was not to intervene in specific decisions.⁴²

The specific idea of the head of state being the head of the judiciary cannot be adopted today due to (a) the complexities of modern government and (b) the benefits of a separation of powers as a means of checking abuse and ensuring accountability. Therefore, the head of state has delegated judicial functions to professional judges led by the President of the Board. The current structure responds to the needs of modern government in Muslim states whilst being consistent with historical precedents.

The independence of the judiciary in general under Saudi law has been emphasised in the Basic Law. Article 46 states that 'the judiciary shall be an independent authority, there shall be no power over judges in their judicial function other than the power of the Islamic *Shari'ah*.' Although there is currently no arrangement for scrutinising the king's appointment of the President of the Board, such an arrangement could be developed in the future. In addition, since Islamic law has been understood as permitting the leader to delegate his judicial function, an arrangement for scrutinising that delegation would be compatible with Islamic law.

The President oversees the General body of the Board. He can appoint some members of the Board to inspect work that is carried out. In addition, he authorises the composition of the disciplinary committee. Furthermore, he can also instigate disciplinary proceedings

⁴² Khaldun note 3 *supra* at 453.

against any Board members either by his own initiative or through recommendations of the President of the Panel. The President's role is vital in the judicial work of the Board. He assigns cases to the relevant Panels and heads the organisation of judicial work.⁴³

The Deputy President carries out all the duties vested in him by the President. In the President's absence, the Deputy undertakes all the functions of the former.⁴⁴ The deputy's role is also very important. His powers are wide ranging but can only be exercised with the President's delegated authority. In order to perform his duties the Deputy is guaranteed his tenure, by statute, for a certain period. Under the Board's regulation, the Deputy cannot be displaced, unless it is for a higher position provided that he is capable of performing at the required standard.

The Administrative Judicial Council was established under the Law 2007 in order to look into the personnel affairs of the judges. It has a supervisory function over the Courts, judges and their jobs. The Council comprises the President of the Board as the President of Council, his most senior deputy, the President of the Supreme Administrative Court and four appeal judges appointed by Royal Order.⁴⁵

The cases of litigants are heard by the members who are appointed to perform judicial functions. The Laws of the Board 1982 and 2007 have stated the membership rules in terms of appointment, promotion, retirement, discipline, transfer and assignment. Although the Law of the Board 1982 referred to the members as *Mustashar* 'counsellors' or 'chancellors',⁴⁶ the Law of the Board 2007 clearly refers to them as judges and states that they are equal to the judges of the ordinary court, under the Law of the Judiciary, in terms of their salaries, promotions, training, retirement etc, and they enjoy the guarantees set forth in the Law of the Judiciary.⁴⁷

The judges of the Board are appointed in a similar manner to ordinary judges, under the Law of the Judiciary. The selection decision is issued by the King. The requirements of appointment are as stipulated in the established procedures in the Law of Judiciary.⁴⁸ These require the candidate to be a Saudi national, of good character and conduct, of the age of not less than twenty two years, fully qualified to carry out judicial work, and a holder of a

⁴³ Articles 44 and 45 of the Board's Law 1982.

⁴⁴ Article 46 of the Board's Law 1982.

⁴⁵ Articles 4 and 5 of the Board's Law 2007.

⁴⁶ For further discussion on the reasons for the term counsellors, see Al-Jerba note 41 supra at 160-164.

⁴⁷ Articles 1,16 and 17 of the Law of the Board 2007.

⁴⁸ Article 17 of the Law of the Board 2007.

degree in *Shari'ah* in the Kingdom of Saudi Arabia (or another equivalent degree but in which case the candidate must pass a special exam set by the Supreme Judicial Court). In addition the candidate must not have been sentenced for a crime impinging on integrity, nor been subjected to a disciplinary decision for dismissal from public office, even if subsequently rehabilitated.⁴⁹

The Board's judicial functions are performed by a number of panels in accordance with the forms of jurisdiction that have been given to the Board. The panels are divided into a general and a subsidiary panel. General panels are of three types: administrative; commercial; and penal and disciplinary. Each General panel consists of three judges; a president and two members.⁵⁰ A subsidiary panel is constituted by a judge who sits alone.

3.5 Jurisdiction of the Board

Under the 1982 Law of the Board, its jurisdiction spanned administrative, commercial, penal and disciplinary cases. It also had jurisdiction over the enforcement of foreign judgments. In addition, it dealt with those cases referred under special law or from the Council of Ministers. Administrative panels have jurisdiction over claims involving judicial review, and claims for compensation based on the delictual and contractual liability of public authorities.⁵¹

Article 8 of the 1982 Law of the Board provided that it had jurisdiction over cases related to the rights provided for in the Civil Service and Pension Laws for government employees, hired hands, independent public entities and their heirs and claimants. It further had jurisdiction to hear objections against administrative decisions where the reason of such objection is lack of jurisdiction, a deficiency in the form, a violation or erroneous application or interpretation of laws and regulations, or abuse of authority.

The Board was also empowered to adjudicate disciplinary cases filed by the Bureau of Control and Investigation against officials of government departments or general corporate bodies that involve allegations of violations of financial or administrative regulations.⁵² It was also empowered to adjudicate cases involving appeals from public servants against

⁴⁹ Article 31 of the Law of Judiciary 2007.

⁵⁰ Shaybat Al-Hamd note 8 *supra* Vol. 2 at 613.

⁵¹ *Ibid* at 611-612.

⁵² Clause 1(e) of Article 8 of the Board's Law 1982.

disciplinary decisions issued by a public body against them.⁵³ The jurisdiction of penal panels included cases of bribery, forgery, allegation of breaching the Public Funds Act of 1975 and cases filed against persons accused of committing crimes and offences provided for by regulations, where an order to hear such cases has been issued by the President of the Council of Ministers to the Board.⁵⁴

The Board was given jurisdiction over commercial disputes in 1987 when the Settlement of Commercial Disputes Committee was abolished and its power was transferred to the Board temporarily until the establishment of specialised commercial courts.⁵⁵ In 2007 the Commercial Courts were established along with General, Penal, Personal Status (Probate and Family Court) and labour Courts as part of the recent Law of Judiciary.⁵⁶ Thus, the Board no longer has jurisdiction over penal and commercial cases.

Subsidiary panels are vested with power to handle several types of claims. Firstly, claims regarding the rights of government employees or their heirs and legatees as provided by civil and military service, retirement and pension laws and regulations. This jurisdiction is also distributed between the administrative and disciplinary panels. Secondly, requests for enforcement of foreign judgments. Thirdly, cases where the claimant has failed to apply within the designated time over financial rights, but demonstrates a reasonable excuse. Finally, cases which the President of the Board considers are insignificant matters.⁵⁷

In October 2007, the Government of Saudi Arabia promulgated both the Judiciary Law and the Law of the Board of Grievances which together were intended to overhaul Saudi Arabia's judicial system. The reformation has been promulgated with the allocation of 7 billion Saudi Riyals (around £1.2 billion) for training judges and developing judicial facilities.⁵⁸ This project involved re-organising the entire judicial system which has led to the Board of Grievances coming to resemble the ordinary courts more closely. The Board was formerly divided into two levels; a court of first instance and an appeal court, whereas the general judiciary has three levels, first instance, appeal and supreme court. The Board was restructured by the recent law into three stages, a court of first instance (now referred

⁵³ Shaybat Al-Hamd note 8 supra Vol. 2 at 615-617.

⁵⁴ Clause 1(f) of Article 8 of the Board's Law 1982.

⁵⁵ Council of Ministers decision No. 241 issued by Royal Decree No. 63/M (1987).

⁵⁶ Article 9 of the Law of Judiciary issued by Royal Order No. 78/M (2007).

⁵⁷ Shaybat Al-Hamd note 8 supra Vol. 2 at 626-627.

⁵⁸ Arab news newspaper 'Kingdom Overhauls Judiciary: Independence of Courts Stressed' 3 October 2007 available at: <http://www.arabnews.com/?page=1§ion=0&article=102007&d=3&m=10&y=2007> (Site visited 20 January 2010).

to as the Administrative Court), a court of appeal (now referred to as the Administrative Court of Appeal) and the Supreme Administrative Court. Each Court exercises its powers through panels, each consisting of three judges. However, as noted above, it is permissible for the Administrative Court to be constituted by one judge.⁵⁹

In accordance with the 2007 Law, the Administrative Court's jurisdiction covers all areas of state liability. It has exclusive jurisdiction over claims regarding the rights of government employees (civil and military) or their heirs and legatees as provided by civil and military service, retirement and pension laws and regulations as well as the jurisdiction to quash final administrative decisions by those affected by such decisions on specified grounds. The Board's jurisdiction extends to claims for compensation by those affected by the decisions or acts of administration. Equally of note is the retention of the jurisdiction over state contractual liability as well as the implementation of foreign judgements and foreign arbitral awards.⁶⁰ The jurisdiction over 'acts of administration,' covers delictual liability of public authorities.

It is further important to note that the 1982 Law of the Board referred to cases of compensation filed by parties concerned against the actions of *al hukumah*, the government or *ahad al ashkhas al ma'anawiyah al mustakilah*, any independent public corporate entity. The 2007 Law refers to claims for compensation by those affected by the decisions or acts of *al idarah*, the government or administration. Neither of the two statutes defines these important terms regarding the subject of the Board's jurisdiction. The discussion that follows will examine the significance of these terms, particularly with reference to this study.

3.5.1 Definition of Public Authorities

Commentators of Saudi administrative law have defined public authorities as 'institutions established by the state in order to achieve the public interest under the control of the state.'⁶¹ As mentioned above, there is no definition of public authority or even the term '*any independent public corporate entity*' mentioned in the 1982 Law of the Board as falling within the exclusive jurisdiction of the Board. However, the amendments in terms of the body (ies) covered by the old and new laws is helpful in reflecting on what 'public

⁵⁹ Article 9 of the Board's Law 2007.

⁶⁰ Article 13 of the Board's Law 2007.

⁶¹ As-Sayyid K Haikal *Al-Qanuun al-Idariy al-Saudi* (3rd ed King Saud University Press Riyadh 2004) 76. See also A A Kalial *Al-Qanuun al-Idariy al-Saudi* (Musbah Bookshop Jeddah 1990)191. and Jaber S Abu-Zaid *Al-Qanuun al-Idariy fee al-Mmlakah al-arbiah al-Saudi* (3rd ed Dar Hafidh Jeddah 2006) 160.

authorities' mean for the purpose of this study. While the 1982 Law talks about *the government or any independent public corporate entity*, the 2007 Law refers only to *the government or administration*.

In Saudi Arabia, there are generally speaking, two types of public bodies, both generally established in the public interest to provide public services. The distinguishing feature is that it is possible to identify some as being established to provide public services without any view to making a profit. The other type, while providing public services, may initially have been established also simply for the provision of public services without a profit motive, but have since been (or are in the process of being) reorganised through commercialisation or privatisation with the clear motive of making profit like privately established corporations. Public Corporations that have undergone this process are now being referred to more commonly as 'joint-stock' companies.

The ministries, government departments, the various branches of the security services and agencies readily come to mind as examples of the first category. Bodies such as Saudi Airlines, Saudi Telecommunications and Saudi Posts are examples of the second category. In terms of the 1982 Law, the first category is what was referred to as '*al hukumah*', 'government'. It is further submitted that reference in the 2007 Law to '*al idarah*,' 'the government or administration' means the same thing. The reference in the 1982 Law to '*ahad al ashkhas ma'anawiyyah al mustakilah*', any independent public corporate entity means those bodies of the second category. The omission of this latter category in the law of 2007 suggests that the intention was to limit the Board's jurisdiction to public authorities in the conventional sense, and that the expression 'government or administration' would cover broadly the same institutions as in the UK context by the definition offered by Booth and Squires in relation to English law.⁶² The second category is understood as being excluded from public authorities at the least, for the purposes of the jurisdiction of the Board. The decisions (so far at least) suggest clarity on this point.

A recent decision of the Board regarding the Saudi Telecommunications Company which took over the functions of Saudi Telecommunications is relevant here. In *F v Saudi Telecommunications Company*⁶³ the claimant's three phone lines had been disconnected by the defender for alleged non-payment of bills. The claimant brought a claim for the money

⁶² See C Booth and D Squires *The Negligence Liability of Public Authorities* (Oxford University Press Oxford 2006) 1 who define a public authority as 'a body whether or not created by statute, which exercises powers in the public interest.'

⁶³ (2009) Unreported Case No. 365/D/A/6 1429.

they had paid to the defender on the basis that the three lines in question were wrongfully attributed to it. In fact, the lines had been obtained by a third party with forged documents of the claimant without authorisation. In striking out the claim the Board stated that the defender is not regarded as '*jiha idariyah*,' 'part of the government or administration' because it is a joint-stock company operating on commercial basis.⁶⁴ The foregoing analysis also accords with the definition of public authorities offered in the literature on the subject as indicated earlier.

Public corporations on the other hand, have independent management and control mechanisms as suggested in the 1982 Law which mentions their independent status. However, another panel of the Board assumed jurisdiction over a case after the 2007 law involving a public corporation. In *H v Saudi Airlines*,⁶⁵ which will be further considered in chapter five, the Board allowed the case against the defender though it referred to the 2007 Law of the Board without discussion of whether the defender is part of the administration or not.

It is suggested that this decision was in error and the case ought to have been struck out for lack of jurisdiction in view of the exclusion of independent public corporations in the 2007 Law of the Board as stated earlier. It appears the decision is a product of what has colloquially been termed 'transition-blues,' a failure to grasp the full extent of the implications of the new law since the case was obviously decided shortly after its passage. More importantly, the fact that Saudi Airlines is still in the process of being privatised could have implications for admissibility of the case. The consideration of operating for profit ('operating on commercial basis') would probably have led to the Board declining jurisdiction in the matter if the privatisation process had been completed when the case arose. However, it is argued that the Board ought to have simply refused jurisdiction given the express provisions of the 2007 Law.

3.5.2 Appellate System

Every decision of the Courts of first instance (the Administrative Courts) will be liable to appeal within thirty days from the date when the aggrieved party receives a copy of the final decision. Otherwise, the decision will be final and enforceable.⁶⁶ According to Article 12 of the law 2007 'the Administrative Court of Appeal shall consider judgments liable to appeal as decided by the Administrative Courts'. The import of this is that the right to

⁶⁴ Ibid.

⁶⁵ (2007) Unreported Case No. 2684/1/Q 1427. It has been mentioned in the previous chapter that the government has finalised plans to privatise the country's national airline, Saudi Arabian Airlines.

⁶⁶ Article 31 of the Rules.

appeal is an unqualified one. This is also the case in practice. This is however not the case for appeals to the Supreme Administrative Court.

The Supreme Administrative Court has jurisdiction over appeals from decisions of the Administrative Appeal Courts where the reason for such appeals is a violation of Islamic *Shari'ah* rules or regulations that are not contradictory with *Shari'ah* or erroneous application or interpretation of these including violation of a judicial principle established in a judgment of the Supreme Administrative Court. The permissible grounds of appeal also includes that the decision was made by an incompetent Court or a Court whose composition is contrary to Law or which uses an incorrect adaptation or description of the case. Further, an appeal can be made on the grounds that a decision in a dispute was contrary to another judgment made between the same parties or that there was a conflict of jurisdiction between the Board's courts.⁶⁷

It would appear that the recent Law limits the jurisdiction of the Board to purely administrative disputes. The Board would have exclusive jurisdiction over any claim involving the state as a party. However, two types of cases are explicitly excluded from the jurisdiction of the Board: cases involving requests related to '*amal assiyadah*' (sovereign actions), and appeals filed by individuals against judgments or decisions issued by other courts which fall within their jurisdiction.⁶⁸

There is no specific definition of the concept of 'sovereign action' which was first introduced to the Board by the Act of 1982.⁶⁹ It is the Board that evaluates which act is a sovereign act and which is not. The lack of criteria used to evaluate whether the act is sovereign can lead to a situation where the Board extends its power to cover decisions which are in fact sovereign, or limits its powers by refusing to hear cases that may not be sovereign.⁷⁰ According to Shaybat Al-Hamd, the Islamic legal system does not recognise a concept of sovereignty which limits the liability of the ruler, as both the ruler and subjects are bound by the rules of *Shar'iah*. He goes further to state that judges under the Islamic judicial system were entitled to adjudicate any kind of cases irrespective of its nature.⁷¹

⁶⁷ Article 11 of the 2007 Law.

⁶⁸ Article 9 of the Board's Law 1982 and Article 14 of the Law 2007.

⁶⁹ Al-Jerba note 41 supra at 212-213.

⁷⁰ A Al-Fozan 'Diwan al-Madhalim fee Dhil Nidhameh al-Jadeed' (1982) 35 Journal of Public Administration 109, 124 (Institute of Public Administration, Riyadh Saudi Arabia, Arabic).

⁷¹ Shaybat Al-Hamd note 8 supra Vol. 2 at 521.

What constitutes a sovereign act remains unclear. Some authors have suggested that the conduct of international affairs may pass the test of sovereign act over which the Board should not have jurisdiction.⁷² Specific state security matters such as the declaration of war and state of emergency have also been put forward as other instances of what ought to be regarded as constituting sovereign acts.⁷³ The decisions of the Board suggest sovereign act has been very rarely invoked as a defence or reason for inadmissibility of a claim. In *L v National Commission for Wildlife Conservation and Development*⁷⁴ the claimant (a company) claimed that the defender confiscated chimpanzees intended for sale in a pet shop belonging to the claimant. The claimant requested an injunction restraining the defender from confiscating the animals and for payment of compensation for the damage and losses it suffered as a result of the confiscation. Alternatively, the defender should be ordered to pay the commercial cost of the animals. The defender stated that its action was in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora, to which the Kingdom of Saudi Arabia is a signatory.

The Court of First Instance struck out the claim for lack of jurisdiction. It noted that although the law did not specify the claims and applications that fall into the category of ‘acts of sovereignty,’ it includes those claims arising from administrative decisions relating to the framework of the state’s relations with other countries and regional and international organisations and the like. Placing those claims amongst the ‘*amal assiyadah*,’ ‘acts of sovereignty’ is no more than a mere convention in the naming of some administrative decisions. There is nothing in the *Shari’ah* that prevents the use of the term ‘*amal assiyadah*.’ Hence, the Court of First Instance held that there was no legal reason to prevent the use of this term to describe claims and cases beyond the mandate of the Board of Grievances in this regard. This was upheld by the Appeal Chambers of the Board.⁷⁵ Suffice it to say that the Board should apply a very narrow meaning to ‘acts of sovereignty’ since the law has given the Board the discretionary power to decide what can be regarded as ‘acts of sovereignty’ or otherwise. A contrary approach will may open the way to executive lawlessness in the name of act of sovereignty which will patently negate the very reasons for the creation of the Board both from the historical and contemporary perspective.

⁷² Ibid at 524 and F Al-Dughaiter *Durus fee al-Qada al-Idari al-Saudi*. (Dar Al-Helal Press Riyadh 1995) 40

⁷³ Shaibat Al-Hamd note 8 supra Vol. 2 at 524-525.

⁷⁴ (1995) Unreported Case No. 809 /1/Q 1415.

⁷⁵ Ibid.

With regard to the second limb of Article 9 - decisions of other courts that fall under their jurisdiction - it is submitted that the General Courts have equal standing with the Board and both exercise judicial powers. In addition, the General Courts have their own avenues of appeal against first instance judgements. Moreover, the Board has its specific jurisdiction over claims involving the state, whereas, the General Court has the general jurisdiction over all matters of disputes except those exempt by a specific regulation. Consequently, this can lead to a conflict between the two bodies if there is any examination of one courts judgement by the other.⁷⁶ This latter provision is ostensibly to affirm that the Board is not to act as a court of last resort in all types of cases; a power which according to some authors, as mentioned above, was included in *al-Madhalim* jurisdiction at some points in the past.

Furthermore, conflicts may arise if the subject of the dispute concerns real estate and a public authority is a party. In theory the Board has the power to adjudicate this type of case. However, in practice the General Courts still handle such disputes, utilising their wide jurisdiction over civil and criminal disputes. According to the Law of Procedure of *Shari'ah* Courts⁷⁷ 'without prejudice to the provisions of the Grievances Board Law, the General Courts have the jurisdiction over all cases *in rem* dealing with real estate'.⁷⁸ But the General Courts have to obtain the King's consent before the commencement of hearing the case.⁷⁹

Where there is a dispute between the Board and the *Shari'ah* Court as to which has jurisdiction, the Law of Procedures before the *Shari'ah* Courts provides that an application must be made by the courts to the Jurisdiction Disputes Committee of the Supreme Judicial Council to determine the authority which is competent to decide the matter. This is important where for instance a case is brought simultaneously both before any court which falls under the law of Judiciary and the Board of Grievances, and both either reject or accept the case as being under their jurisdiction. The committee consists of three members: one from the Supreme Court selected by the President of the Supreme court, another from the Board of Grievances or other relevant authority selected by the President of the Board or the President of the other body, and the third from the full-time judges of the Supreme Judicial Council selected by the President of the Council and the latter will be the committee's President. This committee's jurisdiction includes resolving disputes regarding

⁷⁶ Al-Jerba note 41 *supra* at 217.

⁷⁷ Royal Decree No. 21/M (2000).

⁷⁸ Article 32 of Law of Procedure before *Shari'ah* Courts.

⁷⁹ Royal Orders No. 20941 (1967), 1478/M (1988) and 5058/M (2009).

the execution of two contradictory final judgements, one pronounced by any court which falls under the law of Judiciary and the other by the Board of Grievances or other relevant authority.⁸⁰ The decision of the committee will be by majority and is not liable to appeal.⁸¹

Apart from the *Shari'ah* courts, there are also some administrative or quasi-judicial bodies whose jurisdiction may come in conflict with that of the Board. Examples include the Commercial Papers Committee and Freight and Cargo Committee. Such committees are under the authority of Ministries.⁸² Article 15 of the 2007 Law of the Board provides that in such cases, an application must be made to the Jurisdiction Disputes Committee to determine the relevant authority competent on the matter. This committee comprises three members: one from the Administrative Supreme Court selected by the President of the court, another from the other relevant authority selected by the President of the body, and the third is a member of the Administrative Judicial Council selected by the President of the Council and the latter will preside over the committee. The committee's jurisdiction includes resolving disputes regarding the execution of two contradicting final judgements, one pronounced by a court of the Board of Grievances and the other from the other relevant authority. This committee adjudicates this kind of dispute in accordance with the procedures and rules established by the Law of Judiciary.

3.6 The Board: Practice and Procedure

Historically the *Madhalim* Tribunal had a much broader procedural discretion than general *Shari'ah* courts. For example, it had the discretion to initiate proceedings on its own initiative contrary to the General courts where the claimant has to initiate a case.⁸³ However, this is perhaps no longer so in Saudi Arabia where the procedures of the two courts have become relatively similar. Indeed, the Board currently has a more detailed code of procedure therefore, it may have less flexibility than the traditional *Madhalim* jurisdiction.

In 1989 the Rules of Procedure and Proceedings (1989 Rules) before the Board were promulgated, even though the Law of the Board in 1982 stated that the rules would be

⁸⁰ Article 27 of the Law of Judiciary 2007.

⁸¹ Article 30 of the Law of Judiciary 2007.

⁸² A Al-Ghadyan 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 235, 248-251.

⁸³ Al-Mawardi note 6 supra at 110-112.

issued by a decision of the council of Ministers.⁸⁴ These rules are still in effect to this day and comprise five key chapters. The first relates to administrative cases dealing with applications of review, preparation of cases and conditions. The second relates to penal and disciplinary cases. The third chapter is about the rules relating to governing hearings. The fourth chapter details methods of reviewing the Board's decisions and the fifth chapter highlights general rulings.

There is no provision in the 1989 Rules specifying the applicable law for adjudicating these various categories of cases. They focus principally on the procedures for filling cases. It would appear to be that it was assumed that the Board, like all other courts in the country, will, in accordance with the provisions of Article 48 of the Basic Law of Governance 'apply to all cases before them, the provisions of Islamic *Shari'ah*, as indicated by the Qur'an and the Sunnah, and whatever laws not in conflict with the Qur'an and the Sunnah which the authorities may promulgate.' Indeed, the practice and procedure of the Board is largely similar to that of the *Shari'ah* Courts with two notable exceptions. The first is the power of the Board to grant injunctions to suspend the action of a defender public authority until the determination of the case. An example is the application for an injunction that was requested in *L v National Commission for Wildlife Conservation and Development* mentioned above. The second procedural difference is the existence of a time bar to challenging the administrative decision or act complained about which does not apply to the cases before the *Shari'ah* Courts.

It has been noted that there are three important qualities of the procedures of the Board worth mentioning here. Firstly, the Board covers different types of jurisdiction and thus it has different procedures for each of these jurisdictions. Secondly, the procedures for the administrative panels can be described as being both 'inquisitorial' and 'adversarial' which is a feature also of the general courts. While the Rules of the Board provide for the right of the parties to challenge the testimony and case of each other, the judges are not restricted to the documents submitted or testimony provided by either party.⁸⁵ The judges play a very active role in the proceedings throughout even where the other party is absent the judge has the power and will be expected to investigate the claims of the claimant. It is as a result of this nature of the judge's power that Article 18 of the Rules of the Board provides that if the defender does not appear before the Board after the second notification, the Panel concerned may decide the case and the decision will not be a decision in default. This is

⁸⁴ Article 40 of the Law of the Board 1982.

⁸⁵ Article 19 of the Rules.

because ‘the burden of preparing the case for decision, controlling the hearing, and following its progress’ is the function of the judge. This reduces the impact of the absence of either party.⁸⁶

One of the features of the practice of the Board, again shared by the general courts, is visit to the *locus in quo*. Article 23 of the Rules provides that:

If the panel feels that during the proceedings it is necessary to go to the site of the dispute for inspection, it has the power to do so. It also has competence to undertake a supplementary investigation if needed, and the panel may carry this out itself or direct one of its members to do so.

The third quality (similarly found in the practice of the general courts) is that the primary method for proceedings is in written form which is prepared through an exchange of briefs. However, claims can also be submitted orally as both forms of submissions are possible.⁸⁷ Recently, there have been moves to change the pleading system by restricting submissions to written only unless otherwise required by the court. This is to make the process more efficient in terms of time and effort.⁸⁸ The plan includes the possibility to submit claims electronically.⁸⁹

The initial steps before the hearing depend on the case being compatible with the jurisdiction of the Board. In addition to this condition, three procedural conditions must be fulfilled before the litigation is brought forward to the Board. These are that the claimant must have adequate interests, he must sue the relevant public authority and he must comply with the time limits.⁹⁰

In some cases involving civil servant claims and annulment actions there is a requirement to complain to the administrative department before taking legal action within sixty days from the date that the claimant was informed of the decision concerned.⁹¹ The department involved should answer the claim within ninety days of the claimant’s application. If this

⁸⁶ Al-Jerba note 41 *supra* at 287.

⁸⁷ Article 19 of the Rules.

⁸⁸ Saudi Gazette newspaper “No ban on women appearing in court, asserts senior judge” 21 February 2010, available at: <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentID=2010022164098> (Site visited 23 February 2010)

⁸⁹ *Ibid.*

⁹⁰ Al-Jerba note 41 *supra* at 289.

⁹¹ Article 3 of the Rules

is not done or the reconsideration of the aggrieved decision is refused, the claimant then has sixty days to bring his claim before the Board from the date the department refused to act or from the expiry of the ninety day period.⁹²

However, this requirement is not applicable to cases involving compensation for delictual or contractual liability as the claimant can address the Board directly. For these kinds of cases the statutory time for bringing claims is a period of five years from the occurrence of the incident that gave rise to the claim.⁹³ In exceptional circumstances, a case can still be accepted by the Board if the claimant has a legitimate excuse for any delay in bringing the proceedings within the fixed time but this must be proved before it.⁹⁴

The claimant initiates the case by submitting an application to the President of the Board or someone delegated by him.⁹⁵ The application should be in writing and should include details of the parties involved in the litigation and the subject of it. The Board's President or the person authorised by him will assign a registered case to a panel located in a geographical area with the same jurisdiction as the relevant public authority.⁹⁶

In general, the enforcement of the administrative decision that is under appeal before the Board will not be restrained simply because of the appeal. However, as mentioned above, the panel has the power to issue a stay of execution by the public bodies as well as urgently issuing temporary measures as soon as the case is referred or an application is submitted by the claimant. The panel takes this action in such cases where it deems that the enforcement of the administrative decision would cause the claimant to sustain irreparable consequences. In such cases, the administrative decision will be suspended until the decision of the Board is made.⁹⁷

It is the duty of the President of the panel to designate a specific date for hearing and inform both parties. The time period from the notification and the first hearing should be at least thirty days.⁹⁸ The Rules stipulate that all the three panel members (in those panels that comprise more than one member) should be in attendance throughout all sessions of the hearing. If one of the panel members is absent in a session, that particular session will not

⁹² Ibid.

⁹³ Article 4 of the Rules

⁹⁴ Ibid.

⁹⁵ Article 1 of the Rules

⁹⁶ Ibid.

⁹⁷ Article 7 of the Rules

⁹⁸ Article 5 of the Rules

be valid.⁹⁹ If one member is unable to attend a particular session, another panel member is required to be appointed.¹⁰⁰

However, Al-Jerba observes that the actual practice of the Board has been different. In reality, when the president of the panel receives a case, he designates a member of the panel to handle it and this member will be the only one of the panel's members to be present at most of the sessions. The full panel members will be present together during the discussions of the facts and the outcome.¹⁰¹ According to him, the disparity in the practice of the Board with the rules is explained by some judges of the Board. They argue that this is due to the increasing number of cases over time and accumulation of cases which makes implementation of the rules difficult.¹⁰² However, as mentioned earlier, the recent Law of the Board 2007 has allowed the initial phase of judgement (by the Administrative Court) to be formed by a single judge.¹⁰³ It is useful to briefly consider how the sessions of the Board are conducted.

3.6.1 The Court in Session- Hearing of Cases by the Board

On the day fixed for hearing of case, the parties sit side-by-side facing the judge who may be joined by one other or even two other judges. The witnesses, unlike the case in the Scottish and English courts, sit in throughout the session to be called upon as required to present their testimony. The court permits legal representations of any of the parties but in practice, most claimants present their claim in person or through a person without professional legal qualifications. The representatives of public authorities are usually sent from their legal departments. The judge, similar to the practice elsewhere, will also normally sit after the arrival of the parties in court. A court transcriber takes down the proceedings which are automatically viewed on computer screens available to the parties as well as the judge. The judge calls on the claimant to present his/her case and oral testimonies as well as any relevant document are admitted in evidence. Each party is obliged by the court to provide a copy of any document to be tendered in evidence to the other party for inspection along with the original which is the court's copy. Both parties then present their cases and call any witnesses where relevant.

⁹⁹ Article 15 of the Rules.

¹⁰⁰ Ibid.

¹⁰¹ Al-Jerba note 41 *supra* at 324.

¹⁰² Ibid at 324.

¹⁰³ Article 9 of the Board's Law 2007.

During the hearing, when one party provides briefs or documents, the panel allows the other party to scrutinise them and to give his answer if s/he has. Otherwise, such briefs or documents will not be relied upon.¹⁰⁴ The panel is required to have a record of all briefs and documents that are presented by the parties. The record contains all the procedures carried out by the panel from the commencement of the case.¹⁰⁵ It should also be signed by the judges of the panel, the secretary and the parties to the case.¹⁰⁶

When the panel is satisfied that both parties have provided their claims and evidence, with sufficient examination of the facts, it can then close the hearing. The panel judges (in case more than one) then engage in private deliberations.¹⁰⁷ The judgement is based on the majority of the panel judges and the decision will be ascribed to the panel even though the dissenting judge may remain.¹⁰⁸ The dissenting judge has the right to express his point of view and the reasons behind this, which will be recorded in the case record but not in the final decision. The majority of the panel can respond to the view of this judge and it will be written in the record of the case. The record will be signed by all judges of the panel and its secretary.¹⁰⁹

The decision taken by the panel should detail the name of the panel, the date, the place of issue, the case type, names of the judges, names of the parties, their position and addresses. It should contain the facts, reasons and judgement.¹¹⁰ Once the judgement has been announced, the panel is required to inform the person losing the case that they have the right to appeal. If one of the parties feels aggrieved by the decision of the panel concerned they can appeal to the Administrative Court of Appeal. The rules of the Board state that the party who wants to appeal must do so within the fixed period of thirty days from the date when the aggrieved received a copy of the final decision. As stated earlier, if the aggrieved party fails to appeal within this period, the decision will be final and enforceable.¹¹¹

Decisions of cases involving compensation for delictual acts or contractual liability will be automatically subject to appeal if they are against the public bodies even though there

¹⁰⁴ Article 17 of the Rules.

¹⁰⁵ Article 21 of the Rules.

¹⁰⁶ Ibid.

¹⁰⁷ Article 30 of the Rules.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Article 31 of the Rules.

¹¹¹ Ibid.

might not be any appeal from the parties.¹¹² The reason behind this seems to correspond to a policy as the compensation would be paid from the State Treasury. Therefore, this measure would protect the public purse by assuring the accuracy of the judgement.¹¹³ Other kinds of decisions go through ordinary procedures of enforcement as long as they are the final decisions of the panel.

3.7 Conclusion

The *Qadi, Shari'ah* Court judge is the popular, even the dominant, face of the Islamic legal system. In virtually every Muslim state, past and present, the *Qadi* and his court, organised formally or informally, with or without the backing of the state is identified as an almost, if not indispensable, institution. However, the *Qadi* and the *Shari'ah* court have hardly ever existed alone as the institution for justice or resolution of disputes. Whereas the *Qadi* may represent the standard formal face of the Islamic legal institution, there have been at various times, so called 'extra-*shari'ah* jurisdictions' alongside or competing with the powers of the *Qadi* and the *Shari'ah* courts.¹¹⁴ These include the *Hisbah* and *Muhtasib* (Ethics and Accountability Agency) and *Shurta* (Police). An even more telling one for the authority of the *Qadi* was the *Madhalim*.

Without the benefit of Islamic history, an observer may be forgiven for viewing the existence of *Diwan al Madhalim* in Saudi Arabia today as an anachronistic institution. However, as highlighted above, the *Madhalim* jurisdiction does have a long-standing pedigree. In view of the historical tracing of the recognition, establishment, and operations of the *Madhalim* jurisdiction in Muslim states through the centuries down to (near) recent times, any suggestion that it is an innovation or importation from another legal (western) system would appear difficult to sustain. The foregoing demonstrates that whereas it appears to have all but disappeared in most Muslim states in the contemporary period, *Diwan al Madhalim* had, and arguably continues to have, a significant role to play in the Islamic socio-legal system. The need for a *Madhalim* jurisdiction is perhaps now more relevant than ever given the prevailing experience of authoritarianism and corruption in Muslim countries.

¹¹² Article 34 of the Rules.

¹¹³ Al-Jerba note 41 *supra* at 340.

¹¹⁴ Zubaida note 13 *supra* at 51-60.

Khadduri's point on the roots of the *Madhalim* jurisdiction mentioned above, understood in the broad context of *Shar'iah* and Islamic Law is germane. This is because the *Shari'ah* recognises that when faced with a new situation (as ostensibly created by the myriad of situations arising from the operation of statehood and officialdom) the jurisprudence of Islamic law allows the judge to come to a reasoned judgement through the process of *Ijtihad*. The process of independent reasoning is open to all categories of Muslim judges past and present.¹¹⁵ Hence it is well within the rationalisation of the *Shari'ah* that an institution like the *Madhalim* be established to further its spirit of even-handed justice where its letters may not make express provisions.

The expansion in the territory of the Muslim state and complexity of the exercise of state powers as well as the opportunities for, and experience of abuses of power justify the establishment of a flexible mechanism for checking the state and its officials. This is in line with the need to maintain social justice as a cardinal objective of the *Shari'ah* albeit that the letter of the law (limited as they have always been in terms of volume and context but not deemed scope of application as divine law) may fail to capture the myriad of experiences of oppression or misuse of state power.

In comparative perspective the current situation seems anomalous. Saudi Arabia has separate courts for disputes between citizens and the state but the substantive law that regulates such disputes is the same as the substantive law applied to citizen-state disputes. It is not clear whether this state of affairs came up for consideration in the process of the recent reforms. The separation of the jurisdiction of the *Shari'ah* courts and the Board of Grievances (the Administrative Courts) as stated earlier, has deep historical roots. However, there are separate questions as to (i) whether this has consequences for the substantive law of governmental liability, i.e. would the law have developed any differently if there had not been a separate administrative jurisdiction?; (ii) whether any other consequences flow from the separation such as differences in procedure at trial and assessment of damages for instance. The possible effects of the two issues on substantive law are at least implicitly addressed in the second part of this study which engages the context of the work of the courts. The next chapter moves away from the background aspect of this study, to the substantive one. It considers the main principles of delict which is at the heart of this study on state liability for delict under Saudi Law.

¹¹⁵ For a well-informed discussion of the concept of *Ijtihad* and its place in Islamic jurisprudence see F E Vogel *Islamic Law and Legal System- Studies of Saudi Arabia* (Koninklijke Brill NV, Leiden, the Netherlands 2000)

Chapter Four: The Main Principles of Delict in Saudi Law

4.1 Introduction

The last chapter considered the nature, composition, jurisdiction and workings of the administrative court in Saudi Arabia charged with the function of adjudicating cases of state liability. It has been said that the Board of Grievances is the sole institution with jurisdiction over cases of delictual liability involving the state in the country and that it is required to follow Shari'ah in adjudicating claims. That raises the question what precisely is the nature of delictual liability under Saudi law which is based on the Islamic legal system?

This chapter sets out the main principles of the non-contractual liability in Saudi Law. As indicated in chapter one, I will refer to this as the law of 'delict' even though there is no directly equivalent concept in Islamic Law. This part of the study discusses the functionally equivalent doctrines in Islamic law, i.e. those which require compensation to be made when harm has been caused. I will discuss the basic concept of non-contractual liability, the general rule, the elements required for a successful claim, the limits of non-contractual liability, and defences. The discussion in this chapter lays the foundation for the examination of the liability of public authorities in Saudi Arabia that follows in the next chapter.

The first part examines the development of delict in Islamic Law in general and Saudi Law in particular. The social context and general ideas that have influenced the development of legal doctrine and specifically, the law of delict in Islam are examined in the next part. This part is intended to allow a proper appreciation of the social context of the legal system as a whole. The third part focuses on the definition of liability and delict in Islamic law. This part also addresses the concept of obligation and legal capacity and its application to delictual liability. The key concepts of delictual liability in Islamic law; *Ta'ady*, *Darar* and *Ifdah*, (respectively breach of legal of duty not to cause unjustified harm, damage and causation) are considered in the fourth part. Vicarious liability as well as corporate liability are important to the focus of this study and are discussed in the fifth and sixth parts of this chapter respectively. The penultimate part draws some comparison between Saudi and Scots law. The final part concludes the chapter.

4.2 The Origins and Development of Delict in the Islamic and Saudi System

For Muslims, Islam is a complete way of life. Islamic law is considered by them as a comprehensive system that is dynamic and applicable for all times. Protection of both the individual and society is considered to be a fundamental aspect of the Islamic social system.¹ Thus, liability for wrongdoing in general is well entrenched in Islamic Law. Nevertheless, it is common to find the claim among many contemporary writers that Islamic law (particularly in its classic origins) is devoid of a comprehensive theory of obligations.²

However, as Shabib recently pointed out, this contention may only be ‘partially true’³ for at least two reasons both of which are not peculiar to this aspect of Islamic law. First, delict as a general concept is not found in a single legal treatise or dealt with as a distinct issue in classical texts. Rather, the principles of liability for civil wrongs are scattered among and derivable from the jurisprudence of criminal law on punishment (*hadd*); quasi-criminal proceedings of fixed compensation for personal injury (*diya and Irsh*) and destruction of (other’s) property (*itlaf*) among others.⁴ Second, it is the nature of the *Shari’ah* as a legal form that it ‘did not progress methodologically on the basis of general rules and principles made up into theories.’⁵ In keeping faith with its status as a proclaimed universal, all-encompassing and enduring system for Muslims, it has continued to develop and expand through jurisprudential mechanisms of independent juristic reasoning, analogy and scholarly consensus over time and space based on general or specific provisions of the sources of the Qur’an and Sunnah. In this way, Islamic law is seen to be in a continuous process of development and formulation of principles in documented works of classic, medieval and modern scholars.⁶

¹ M Musleh-ud-Deen *Concept of Civil Liability in Islam and the Law of Torts*, (Islamic Publications Ltd Lahore 1982) 51.

² See for instance C Mallat ‘Comparative Law and the Islamic (Middle Eastern) Legal Culture’ in M Reimann and R Zimmermann *The Oxford Handbook of Comparative Law* (Oxford University Press Oxford 2006) 609, 629.

³ R bin Shabib *Tortious Liability in the Sharia and Modern Middle East Law with Particular Reference to UAE Law* (PhD Thesis Submitted to the School of Oriental and African Studies, Faculty of Law University of London 2004) 1.

⁴ M A Mosmar *Civil Liability in the Jordanian Civil Cod a Comparative study with the Shari’ah* (PhD Thesis Submitted to the School of Oriental and African Studies, Faculty of Law University of London 1998) 182 and S Amin *Al-Masu’liyyah al-Taqsiriyyah ‘an fi’l al-Ghayr fee al-Fiqh al-Islami al-Muqaran* 69. Available (in Arabic) at:

<http://al-mostafa.info/data/arabic/depot3/gap.php?file=012465.pdf> (Site visited 8 August 2011).

⁵ Shabib note 3 supra at 1.

⁶ Ibid.

Traditionally jurists of Islamic Law, unlike their western counterparts, do not concentrate on theorisation. Rather they focused on expounding the sources of Islamic law as a pragmatic and accessible body of laws derived from a divine source, thus enabling its followers to apply and observe it in their daily lives. In this way, the scholarship was practical in nature rather than philosophical with respect for and acceptance of it being based not on 'refined', extensive or nuanced arguments but on faith.⁷ Thus, any general description of the law of delict especially as required by a study of this nature is produced by abstraction from many specific instances i.e. from many statements in the Qur'an and Hadith dealing with particular instances of liability as will be discussed below.

The work of the Islamic jurist Abu Muhammad Al-Baghdadi of the 17th century, *Majma' Al-Damanaat* (Compendium of the Law of Obligations) has been cited as the first recorded attempt to provide a compendium of 'tort' in Islamic law.⁸ It was limited to the Hanafi school of thought. Subsequently, the government of the Ottoman Empire, under pressure from the West to provide the empire with definite legislation on all aspects of life, appointed a committee to create a code on the law of obligations which was promulgated in 1876, *Majallah al-Ahkam al-'Adiliyah* (Compilation of the Rules of Justice). The Hanafi School of law again formed the basis of the committee's work. It took seven years for the committee to produce the *Majallah* which was then applied in many Muslim countries until recent times.⁹ In general, western influences have been at the root of contemporary attempts to develop a theoretical presentation of the Islamic law of obligations (delict and contracts both) first as a result of colonisation and more recently, as a result of globalisation.¹⁰

Saudi Arabia is the prime example of a jurisdiction where a codified law of civil obligations has never been promulgated and the system of civil obligations is still largely based on general Islamic law derived from classic Islamic jurisprudence.¹¹ It is interesting to note however that there had been an initiative to secure a civil code for the country. In 1926, King Abdulaziz (the founder of the country) requested Islamic scholars to compile a

⁷ Ibid. at 14 and M Zahraa 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15 Arab Law Quarterly 168, 170-172.

⁸ Mallat note 2 supra at 632 and M A Siraj *Damman Al-'Udwan fee Al-Fiqh Al-Islami* (Dar Al-Thaqafa Cairo 1990) 6.

⁹ Turkey, Lebanon, Syria, Jordan and Kuwait have all abolished it. Egypt never adopted it but preferred to create its own the origin of which has been a source of controversy. See F E Vogel *Islamic Law and Legal System- Studies of Saudi Arabia* (Koninklijke Brill NV Leiden the Netherlands 2000) 212-4 and Mallat note 2 supra at 630.

¹⁰ Mallat note 2 supra at 629.

¹¹ Ibid. at 630.

civil code based on rules synthesised from all the four schools of Islamic jurisprudence based on the best evidences from the sources of Islamic law.¹² But scholars were not receptive to the idea and it was stifled.¹³

It is relevant to note that ‘unofficially,’ one of the scholars of the time, Ahmad bin ‘Abdul Allah Al-Qari took up the challenge and produced *Majallah al-Ahkam al-Shar’iyyah* (Compilation of the Principles of Islamic Law) which has been described by Vogel as a ‘superb codification of the Hanbali law of obligations’¹⁴ much in the mould of the *Majallah*, although this text was only allowed to be published recently.¹⁵

It does appear that the reservation of the Islamic scholars about the propriety of codification of any aspect of Islamic law was at the root of the resistance to the call by the King at the time. As discussed in chapter two the conservative attitude to codification has become somewhat relaxed though challenges remain from formidable quarters on the issue. In particular, a move to secure the support of Islamic jurists for codification of the civil code has been resisted on the premise that Islamic law does not allow the state to bind judges to a particular view or school of thought which codification inherently represents. On the other hand, there is a growing support for the view that indeed, the King as the Head of State has the power to lay down rules for judges to follow,¹⁶ and there have been calls in recent times for addressing the need for a codified civil law of obligations in the Kingdom.¹⁷

4.3 The Social Context - The Nature of the Muslim Community¹⁸

There are a number of important social concepts around which the Muslim Community (the *Ummah*) is organised. A proper appreciation of the content and application of any aspect of Islamic law is better achieved by some understanding of these key concepts as they constitute the social context of the legal system as a whole. On this view, it is relevant

¹² *Umm Al-Qura* Gazette No. 141/ 1346 (1927)

¹³ Vogel note 9 supra at 287.

¹⁴ The Hanbali school of Islamic Jurisprudence is the dominant and official school of thought in Saudi Arabia.

¹⁵ Vogel note 9 supra at 287.

¹⁶ See the discussion on codification of the law of civil obligations in Saudi Arabia in Vogel note 9 supra at 336-362.

¹⁷ See for example, Asharq Alawsat newspaper “The Codification of Islamic Sharia” 28 April 2006 available at:

<http://www.aawsat.com/english/news.asp?section=2&id=4740> (Site visited 28 April 2010)..

¹⁸ For a discussion of the political and socio-economic order in Islam see G W Choudhury *Islam and the Contemporary World* (Indus Thames Publishers London 1990) 36-77.

to provide a brief overview of such concepts as they define the Muslim Community where Islamic law is expected to operate. The consideration here will be limited to those concepts that particularly impact on the specific issue of delictual liability.

As Esposito explains, Muslims view their community as one with a ‘mission to create a moral social order.’¹⁹ Indeed, the Muslim society as envisioned by the Qur’an is one that is firmly based on social cohesion and equality. It is one where ‘moral and social justice’ counterbalance any form of oppression and economic exploitation.²⁰ Thus practices such as usurpation of the legacies of orphans, women, the elderly and any other vulnerable person are prohibited and strongly condemned. Acts of bribery, cheating and usurious transactions are similarly prohibited.²¹ The latter are declared as a ‘war against God and His Prophet’ presumably because it tends to create socio-economic conditions that can cause hardship for the majority of the community, the antithesis of the message of Islam.²² The Prophet had emphasised that his message was to promote ease and warned against creating any form of hardship for the community.²³

In line with this, there is an emphasis on taking care of the needy and vulnerable members of society and all forms of social solidarity.²⁴ In promotion of the values of social justice, the Qur’an declares turning away from supporting the needy as ‘declaring the *deen* (Islamic religion and way of life) false.’²⁵ This implies a serious consequence which every Muslim with an understanding of the precepts of Islam will take quite seriously. This same promotion of social justice is the basis for the institutionalisation of *Zakat* (the Islamic tax on wealth) designed essentially to facilitate re-distribution of wealth and discourage unfettered accumulation of capital. The Islamic position on social justice and equity is well articulated thus:

The Quran enjoins human beings to set up a social order wherein justice, equality and fairplay should prevail. The quranic goal of an ethical and just society is affirmed by its condemnation of the unjust and social-economically unfair society of the pre-Islamic Makkahan social order. The

¹⁹ J L Esposito *Islam: The Straight Path* (3rd ed Oxford University Press New York 2010) 29.

²⁰ Ibid.

²¹ Ibid.

²² See Qur’an Chapter 2: 279.

²³ In one Hadith he commanded the Muslims: ‘Promote ease and do not cause hardship.’ This is narrated in the two most respected books of Hadith of Bukhari and Muslim. See: http://www.harunyahya.com/hadith_corner.php (Site visited 17 June 2011).

²⁴ Esposito note 19 supra at 29 - 30.

²⁵ See Qur’an Chapter 107:1-4.

Quran lays down that wealth should not circulate among the rich. It does not ban private property; but in order to ensure distributive justice, the Quran prescribes Zakat, an Islamic system of tax.²⁶

Related to this, Islam prioritises the protection of certain interests; preservation of life, property, health, reputation. The Islamic social system identifies as pivotal the preservation of life, property, health and reputation as ‘universal obligations’ on the community.²⁷ The social system is obliged to jealously guide these elements as the very basis of its legitimacy as they constitute the *raison d’être* for its formation. The sources of Islamic law are replete with injunctions on the importance of protecting these elements.²⁸ There is this famous proclamation in the Hadith of the Prophet: ‘Your blood (life), your property, and your honour (reputation) are inviolable as is the inviolability of this day, in this city of yours and in this month of yours.’²⁹ The significance of this Hadith in the historical context is best appreciated when it is understood that he made this statement reportedly before over a hundred thousand pilgrims on the day of *Arafah* which is the single most important ritual of the Muslim pilgrimage in Makkah. The occasion of Hajj (pilgrimage) generally, and the day of *Arafah* in particular, is considered the most auspicious in the life of Muslims.

The most important of the elements is individual life. There is in general an obligation on the community to preserve the lives of each and every member of the community. This transforms into an individualised duty at a point where an individual action or intervention is required subject to the limitation of capacity. It is stated in the Qur’an that ‘whoever kills a soul unless for a soul (i.e. in legal retribution for murder) or for corruption done in the land (i.e. which require the death penalty) it is as if he had slain mankind entirely and whoever saves a soul (or refrains from killing) it is as if he had saved the entire mankind.’³⁰ As will be further discussed below, this obligation on the preservation of life impacts on consideration of delictual liability.

Islam places considerable emphasis on creating and preserving social harmony.³¹ *Al-Taharuz* and *As-Salamah*, social harmony here, is the requirement that individuals, groups

²⁶ Choudhury note 18 supra at 23.

²⁷ A Al-Raysuni *Imam Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (The International Institute of Islamic Thought London 2005) 137-146.

²⁸ See for instance Qur’an Chapter 5:32, Chapter 2: 256, and Chapter 49: 13. See also Choudhury note 18 supra at 24.

²⁹ M Al-Bukhari *Sahih Al- Bukhari* Vol. 2 (Dar Ibn Katheer) 619.

³⁰ Qur’an Chapter 5:32.

³¹ See Qur’an Chapter 107: 1-4 and Choudhury note 18 supra at 27.

and institutions alike act in a manner that is mindful of the safety, rights and privileges of others.³² In this regard, the function of the Islamic state is succinctly expressed by Baderin:

The Islamic state does not exist merely to maintain law and order or to protect its territory. Its viability depends also upon its ability to achieve social justice, promote public good and balance the relationship between individuals, society and government.³³

There is a breach of social harmony where an individual, irrespective of status, acts contrary to what is considered normal, acceptable and conventional. The finding that an act is contrary to the custom or convention can be of particular relevance to the determination of delictual liability as will become clear later in this chapter and those that follow.

4.4 General Legal Concepts of Delictual Liability

4.4.1 Definition of Liability and Delict

The concept of liability in Islam or the Islamic Law of Obligations is generally referred to as *al-Damaan*. Literally, *al-Damaan* means a 'commitment' or 'guarantee.' Under Islamic Law, it refers to 'the obligation to compensate for harm',³⁴ done to others. Other scholars define *al-Damaan* as 'the duty or obligation that arises from an act or omission that has caused harm to another.'³⁵ A comprehensive definition is provided by Az-Zuhayli who defines it as 'an obligation to compensate another for an act or omission that leads to economic loss or loss of other benefit or personal injury.'³⁶ This study adopts Az-Zuhayli's definition in view of its relative comprehensiveness. However, it is important to note that this study is specifically concerned with the aspect of *al-Damaan* referred to by jurists of Islamic Law as *Damaan al-Itlaf* or *Damaan al-f'il al-dar*, liability for harmful acts. Delictual liability as an aspect of the law of obligations is a well recognised feature of Islamic Law.

³² M A Ibn 'Abideen *Radu AlMuhtar 'ala Al-Dur Al- Mukhtar* Vol. 10 (Dar Ihya Al-Turaath Al-Arabi Beirut 1999) 219.

³³ M A Baderin 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 No.2 *The International Human Rights* 72. 96.

³⁴ Y Al-Khateeb '*Al-Bi'ir wa Damanah*' *Majalah Al Bu'uth Al-Islamyyah*, 56, 136-137.

³⁵ Siraj note 8 supra at 34-35.

³⁶ W Az-Zuhayli *Nazriyat Al-Damaan* (7th ed Dar Al-Fikr Damascus 2006) 15.

In many Arab countries, delict is provided for under, *al-Masuliyah al-Madaniyah*, the law of civil liability. In those countries, civil liability is divided into *al-Masuliyah al-Taqsirriyah*, delictual liability and *al-Masuliyah al-Aqdiyyah*, contractual liability. As in the Saudi system, delict in these countries is specifically limited to liability for illegal or harmful actions in which the defender is responsible for compensating his victims.³⁷

4.4.2 Legal Capacity

As stated in chapter two, *Fiqh*, is essentially, the jurisprudence of *Shari'ah*. This jurisprudence has a methodology and system of rule-deduction referred to as *usul al-Fiqh*, principles of Islamic jurisprudence. *Usul al-Fiqh* is mainly concerned with establishing procedural rules and principles for the determination of substantive cases from the sources of Islamic law.³⁸ The development of the principles of Islamic jurisprudence arose from the need to meet the challenge of securing the proper and correct application of a system of law with a divine source through the agency of human reasoning. A fundamental aspect of *usul al-Fiqh* is setting out the parameters for the choice of the appropriate methods and principles of Islamic law to be adopted by a jurist in determining the *al-hukm al-shari'i*.³⁹

Al-hukm al-shari'i is the legal ruling on or value attached or assigned to any issue by the *Shari'ah*. There are three *arkan*, pillars of *al-hukm al-shari'i* namely the Lawgiver, Allah, the *mahkum feeh*, subject-matter of the law and the *mahkum 'alayhi*, audience of the law.⁴⁰ Of particular significance to the discussion here on the nature of delict in Islamic law is the individual who is subject to law, the *mahkum 'alayhi*. The individual as the subject of law brings into focus the issue of legal capacity, *ahliyyah* under Islamic law. In Islamic law, every individual has some form of legal capacity or the other,⁴¹ what can be regarded as some form of 'legal persona.'⁴²

There are two types of capacity or ways in which the individual is viewed as a subject of law, *ahliyyah al-wujub* and *ahliyyah al-aada*. *Ahliyyah al wujub*, what Kamali referred to as 'receptive legal capacity,' means the capacity of the individual to have rights and

³⁷ A Amkhan 'The Concept of Fault in Arab Law of Contract' (1994) 9 Arab Law Quarterly 171, 171.

³⁸ Zahraa note 7 supra at 171.

³⁹ M H Kamali *Principles of Islamic Jurisprudence* (2nd ed Cambridge The Islamic Texts Society 1991) 2-3.

⁴⁰ M H Kamali *Principles of Islamic Jurisprudence* (3rd ed Cambridge The Islamic Texts Society 2003) 440-452.

⁴¹ Ibid. 450.

⁴² Mawil Izzi Dien *Islamic Law from Historical Foundations to Contemporary Practice* (Edinburgh University Press 2004) 103.

obligations. *Ahliyyah al-aada*, ‘active legal capacity’ obligates the individual to ‘fulfil rights and discharge obligations.’⁴³ The fact of being alive is by itself sufficient to create receptive legal capacity. Thus, every individual, even the foetus, has receptive legal capacity under Islamic law. On the other hand, this criterion and three others; attainment of puberty, sound mind, and capacity to distinguishing proper and improper conduct, are jointly required for active legal capacity. Whereas both forms of capacity may jointly attach to an individual or not at certain points in his/her life, what is of particular relevance to the discussion here is the nature of receptive legal capacity.

Kamali,⁴⁴ as well as Izzi Dien⁴⁵ have both noted that receptive legal capacity may either be deficient (or incomplete) or complete. As an example, the receptive legal capacity of a foetus is incomplete until delivery because s/he is only able to receive certain rights. Such rights include inheritance and bequest. The receptive legal capacity of the foetus is incomplete or deficient because it cannot bear any obligation towards others for instance. The individual acquires complete receptive legal capacity at the moment of birth. An infant or a child, through its guardian, can discharge certain obligations. Thus, a child (or even infant) can bear the obligation of maintenance, liability for services rendered to him/her and more relevant to our discussion here, liability for loss suffered or harm caused by his/her conduct. This is the same with persons of unsound mind and the unconscious. They all fall into the same category under Islamic law.⁴⁶

It is further relevant to state that *al-Hukm al-shari'i* has two main divisions; *al-hukm al-takleefi* and *al-hukm al-wadi'i*. While the former is concerned with the legal classification of the conduct of a *mukallaf* (a person of full capacity) the latter focuses on the causes and effect of conduct. Thus, Islamic scholars define *al-hukm al-takleefi* as communication from the Lawgiver concerning the conduct of the *mukallaf* which consists of a command or demand to do or refrain from an act.⁴⁷ An important point to note further is that the *mukallaf* is normally in a position to discharge the obligation prescribed or defined by the Lawgiver.⁴⁸ By its nature requiring a duty (takleef), *al-hukm al-takleefi* is directed at the individual. It is constituted by prescriptions; ‘do’ and ‘don’t’ injunctions.⁴⁹ *Al-hukm al-takleefi* has five categories; *fardh* or *wajib* obligatory (such as the five daily

⁴³ Kamali note 40 supra at 450.

⁴⁴ Ibid at 451-452

⁴⁵ Izzi Dien note 42 supra at 102-103

⁴⁶ Kamali note 40 supra at 451-452 and Izzi Dien note 42 supra at 102-103.

⁴⁷ Kamali note 39 supra at 335.

⁴⁸ Ibid. at 336.

⁴⁹ Izzi Dien note 42 supra at 99.

prayers), *mandub* recommended (e.g. giving in charity), *haram* forbidden (e.g. drinking alcohol), *makruh* detestable (e.g. walking around with one shoe) and *mubah* permissible (e.g. eating and drinking whatever is not prohibited).

However, it is the latter division of *al-hukm al-shari'i*, the aspect focusing on conduct, which is of particular interest in this research. Islamic scholars consider *al-damaan* which delict, as stated earlier, forms a part of, as coming under *al-hukm al-wadi'i*. *Al-hukm al-wadi'i* is defined as that form of communication from the Lawgiver that enacts something into a cause (*sabab*) of, condition (*shart*) for or hindrance (*mani'*) to something else.⁵⁰ Unlike the *al-hukm al-takleefi*, it does not take human ability or will into consideration in arriving at a legal determination. Rather, *al-hukm al-wadi'i*, as Izzi Dien, a contemporary writer has noted, is consequential in its operation rather than prescriptive like *al-hukm al-takleefi*.⁵¹

An example of condition precedent for the validity of another conduct is the requirement for ablution before performance of the five daily prayers. An individual who is in debt is not obligated to pay *Zakat* as the debt is a hindrance to the obligation of paying *Zakat*. More relevant to the context of this research is *sabab* which locates delict as a legal category in Islamic law within *al-hukm al-wadi'i*. On this view, an individual even where he may be lacking in legal capacity for contractual obligation (and thus not liable for compensation) or with diminished responsibility for criminal acts (and thus exempted from punishment), will still be held liable in delict on the basis of 'cause and effect' where conduct emanating from an individual causes unjustified harm.⁵²

It serves to make the point clearer by comparing the position further in criminal law especially. People with diminished responsibility, for example, a sleeping person, a child, or a person of unsound mind, are not subject to punishment for any criminal act they commit. This is in a restricted sense, similar to the common law concept of *doli incapax*. However, the Islamic law conception of diminished responsibility in criminal law which is the principle applicable to individuals in this category differs in an important way from the common law concept of lack of legal capacity or *doli incapax*. The fundamental difference is that whereas a finding of *doli incapax* nullifies any culpability and thus compensation, individuals adjudged as bearing diminished responsibility remain liable to pay

⁵⁰ Kamali note 39 supra at 335. Some other scholars further recognise two categories; *rukhsah*, permissibility and *sihha/butlan*, correctness/falsehood but this has remained a controversial categorisation.

⁵¹ Izzi Dien note 42 supra at 99-100.

⁵² Kamali note 39 supra at 352.

compensation for specific offences which are stipulated in the *Shari'ah*. The offences in issue are those relating to personal bodily injury such as manslaughter.⁵³ Thus, diminished responsibility is only a limited defence even in criminal law; it does not obviate the requirement of compensation for unjustified harm. This serves to emphasise the significance attached by Islamic law to securing reparation for unjustified harm as a means of ensuring harmony in the society.

The rationale for this form of diminished responsibility can be stated in two ways. The first returns to the 'cause and effect' rule stated earlier. However, since this rule does not apply to property offences it can only be a partial explanation. Indeed, Islamic jurists have stated that it is essentially based on the sacredness of preservation of life and physical integrity of the individual which are both paramount objectives of *Shari'ah*.⁵⁴ From the foregoing position of criminal law on the conduct of those with diminished responsibility where their conduct results in personal bodily harm, it becomes clearer why the same category of people are liable for delictual conduct generally.

4.4.3 Implications of the Concept of Legal Capacity for Delictual Liability

There are a number of specific statements and incidents in the sources on which jurists have drawn to develop the principles of delict. One of the most noted references for the recognition of delictual liability in Islamic law, highlighted in several classical Islamic legal texts, is the declaration of the Prophet on the inviolability or respect for life, property, health and honour of each individual. Arising from this declaration there is a recognised duty upon every individual to respect the right of others to their lives, property and integrity. In other words, the broad statement in the Hadith creates a legal duty to abstain from causing harm, injury or damage in any form whatever that is not justified in or allowed by law to those one comes in contact with or might come in contact with. From the normative perspective, it underlines the importance of delict in the Islamic system and law. In addition, the Hadith directs an obligation to repair, compensate or make good any *unjustified* harm that flows from a violation of this duty.

⁵³ It is interesting to note in passing that these categories of people cannot at all be charged with murder due to their incapacity but can only be charged with manslaughter due to the inability to impute deliberation or intent to them.

⁵⁴ Al-Raysuni note 27 supra at 16, 18 and 138. See also *T v Ministry of Information and Culture*. (2008) Unreported Case No. 4115/1/Q/1428 discussed in chapter 6.

Further, in conformity with the Islamic social system, every individual has a legal duty to abstain from causing *unjustified* harm to others generally because of the emphasis of the Islamic legal system on maintaining peace and justice as the basis of social harmony. With specific reference to liability of the state for delict, there are several recorded incidents of delictual liability of the state during the time of the Prophet and his successors in the first century of the Islamic state and the period afterwards as discussed in the previous chapter which traced the history of the grievances jurisdiction in the Islamic system.

With regard to liability for delict, the general rule in Islamic law, it must be noted, consists of two important features: the first is personal liability. The second is the requirement of compensation for unjustified harm. On the first aspect, every individual is held accountable for his/her deeds, i.e. there is recognition of the rule of individual responsibility or liability. Thus, Islamic jurists refer to several verses in the Qur'an clearly stating this principle. The verse 'No bearer of burdens can bear the burden of another'⁵⁵ is an example. In another, it is stated that 'The blame is only against those who oppress others with wrongdoing and insolently transgress beyond bounds through the land.'⁵⁶ A third similarly states that 'Every soul (or person) will be held in pledge for its deeds.'⁵⁷

Personal liability is the basic principle of liability in Islamic law but as will be discussed below, there are some exceptions to the rule. Personal liability applies both to the criminal and civil jurisdiction generally. As stated earlier, the rules of personal liability for injurious acts can be regarded as strict to the extent that they do not exclude minors or persons of unsound mind from the need to compensate for their delictual conduct. This is because the duty not to cause unjustified harm is regarded as a general and objective one.⁵⁸ This position of the law has been restated by the Board of Grievances. In *M and N v Minsitry of Health*,⁵⁹ the Board stated that:

the core of liability for delict is the occurrence of harm ...it is for this reason that liability can be established from the actions of the under-aged or mentally imbalanced even though they do not have legal responsibility in Islamic Law.

⁵⁵ Qur'an Chapters 6:146. and 35:18

⁵⁶ Qur'an Chapter 42: 42

⁵⁷ Qur'an Chapter 74:38

⁵⁸ A Al-Qasem 'The Injurious Acts under the Jordanian Civil Code' (1989) 4 Arab Law Quarterly 183, 184-192.

⁵⁹ *M and N v Minsitry of Health* (2008) Unreported Case No.777/1/Q/1426.

Notwithstanding this broad statement of the principle, it must be borne in mind that not all harm leads to liability. Where there is a right to inflict the harm or the harm is in some way permissible then there is no ground for liability. Muslim jurists stipulate for establishing delictual liability that the action causing the damage must be in breach of duty not to cause unjustified harm. The act must be without legal justification or be carried out in a manner contrary to Islamic Law.⁶⁰

The second aspect of the general rule follows on from the first. It is the principle that where an injury has been suffered without justification, the victim must be compensated. Islamic jurisprudence emphasises the prohibition of causing unjustified harm to others in any way. This is referred to as the principle of 'avoidance of harm.' This aspect of the general rule (on the requirement for compensation) is well captured in the current Jordanian Civil Code (1976) which relied on the *Shari'ah* and the work of Muslims jurists (*Fiqh*) as the main sources of the code.⁶¹ Article 256 states:

Every act that causes damage to another obliges the actor, though lacking discernment, to make compensation for such damage.

This article strongly suggests that *every* harmful act must be compensated for. However, this is somewhat misleading as not *all* harm leads to liability. There are certain harmful acts which do not incur liability. They constitute defences to and limitation of the scope of liability in the Islamic law of delict as will be discussed below.

The safety of the individual, property and reputation as stated earlier, are to be protected and jealously guarded.⁶² This is clearly stated in a well known *Hadith* of the Prophet, *La darar wa la dirara*,⁶³ which literally means there should be neither causing of harm nor reciprocation of harm.⁶⁴ As a legal principle, it means 'no abuse of right or causing any harm or damage is allowed'⁶⁵ under the Islamic system. Thus, the principle of avoidance of unjustified harm constitutes a cardinal foundation for delictual liability in Islamic Law with a fundamental emphasis on obtaining redress for injurious conduct.

⁶⁰ A ibn Rajab *Al-Qaawa'id* (Dar Al-Kutub Al-'Ilmiyah Beirut) 66 and A Al-Kasani *Bada' Al-Sana' fee Tarteeb Al-Sharaa'* Vol 7 (2nd ed Dar Al-Kitab Al-'Arabi Beirut 1982) 165.

⁶¹ Al-Qasem note 58 supra at 183.

⁶² M Musleh-ud-Deen note 1 supra at 52.

⁶³ Malik *Al-Muwatta* Hadith No. 502 (2/745) and A bin Hanbal *Musnad Al-Imam Ahmad* Vol. 1 (Muasasst Cordoba Cairo) 313.

⁶⁴ J Zarabozo *Commentary on the forty Hadith of Al-Nawawi* Vol 3 (Al-Basheer Company for Publication and Translation, Boulder U.S.A 1999) 1135.

⁶⁵ S H Amin *Wrongful Appropriation in Islamic Law* (Royston Limited Glasgow 1983) 8.

Muslim jurists have also derived from the above Hadith, several principles. The most basic are that harm must be removed⁶⁶ and it must be avoided as much as possible.⁶⁷ The former principle is akin to the common law principle of *restituto in integrum*. Where there is unjustified harm, the claimant must be restored to his former position as much as possible. The latter principle, that harm must be avoided as much as possible, as Az-Zuhayli tells us, means that such harm must be avoided before its occurrence.⁶⁸

The principle that harm must be removed is applied by the General Courts in Saudi Arabia even where the economic interests of the defender is affected. In *T v S*⁶⁹ the courts applied the principle even where the defender had obtained the requisite permission or licence from the relevant public authority to carry out the activity that allegedly caused harm. The case of the claimant was that fumes emanating from a restaurant adjacent to his property was causing nuisance and had a negative impact on his health and that of his family as they had variously suffered ill-health as a result of it. Moreover, the fumes caused damage to his property and he had to undertake restoration on his property several times. While the claimant did not request damages, he asked that the court should order the harm to be abated.

The court's Panel of Experts was mandated to investigate the claim that the location of the defender's restaurant's pipes and chimney caused the release of foul smells and toxic fumes into the household and property of the claimant. They noted that an amendment to the structure of the pipes and chimneys would correct the situation. The judge accepted the report and ordered that the defender should comply with the experts' recommendations. The court held that this was in view of the legal principle that 'there should be neither causing of harm nor reciprocation of harm' and that harm should be removed.

Other principles include the rule that an injury may be excused where it is inflicted in order to prevent a greater injury.⁷⁰ In situations where there are two harms, one less severe than the other (and the incidence of one of the two is inevitable), then the lesser harm can be occasioned. The more severe harm must be avoided or prevented from occurring. This principle is based on the understanding that carrying out a harmful action is 'unlawful' -

⁶⁶ Article 20 of *Majallah al-Ahkam al-'Adiliyah* (Al-Majallah) An English translation is available at: <http://www.scribd.com/doc/8503/Al-Majalla> (Site visited 8 March 2009).

⁶⁷ Article 31 of Al-Majallah.

⁶⁸ Az-Zuhayli note 36 supra at 17.

⁶⁹ (2009) Unreported Case No. 124/200/36 1430.

⁷⁰ Article 27 of Al-Majalla.

since it is essentially a transgression - and committing such an act is not allowed except where necessary. Necessity is evaluated carefully, and the less harmful act is allowed, since unavoidable circumstances make it necessary. For instance, it is allowed under Islamic law to cut the abdomen of a dead pregnant woman in order to rescue the embryo, if it is likely to survive.⁷¹ It is now relevant to consider the constitution of delict in Islamic law.

4.5 The Key Concepts in Delictual Liability- *Ta'ady*, *Darar* and *Ifdah*

This part examines the key concepts of delict. It is relevant to mention that while these concepts were identified and discussed in the work of classical Islamic scholars those scholars did not give a systematic presentation of liability to compensate for unjustified harm in these terms. However, what can be deduced from the analyses of their works is the existence of three such concepts or elements:

- I. *Ta'ady*, breach of the duty not to cause unjustified harm.
- II. *Darar*, Harm.
- III. *Ifdah*, causal connection.

All three constitutive elements must be present in any given case to establish delictual liability whether by a private individual or a public body. The position of Islamic Law has been stated in a number of cases by the Board of Grievances. In *F v Department of Immigration*⁷² the Board, with specific reference to the delictual liability of public authorities, stated that:

...it is judicially settled that the liability of public authorities for their delictual acts is based on three elements *Ta'ady* (breach of legal duty not to cause unjustified harm) *Darar* (harm) and *Ifdah* (causal connection).⁷³

⁷¹ M S Al-Burnu *Mausuo'ah Al-Qawaa'id Al-Fiqhiya* Vol 6 (Muasasat Al-Risalah Beirut 2003) 253.

⁷² (2001) Unreported Case No 97/3/Q/1422.

⁷³ Ibid. at 8, see also (2008) Unreported Case No 139/1/Q/1428 at 14.

4.5.1 Meaning and Scope of *Ta'ady*

As Al-Qasem has noted, the concept of *Ta'ady* has been developed over centuries by scholars of Islamic law into a term of art, indicating breach of duty not to cause (unjustified) damage or harm to others.⁷⁴ According to Al-Zuhayli, *Ta'ady*, literally means 'exceeding the limit.'⁷⁵ It refers to an injustice or a wrongful act in violation of a right.⁷⁶ Faidullah defines it as the absence or lack of due diligence in carrying out a specific act as well as 'exceeding acceptable limits of law, convention, and customs.'⁷⁷ Al-Zuhayli similarly agrees with this legal definition.⁷⁸ *Ta'ady* also includes *Taqsir*, falling short of required standard. It has further been defined as 'the harmful act without right or legal permissibility.'⁷⁹ According to Al-Zarqa *Ta'ady* is violating others' rights or encroaching on their properties or possessions.⁸⁰

From these and other definitions, it can be deduced that Muslim jurists use the term '*Ta'ady*' with multiple meanings, all of which are relevant in considerations of delictual liability. These meanings can be outlined into at least three broad categories:

- (i) Doing something which is specifically prohibited, without any special legal permit or exemption to do so.
- (ii) Falling short of required objective standards, acting carelessly, or without due diligence.
- (iii) Doing an act or making an omission which may be otherwise permissible in a manner that exceeds or breaches the acceptable limits of law, convention, and custom.

Based on the foregoing analysis, it is suggested that the concept of *Ta'ady* could be best captured by the principle of breach of a legal duty not to cause unjustified harm generally. The three strands highlighted here are best viewed as inter-related rather than separate or individualised standards of reference, definition or requirement that must be separately established. It is important to emphasise that in the Islamic system, the effect of any of the three strands are the same; they result in a breach of the duty not to cause *unjustified* harm.

⁷⁴ Al-Qasem note 58 *supra* at 192.

⁷⁵ Az-Zuhayli note 36 *supra* at 18.

⁷⁶ *Ibid.* at 23.

⁷⁷ M Faidullah *Nazriyatul al-Damaan fee al-Fiqh al-Islami al-'am* (2nd ed Maktabah Dar Al-Turath Kuwait 1986) 92-93.

⁷⁸ Az-Zuhayli note 36 *supra* at 25.

⁷⁹ M Ibn Al-Arabi, *Ahkam Al-Quran* (Dar Ihiaa Al-Kutab Al-Arabiah 1957) 113.

⁸⁰ M A Al-Zarqa *Alfi'l Aldar wal Damaan Feeh* (Dar AlQalam Damascus 1988) 78.

Ta'ady is a comprehensive principle compared to a fault-based system. In discussing liability and compensation under Islamic law with reference to Saudi Arabia, a contemporary writer, Le Roy notes that:

The notion of fault, in the technical sense that we [western legal scholars] know, does not exist in Muslim law, which uses the concept of *ta'adi*. This is a broad concept encompassing any illicit act that causes injury or damage to others. It is an act carried out without justification and which exceeds an individual's right to encroach upon the right of another.⁸¹

While the concept of *Ta'ady* is broad enough to cover cases which in many European legal systems would be considered as examples of negligence or some other type of fault, it does appear to involve a wider conception of breach of the duty not to cause unjustified harm to others.⁸² There are cases where it is not necessary to prove fault in order to establish breach of the duty not to harm others (*Ta'ady*). In such cases, the occurrence of harm without legal justification constitutes the breach of the legal norm not to cause harm to others. In other words, there is no requirement to prove *dolus* or *fault* in the strict and technical sense.⁸³ In this regard, it has been suggested that Islamic law recognises what has been identified by a leading authority on Scots law as 'absolute liability,' in which liability applies even in the absence of a mental element but entirely as a result of statutory prescription.⁸⁴ This is the sense in which Musleh-ud-deen iterated that:

In view of the words of the Prophet which hold the life, property and honour of each individual member as sacred, the duty imposed upon [the] community seems to be of absolute character, breach of which will naturally result in absolute liability, so it may be said that the nature of civil liability in Islam is absolute.⁸⁵

However, there is a danger that a simplistic acceptance of Musleh-ud-deen's view amounts to clouding the correct Islamic perspective on delictual liability unless of course it is understood that the 'absoluteness' implies that the harm is unjustified. It is suggested that the correct statement of the Islamic position is that it is not essential to establish fault in

⁸¹ P Le Roy 'Liability and Compensation for Bodily Injury Under Islamic Law' available at: <http://www.genre.com/sharedfile/pdf/Topics13LeRoy-en.pdf> (site visited 22 April 2010)

⁸² Al-Qasem note 58 supra at 192.

⁸³ Amkhan note 37 supra at 173

⁸⁴ D M Walker *The Law of Delict in Scotland* (2nd ed W. Green & Son Ltd Edinburgh 1981) 32-50.

⁸⁵ Musleh-ud-deen note 1 supra at 53-55.

order to establish liability. There will be many cases in which liability is based on acts or omissions which would be treated as examples of fault liability in European legal jurisdictions, but there are also other cases where liability is clearly not based on fault. The critical distinction is between justified and unjustified harm.

There is liability in delict for destroying the property of others without legal justification whether this is carried out with deliberation or not. Liability of a defender is established, with no need for proving intent. This is the case even where the act is essentially of an involuntary nature which can not be described as ‘permissible’ or ‘prohibited’ (in law). The key issue is that the act of the defender has resulted in a breach of the duty not to cause unjustified harm in contravention of the sources of Islamic law. Thus, a sleeping person who rolls over while sleeping and damages another’s property will still be liable despite the absence of deliberation or intent.⁸⁶ This follows the discussion above of the context of delict being in the realm of ‘cause and effect’ in Islamic jurisprudence. The damage that results cannot be *justified* in terms of it not coming under any of the recognised defences.

It is relevant to note that some writers like Masoodi claim that intention is crucial for civil liability in Islamic law. The basis of his claim is the assumption that intention is the basis for all action, and a key element for accountability and responsibility under Islamic Law.⁸⁷ Masoodi states that ‘In view of the clear and express scriptural dictates, it is very difficult to confine “intention” to crime only, which is an express negation of the divine law’.⁸⁸ He claims that intention is considered in both *Ibadaat* (acts of religious observance) and *Mua’malat* (social relations), whether the liability is toward God or man. He further argues that ‘there has been consensus among jurists that intention is the sheet anchor of civil liability in Islamic law of *jinayah*.’⁸⁹

However, this position fails to accurately discern between different aspects of Islamic law, and mistakenly cites classical jurists as supporting his position. Masoodi confuses the spiritual aspect (religion or worship) of Islam with the legal-jurisprudential aspect as will be made clearer below under the section of the meaning of *Khata* in Arabic language and Islamic law.⁹⁰ Indeed, it is a crucial principle of Islamic law that rites or acts of worship are rewarded according to their intent. This is regarded as being entirely in the realm of the

⁸⁶ Al-Zarqa note 80 supra at 81-82.

⁸⁷ G S Masoodi ‘Civil Liability in English and Islamic Laws: A Comparative View’ (1992) 12 *Islamic and Comparative Law Review*. 34, 49.

⁸⁸ Ibid.

⁸⁹ Ibid. at 50.

⁹⁰ See pages 109-110 below.

spiritual but it is inaccurate to assume that this extends to civil liability in Islamic law as the discussion above and below has shown.

In addition, the term *jinayah* has been used by Muslims jurists to refer to what corresponds to criminal liability and it is unusual, even inappropriate to extend that terminology to delict or tort. As the classic jurist, Al-‘Iz bin Abdulsalam, points out, *Al-Jawabir*, reparations, under *Shar’iah* are designed to restore the benefits or interests that have been lost or negatively affected by the conduct of another. On the other hand, *Al-Zawajir*, deterrence, is designed to ward off harm from the individual and society at large. Furthermore, reparation is obligatory in relation to intentional or wilful acts, whether done ignorantly or knowingly, in remembrance or forgetfulness, and whether by the unsound or children. Conversely, deterrence is directed at checking a sinful person in order to deter that person from sinful conduct. He goes on to state that all forms of compensation for harm constitute reparations while retaliation for harm (*Qisas*), corporal punishment (*Jald*) and imprisonment (*Sijjn*) are deterrent in nature, clearly vindicating the view that the last three are aspects of criminal liability.⁹¹

Furthermore, there are cases of positive obligation created by (moral) prescription. A person incurs liability for failing or neglecting to perform such obligations. As an example, D who is apparently starving asks E for food or water (which the latter does not need for his immediate survival) but E refuses to oblige him. D dies of starvation. In this case, the legal position is that E is liable for D’s death for failing to give him the food and is obliged to pay compensation for the loss of life. The case would be different if E required the provision for his own survival. The same goes for failing to rescue a person in peril where one is able to do so.⁹² This is the firm position of the Hanbali school of Islamic Jurisprudence.⁹³ In both cases there is an obligation to act which the wrongdoer has not fulfilled. Both examples seem to follow from the existence of the duty to preserve life as discussed above. This is well explicated by a classic Islamic jurist of the Malik school of jurisprudence who states that:

A person will be liable if he omits to save a person or a property in jeopardy that he could have saved by his capability, prestige or money. As such, that person will be liable to pay compensation for the person or the value, for the

⁹¹ Al-‘Iz bin Abdulsalam *Qawa'id al Ahkam fee Masalih al Anam* Vol 1 (Muasasst Al-Riyan Beirut 1989) 129.

⁹² Al-Zarqa note 80 supra at 81-82.

⁹³ See for instance A Ibn Qudammah *Al-Mughni* Vol 9 (Dar Al-Kutub Al-‘Imiah, Beirut) 580-581.

property. To save person or property is a duty on every person who is capable, even by paying from his own money, and he will be reimbursed by the owner of the property where the saving is limited to the payment of money, even if the owner of the property did not authorise him to pay the money for such saving.⁹⁴

The basis for this view is that the Islamic system (including its law) is a composite one that does not divorce morals from law and moral or religious obligation can transform into legal duty. From a 'western' positivist perspective, however, such prescriptions contained in the sources of Islamic law may not be regarded as constituting a legal obligation.⁹⁵ This can be seen in the verse earlier mentioned on the implication of killing or saving a single person. The verse calls attention to the fact that 'saving' a person at the risk of death is not just a virtue but a duty since it is a grave infraction to cause the death of even a single individual. In this regard, the critical point is that preservation of life, as mentioned above, is one of the cardinal objectives of the *Shari'ah*. The obligation of the individualised responsibility (liability) dissolves only in the absence of capacity. Life is a trust which must be safeguarded by anyone in a position to do so. Thus, like the former position under Scots and English law⁹⁶, suicide remains an offence under the Islamic system.⁹⁷ The next issue for consideration is how to establish *Ta'ady*.

4.5.1.1 Establishing *Ta'ady*

Like many aspects of social relations, *Mua'malat*, in the Islamic system, delict is only delimited in terms of broad applicable principles which must be observed. In matters of social relations, as distinct from acts of religious observance, *Ibadaat*, Islamic law recognises the need for taking into consideration, the dynamics of the society. Thus, there is no comprehensive statement in the sources of Islamic law of the contents or elements of breach of duty not to cause unjustified harm.

As a result, the exact content or structure of the duty owed to others falls into an area that is not specifically defined in Islamic law. Where this is the case, the general principle is that

⁹⁴ M Shaltut *Al-Mas'uliyah Al-Madaniyya wal Jinaiyyah fee Al-Shari'ah Al-Islamiyya* 25.

⁹⁵ M Baderin 'Understanding Islamic Law in Theory and Practice' (2009) 9 Legal Information Management 186, 188.

⁹⁶ The position has been altered by the Suicide Act 1961 which only criminalises 'assisted suicide.'

⁹⁷ See Qur'an chapter 4:29 verse 'And do not kill yourselves (nor kill one another) surely, Allah is most merciful to you' and Quran chapter 2:195 verse 'and do not throw yourselves into destruction'.

the criterion for establishing wrongdoing in that aspect of the law falls for determination under the concepts of '*Urf*, Convention and '*Aaada*, Customs. As procedural (rather than substantive) sources of Islamic Law, these refer to what can be broadly termed as 'the general usages of mankind' or more accurately, what is generally considered acceptable and appropriate in the context of the customs and habits of the society or a particular section of it, like professional bodies or trade guilds for instance within a specific time or geographical frame.⁹⁸ The significance of custom and culture is reflected in the maxim 'custom is the basis of judgment' which is one of five leading maxims of Islamic law on which there is unanimity of the classic schools of thought.⁹⁹ As Kamali observes an Islamic court is

authorised to base its judgment on custom in matters which are not regulated by the text, provided, that the custom at issue is current, predominant among people, and is not in conflict with the principles of *Shar'iah*.¹⁰⁰

This characteristic of Islamic law provides a veritable platform for the reception of 'foreign' ideas and development of the Islamic law of obligations of which delict forms a part in addition to allowing for variations of acceptable standards for conduct from one society to another as mentioned in chapter two.

Further, a key consideration in determining whether there is breach of a duty not to cause unjustified harm in Islamic law is the need to preserve social harmony, *al-Taharuz* and *As-Salamah*. This is the requirement that individuals, groups and institutions alike act in a manner that is mindful of the safety, rights and privileges of others.¹⁰¹ There is a breach of social harmony, and thus a legal norm, where the defender, irrespective of status, acts contrary to what is considered normal, acceptable and conventional. As a result of this principle even an otherwise *legally* permissible act may be considered impermissible when given a specific context. This is regarded as lawfully caused but unjustified harm which is discussed in the next chapter along with other types of delictual liability of the state. To take an example of such harm, if a person lights a fire on his land on a windy day and the fire spreads to and destroys neighbouring property, he will be held liable in delict. This is

⁹⁸ M A Al-Zarqa *Al-Fiqh Al-Islami fee Thawbih Al-Jadeed* Vol. 2 (Dar Al-Fikr Beirut 1967) 1001.

⁹⁹ M H Kamali 'Legal Maxims and Other Genres of Literature in Islamic Law' (2006) 20 Arab Law Quarterly 77, 82.

¹⁰⁰ Ibid. at 88.

¹⁰¹ Ibn 'Abideen note 32 supra at 219.

because while it is permissible to light a fire on his land as a matter of right, it will not be considered customary to do so on a windy day since it would be generally known there is a high probability of causing harm to another.¹⁰² Thus, performing a lawful act is restricted by the principle of *al-Taharuz* and *As-Salamah*, social harmony. Where a lawful act causes unjustified damage or harm to others, it becomes unlawful and is then considered a breach of a legal norm incurring compensation. This is important since all matters detailed in *Shari'ah* without specific rules, are referred to customs, traditions and conventional norms.¹⁰³ This will not be the case, as stated earlier where the conduct is in accordance with customary practice. In the case, where C for instance, irrigates his farm in accordance with custom and the water flows to D's land, causing flooding and damage to the latter's crops, the former will not be held liable for damage.¹⁰⁴

In classic Islamic Law, the position is that *prima facie*, a person is responsible for the unjustified harm his/her conduct caused to another. In other words, establishing a breach of a legal norm not to cause unjustified harm is an objective rather than a subjective matter.¹⁰⁵ The criterion is objective in the sense that it does not derive from the intentional or unintentional act of the actor. This has led to the view expressed by some writers like Musleh-ud-deen that liability for delict in Islamic Law is damage-based. According to him 'Damage is the essential mark of liability in Islam...it is the damage suffered that is taken into account in Islamic law.'¹⁰⁶ In the light of the foregoing discussion, this may be considered an over-statement. It would appear that it is more appropriate to regard the *unjustified* nature of the damage as a key element in establishing delictual liability and the need for compensation.

Once there is a causal connection between the injurious act and the damage that results to the victim, compensation must be extracted from the defender if there is no justification for the damage. The emphasises on damage, as Al-Qasem further explains, is so to ensure that the victim is not left to suffer where there has been an invasion of the person's bodily integrity, property or interest.¹⁰⁷

Generally, as has been indicated above, the Islamic system places a premium on preserving social harmony in evaluating harmful conduct. An actor is required to maintain an

¹⁰² A Al-Khateef *Al-Damaan fee al-Fiqh al-Islami* (Dar Al-Fikr Al-Arabi Cairo 2000) 61.

¹⁰³ G Al-Suyuti *Al-Ashbah wal Nadhair* (Dar Al-Kutub Al- 'Ilmiyah Beirut 1983) 98.

¹⁰⁴ Abdulsalam note 91 supra Vol 2 at 165.

¹⁰⁵ Al-Qasem note 58 supra at 184.

¹⁰⁶ Musleh-ud-deen note 1 supra at 53-54.

¹⁰⁷ Al-Qasem note 58 supra at 185.

awareness of the rights and well being of others and generally refrain from causing them unjustified harm. This is what is meant by the concept of *la darar*. Al-Qasem suggests that the standard of conduct that is required is one of the ‘extremely careful’ individual. This standard he argues is what is applicable in the codification of delict in Jordanian Law.¹⁰⁸ Such a position appears to pitch the required standard of conduct at a level that is higher than the common law principle of ‘the reasonable person.’ Others take the position that the standard of conduct that will be considered is that of the ordinary person. This is the position of the Egyptian courts on the matter.¹⁰⁹ It is doubtful that either position is correct.

The issue of the required standard of conduct failure to observe which may lead to liability in delict under Islamic Law remains sparsely examined in the literature. However, it is arguable that the correct statement of the law in this area is that the criterion of whether harm is justified or unjustified is whether the conduct causing the harm is contrary to *Shari’ah* or to custom. In other words, an act which is contrary to some specific requirement of *Shari’ah* as expressly stated in the sources, or is not in accordance with established conventions (*‘Urf*) and custom (*‘Aaada*) gives rise to liability as mentioned earlier. This view takes into consideration the very nature of Islamic law as one derived from a divine source which recognises conventions and customs as a binding principle of law where they are not in conflict with the divine *corpus*.

In *Y v N*¹¹⁰ the claimant alleged that the defender trespassed into a ravine belonging to the claimant’s ranch and dug drainage resulting in damage to the ranch. He demanded that the defender should be ordered to refrain from trespassing into his farm’s ravine again. In response, the defender stated that the claimant’s claims of trespass were not true and that the drainage was built in the street which runs alongside his own property. Court appointed experts determined that the disputed area was within approximately three meters in the street as agreed upon (before) between the parties. The court was unable to determine a precise boundary line. There was no harm to the claimant because the drainage was within a buffer zone between them. Therefore, the claimant could not establish a claim based on trespass or damage to his property. The court dismissed the claim based on these findings. It held that since the harm or damage the *Shari’ah* is meant to remove is the one that is contrary to customary practice then the claim ought to be dismissed.

¹⁰⁸ Ibid. at 193. His view is informed by the Explanatory Memorandum of the Jordanian Civil Code. It provides that ‘Such obligation (the obligation not to inflict damage) calls for *attentiveness* in behaviour requiring the exercise of the care of an *extremely* careful person.’ See Vol. I at 277.

¹⁰⁹ Amkhan note 37 supra at 172-173.

¹¹⁰ (2004) Unreported Case No. 24/5/2 1425.

In sum, the key question in establishing *Ta'ady* is whether the conduct causing harm is contrary to *Shari'ah*, convention or custom. In this way, it can be asserted that some form of wrong must have been committed. However, while this wrong would in most cases amount to fault in the western sense, this is not always the case. There is, therefore, liability for harm caused by a person's conduct in a wider range of situations than in western fault-based systems.

4.5.1.2 Limitation of *Ta'ady*: Justified Harm and Defences to Liability

As stated earlier, it is simply not the correct understanding of the law to assume that every injury will attract compensation. This is because there are defined and recognised exceptions to the rule. The exceptions may arise either because the harm is not regarded as unlawful or because it is clearly impossible to attribute the damage that results from the relevant conduct to human agency. *Ta'ady*, breach of duty not to cause unjustified harm as mentioned above is the harmful act *without right* or *legal permissibility*. A number of categories limiting the scope of liability principally based on the inability to establish *Ta'ady* can be identified. In all of the cases which will be discussed below, the conduct which allegedly caused harm is justifiable in terms of *Shar'iah* or custom that does not contradict the *Shar'iah*.

a) *Harm caused to others by the exercise of one's rights*

Ta'ady is not established where harm occurs as a result of the exercise of right. According to some scholars, even where harm occurs to another due to the legitimate use of one's property for example, such harm is deemed justified. The operative maxim in this regard is expressed in Article 91 of Majalla: *al jawaz al shari'i yunafi al damaan*; legal permissibility negates liability. However, the leading classic Islamic jurists differed on this issue. Imams Abu Hanifa and Shafi held the view that the exercise of right is absolute and so even where harm results to another from such exercise, no compensation is due. By implication, there is no question of *Ta'ady*. In this regard, Abu Hanifa stated that 'no one can be prevented from exercising his right in his property, although his neighbour may sustain an injury.'¹¹¹ But Imams Malik and Ahmad bin Hanbal held a contrary opinion. In their view, the exercise of right is not at all absolute. Thus, where it results in harm, that amounts to *Ta'ady* and compensation then flows.¹¹²

¹¹¹ Az-Zuhayli note 36 supra at 21.

¹¹² Ibid. at 21-23.

There are some views in between these positions. For instance, some jurists of the Hanafi school like Abu Yusuf (and as prominently reflected in *al-Majallah*) hold the opinion that the exercise of right is limited where it results in excessive damage to the property of another. An example is where the building of a mill or a forge in one's house threatens the foundations of an adjacent neighbour's house. Article 1199 of *al-Majallah* defines excessive damage in this regard as 'Anything which hinders basic use, that is any benefit intended from the building or makes it prone to collapse.'

Al-Majallah provides a number of other examples clarifying what amounts to abuse of exercise of right. Article 1197 for instance provides that 'No person may be prevented from dealing with his property, which he owns in absolute ownership, unless by doing so he causes excessive damage to any other person.' On this view, where the exercise of right by an individual interferes with benefits which are not considered to be fundamental necessities, but to which others are entitled, for instance blocking the view of a house, such an exercise of a right will be upheld. This is because the exercise of right in the circumstances will not be regarded as being excessive. However, as a leading contemporary scholar of Islamic and international human rights law has stated, the prevailing view is that exercise of right is not at all absolute (the Malik and Hanbali position).¹¹³

It is suggested that exercising rights is limited to conduct in accordance to customary practices at any given time. To go beyond such customary practice in the pursuit of one's rights may result in such conduct attaching liability. As will be discussed below, an assessment of customary practice centres on the concept of both *al-Taharuz* and *As-Salamah*, social harmony. In theory, a person is at liberty to do what s/he pleases in her/his property but custom acts as a limit to acceptable conduct. It is suggested this view fits better with the basic principles of Islamic law on the point that acting in accordance with custom is generally a good guide to acceptable conduct unless there is a specific provision in the *Shari'ah* that prohibits this. This is because, as a modern scholar notes, an Islamic court is entitled to apply local custom in matters that are not regulated by the text. The only conditions are that the custom is common and currently practised and does not contradict the principles of the *Shari'ah*.¹¹⁴

¹¹³ Baderin note 33 supra at 84.

¹¹⁴ M H Kamali 'Qawa'id Al-Fiqh - The Legal Maxims of Islamic Law' 3 available at: http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf (Site visited 21 July 2011).

b) *Consent of the victim*

In cases where the actions to which the ‘victim’ has expressly consented causes harm, there is no liability. This is analogous to the Scots and English law concept of *volens* captured in the maxim *volenti non fit injuria*; consent of the victim negates liability.¹¹⁵ It is however important to note that an important limitation applies to the application of this consent, namely that the harm must be of a nature that is permissible generally under Islamic law. Consent will not operate to eliminate liability where the act consented to is prohibited under Islamic law. It will not avail as a defence that the harmed person agreed to a prohibited act to be done. Thus for example, it will not be acceptable to kill another with his consent or cut a part of the body except for medical treatment. Otherwise, the act will attract compensation.¹¹⁶ Actions which could legitimately be consented to will often be related to property. For example, where a property-owner requests or employs another to demolish his property, the former cannot after such demolition claim damages for it, except of course where harm results from improper execution of such a request.

c) *Conduct of the victim*

The conduct of the victim may in certain cases negate liability. This must be distinguished from the consent exception mentioned above. In this case, the injury or damage suffered by the victim results from or, can in fact be connected to, an act of another. But in such cases, the harm is principally a product of an initial illegal or unsolicited conduct of the victim in the first place. It constitutes self-induced harm. The example often cited in the classic Islamic legal literature is that of an individual who digs a well in his/her land, and a trespasser falls into it sustaining injuries thereby. No liability will attach to the owner of the land. Rather, the harm will be deemed to be self-inflicted on the part of the trespasser-victim.¹¹⁷ Liability in this example is negated because the conduct of the ‘victim’ of the harm is in itself illegal or improper i.e. the act of trespassing. Other examples will include where a person prods an animal (say a horse) owned by another and the animal gives the person a violent kick that results in injury to that person, no liability will attach to the owner.¹¹⁸ In this example, the improper act of prodding the horse brought the harm that resulted to the ‘victim.’ The examples in the classic texts strongly suggest the conduct of

¹¹⁵ Al-Zarqa note 80 supra at 105.

¹¹⁶ Faidullah note 77 supra at 199-200.

¹¹⁷ See for instance Ibn Qudammah note 93 supra Vol 12 at 88.

¹¹⁸ M Al-Sarkhasi *Al-Mabsut* (Dar Al-Ma’arifah Beirut) 2 and Az-Zuhily note 36 supra at 41.

the victim only negates liability where such conduct is, on scrutiny, either illegal or improper. This remains the position in the Saudi courts.

In *A v F*¹¹⁹ the case of the claimant was that the defender caused the death of his son. The claimant alleged that one of the workers on the farm of the defender asked his son to clean up a polluted pond. As the claimant's son went into the pond to clean it, he was asphyxiated by the toxic fumes, fell into the dirty water and died. The claimant argued that since that pond belonged to the defender and he did not warn the claimant's son against getting into it, but rather ordered him to carry out this work, the defender caused his death. Thus the claimant demanded that the defender should be made to pay compensation for the loss of his son's life. The defender stated that he did not personally order the claimant's son to get into the pond nor did he ask him to carry out any work. He did not know and had never met the claimant's son. Therefore, he did not cause the death of the claimant's son and had nothing to do with the incident.

The court asked the claimant for any evidence he had. He stated that he only had the documents in the incident file. The Civil Defence statement included in the file showed that the death was accidental and that there was no sign of any criminal act. The court found that anyone who approached the pond would realise it was dangerous. It held that the claimant's son should have taken all necessary precautions to protect himself. And since the claimant's son chose to get into the pond willingly, the court could not find that the claimant was entitled to what he demanded and the case was dismissed.¹²⁰ The decision was to the effect that any reasonable person would not assume the obvious risk assumed on the facts by the deceased.

d) *Extraneous causes*

Further, where the harm results from an extraneous cause which is not the responsibility of the defender then there is no ground for liability. The main category of extraneous causes is natural interventions or occurrences (such as earthquake, storm, thunder, flood, lightening, etc). This category is what is referred to as Act of God or *damnum fatale* in Scots and English law. If for example a boat collided with another due to exceptionally strong winds at sea, there is no liability on the owner of the boat.¹²¹

¹¹⁹ (2002) case No. 289/23 *Mudawanah Al-Ahkam Al-Qadhaiyyah* (3rd ed Ministry of Justice 2008) 201.

¹²⁰ *Ibid.* at 204-205.

¹²¹ Az-Zuhayli note 36 *supra* at 224.

e) *Self-Defence*

There is also the issue of lawful self-defence. Where this leads to injury, there is no liability for delict. Protection and preservation of life, property and family *inter alia*, are cardinal objectives of the *Shari'ah* as mentioned above. Thus where any of these are threatened, the victim is entitled to ward-off or repel the threat with such means or measures as are appropriate in the circumstances. The key point to note is that the measure of self-defence must be commensurate to the attack. This is in accordance with the verse of the Qur'an that provides: 'And one who attacked you, attack back in the same manner as you were attacked.'¹²² On the issue of appropriate measures of self-defence, jurists have emphasised that where an oral defence will suffice, it is not proper to resort to violence and where measured physical force would be sufficient to repel an attack, there must not be recourse to a measure that would result in death and so on.¹²³ Otherwise, the self-defence will not negate liability.

4.5.1.3 Some Reflections on Justifications and Defences for *Ta'ady*

Some reflections on the foregoing justifications or defences are in order here. There is a fundamental thread that runs through these justifications for excluding liability for delict in Islamic Law. The common thread appears to be that in the normal run of things, individuals are not likely to expect or attempt to extract restitution or compensation for harm resulting from any of these exceptions. Justice in the matter does not require compensation due to the conduct leading to the harm being viewed as arising from any of the exercise of another's rights, consent of the victim, self-inflicted, self-defence or an Act of God, as the case may be.

However, it may be contended that such justification or defence should extend to a cause or source of harm like the one which emanates from those with diminished responsibility such as the under-aged or unsound person who at least in part, in reality, may be said to be incapable of deliberation. But this category, as mentioned earlier, is not covered by the justification or defence regime. The reason is this that Islamic law as a divine legal system claims to recognise and operate on human nature; *fitrah*. On this basis, it seeks to achieve peace and harmony through law constructed firmly on a conception of justice and fairness to all. It emphasises in this view, justice not only to the victim, but also the offender in the

¹²² Qur'an Chapter 2:194

¹²³ Faidullah note 77 *supra* at 195-196.

case of criminal law, and more relevantly to this study, not only the wrongdoer, but also the victim.

Proceeding further then on a need to maintain harmony, it appears the decision to include those lacking in capacity is premised on two grounds. First is the fact that each system of law is based on certain values and at every point, it is possible to determine that the legal principles and laws of that system demonstrate a choice among competing values. Thus the value of liberty would be compromised in most legal systems to establish (or indeed, acquit) a criminal charge as demonstrated through detention pending trial or completion of trial. Imposition of liability on those with diminished responsibility can be viewed from this perspective. The competing values may be considered to be the propriety of holding an individual like one lacking mental capacity for deliberation, liable for causing harm, albeit emanating from his conduct against the sense of an unremitted injury felt by the victim.

Under the Islamic socio-legal system, it is felt that the rule of law and harmony desired in the operation of law in society is better achieved by addressing the latter. Otherwise, there is a latent, even real, threat of recourse to retaliation or self-help where the victim is not compensated. The second reason is an indirect extension of this last point, namely that were the table turned; with the victim being a person with diminished responsibility, this status (of one with diminished responsibility due to mental incapacity or age) would not be a defence for non-compensation or justification for harm suffered by such person. Indeed, rather, the opposite would normally be the case; that a sense of injustice done to the one with diminished responsibility would be stronger in the society and expectations for compensation, higher, bearing in mind the vulnerable status of the victim.

In both possible cases involving an individual with diminished responsibility, there is arguably a constant. It is this: that the individual is not aware of the harm s/he has caused as wrongdoer, or suffered as victim. Such then is the nature of the Islamic law that justice must be even-handed, taking into consideration all rights and protecting them equally as a means for maintaining peace and achieving harmony. Both are cardinal objectives of the Islamic system. In other words, just as the personal integrity and proprietary rights of the individual with diminished responsibility has to be protected, in equal measure, s/he must be held liable for causing unjustified harm. Having discussed limitations of *Ta'ady*, the next section moves on to consideration of the consequences of the breach of a legal duty not to cause unjustified harm.

4.5.2 *Darar*, Harm

Az-Zuhayli defines *Darar* as any physical harm or injury to an individual, property, dignity, integrity or emotional well-being. Harm can thus be broadly divided into two types, material and immaterial.¹²⁴ Material harm is damage that is occasioned to the individual body or to property. It refers to harm suffered by a person or something with a monetary value. This can occur through damage arising from the violation of a right or pecuniary interest. Material harm includes physical injury, damage to property, loss of earnings and similar tangible forms of loss that can be quantified.¹²⁵ Immaterial harm on the other hand is harm that affects a person's dignity, reputation, honour, feelings or 'such other value people respect.'¹²⁶ Thus, forms of harm under Islamic Law can be categorised into personal injury, damage to property, economic loss and immaterial harm. The application of the law in these categories will be examined in the analysis of damage and compensation later.

As Az-Zuhayli acknowledges, the question of liability for immaterial harm has proven problematic. On a basic level, this is partly because certain types of immaterial harm can be properly regarded as criminal in nature and attracts punishment. Notable in this regard is the Islamic punishment for *Khadf*, sexual defamation.¹²⁷ However, the crux of the matter is the divergence of views resulting from the alleged *indeterminability* of immaterial harm. This is articulated by Musleh-ud-deen citing the important example of harm to reputation:

It is said that reputation is not a material thing, hence damage to it cannot be fixed or measured precisely. It is, therefore held that there can be no pecuniary compensation for the loss of reputation. The *Qadi* (Muslim Judge) is allowed discretion to deal with such cases.¹²⁸

This can be referred to as the 'restrictive view.' On this view, immaterial harm does not entail or deserve compensation. Others like Al-Zarqa have explained that there is considerable evidence in *Shar'iah* confirming the prohibition of causing moral damage. He cites the position of the *Shar'iah* on sexual defamation referred to earlier as a clear example. However, he goes on to state that the method adopted by *Shar'iah* in repairing

¹²⁴ Az-Zuhayli note 36 supra at 18.

¹²⁵ Al-Qasem note 58 supra at 185-186.

¹²⁶ Ibid at 185.

¹²⁷ Az-Zuhayli note 36 supra at 24 and Musleh-ud-deen note 1 supra at 60-61.

¹²⁸ Musleh-ud-deen note 1 supra at 61.

moral damage is deterring, warning or punishment, and not financial compensation. This is because *Shar'iah* does not consider a person's honour or reputation a financial asset that can be repaired with financial rewards if attacked.¹²⁹ Thus, financial compensation is not stipulated.

Critics of this position, however, argue that it is inaccurate that delictual harm does not incur compensation unless it is financial in nature. This is clear in that *Shari'ah* makes *Diyah* -fixed compensation for particular injuries sustained by a human being or for loss of life- obligatory, as reparation for the lost soul, although it is not of the same kind nor is it a member of the human body so to say. This is simply a rule of 'substitute' as when the 'object' is not possible to get. The soul in such a ruling is guaranteed compensation, although it is not financial itself.¹³⁰ Thus, the emphasis remains on the need for compensation for *harm* resulting from breach of duty to avoid causing harm to others. In any case, as rightly argued by Musleh-ud-deen;

...reputation though not material may yet have its value which can be measured with reference to its nature and character, the extent of its circulation, the position in life of the parties and the surrounding circumstances of the case.¹³¹

The other contending view, the 'liberal approach' is the opinion that immaterial harm is just like material harm. It involves an assault on another's right or rights. Immaterial harm may also result in the loss of some benefit or benefits by the victim. It is therefore important to guarantee the victim's right to compensation in compliance with the rules of justice in Islamic law.¹³² The strongest foundation of this position is the Hadith of the Prophet 'There should be neither causing of harm nor reciprocation of harm.' It is argued that based on this *Hadith*, the prohibition is general, and includes all types of harm and damage. Immaterial harm is a type of harm, and as such it is prohibited in the said Hadith.¹³³ Hence, it is necessary to guarantee compensation for the victim, just like all other forms or types of harm prohibited and for which legal evidence clearly recommends compensation.

¹²⁹ Al-Zarqa note 80 supra at 124 Emphasis mine.

¹³⁰ Abdulsalam note 91 supra at 174.

¹³¹ Musleh-ud-deen note 1 supra at 61.

¹³² Az-Zuhayli note 36 supra at 56.

¹³³ The explanatory memorandum of the Jordanian Civil Code, in respect of financial compensation for immaterial damage, cites the Hadith 'There should be neither causing of harm nor reciprocation of harm' as the basis for that rule.

Reference is similarly made to another *Hadith* mentioned earlier that ‘Your blood (life), your property, and your honour (reputation) are inviolable as is the inviolability of this day in this city of yours and in this month of yours.’ Here, the Prophet specifically mentioned the inviolability of honour along with property and blood (life). In other words, the prohibition of assault on or attack of an individual’s honour is linked with the similar prohibition of violating the right to life, bodily integrity and property rights. This proves that the same rule applies to honour namely the requirement of compensation where there has been a violation of it. As earlier suggested, this Hadith is one of the foundations of delictual liability in Islamic Law. Further, those who hold this opinion cite the views of some Islamic jurists guaranteeing compensation for victims of immaterial harm in cases of honour and status. According to Al-Mawardi:

If a suspended sentence is linked to a person’s rights, like in cases of verbal or physical abuse or assault, the victim’s right is guaranteed; and the ruler has the right to correct and reform. The ruler cannot use (the power of) pardon to deprive the victim’s rights. Instead, the ruler should restore the victim’s rights with a fine paid by the offender.¹³⁴

Hence, if someone is injured in a way that leaves no scars, the judge has the discretionary power to award the victim compensation according to the judge’s evaluation of the amount of pain suffered.¹³⁵ The classic jurist of Islamic Law, Ahmad Ibn Taymiyyah, and his famous student Ibn Al-Qayyim stated that deterrent or punishment in the shape of financial fines is acceptable in specific circumstances.¹³⁶ It is submitted that the better view is that immaterial harm does constitute harm and ought to attract compensation once reasonably proved. It is unreasonable to, on the one hand recognise the possibility or existence of immaterial harm, and on the other hand, refuse to compensate for it on the excuse that it cannot be measured, thereby implying that immaterial and material harm should be determined or measured in the same way; they are clearly different.

¹³⁴ A Al-Mawardi *Al-Ahkam al-Sultaniyah wa al-Wilayaat al-Deeniyah* (Dar Ibn Qutaybah Kuwait 1989) 268.

¹³⁵ Al-Sarkhasi note 118 supra Vol. 26 at 28.

¹³⁶ M Ibn Al-Qayyim *Al-Turuq al-Hukmiyah fee al-Siyasah al-Shari’ah* (Dar Al-Kutub Al’Ilmiyah Beirut 1994) 213.

4.5.3 *Ifdah*, Causal Connection

Ifdah, causal connection, is required to establish liability for delict in Islamic Law. There must be a causal connection between *Ta'ady*, the breach of duty not to cause unjustified harm and *Darar*, the harm that results from it under the 'cause and effect' framing of delict discussed above.¹³⁷ As with Scots and English Law, to establish liability and obtain compensation, the claimant is required to show that the act of the defender is responsible for or *caused* the loss suffered.¹³⁸ Under Islamic law, there are two forms of causation; direct and indirect.

4.5.3.1 Direct Causation

On the principles of Islamic law of delict, where there has been a direct action in violation or breach of a legal norm not to cause unjustified harm, liability for compensation is established. This is otherwise referred to as *Mubashara*, directly caused harm or in the words of one contemporary author, 'the rule of immediacy'.¹³⁹ No further condition is required because the wrong-doing is inherent in the resulting damage.¹⁴⁰ Here, the basis of liability is the unjustified harm which originates from the direct conduct of the defender in breach of the legal norm not to harm others. The harm suffered must be the *direct* result of the *immediate* act of the defender.¹⁴¹

In cases of *Mubashara*, the fact of direct involvement and the establishment of the violation or breach of a legal norm not to cause unjustified harm to others leave no doubt in the correct ascription of the action to the defender. This is because of the absence of a mediator or intervener between the act and the harm that results.¹⁴² As Le Roy rightly puts it 'the system of liability [in case of direct causation] depends on the immediacy of the damage in relation to the action that caused it.'¹⁴³ Al-Majalla cites examples of direct damage to include demolition of a building and cutting down of trees.¹⁴⁴ It will also include hitting someone with a bare fist or an object like a stone.¹⁴⁵ The key point to note

¹³⁷ See also Al-Qasem note 58 supra at 193.

¹³⁸ C Booth and D Squires *The Negligence Liability of Public Authorities* (Oxford University Press Oxford 2006) 251-252.

¹³⁹ Le Roy note 81 supra at 80.

¹⁴⁰ This has been codified in Article 257 of the Jordanian Civil Code. See also Article 887 of Al-Majallah and Le Roy note 81 supra at 80.

¹⁴¹ Musleh-ud-deen note 1 supra at 56 and Le Roy note 81 supra at 80.

¹⁴² Al-Khafeef note 102 supra at 65 and Az-Zuhayli note 36 supra at 27.

¹⁴³ Le Roy note 81 supra at 80.

¹⁴⁴ Articles 918 and 920 of Al-Majallah.

¹⁴⁵ Vogel note 9 supra at 128.

in all cases of direct causation, is that not only is the act causing harm directly attributable (without intervention of anyone or anything else) to the defender, but also, the harm done is immediate.

It is important to note that some contemporary scholars of the Hanafi School of jurisprudence hold the view that there can be liability for directly caused harm even without the existence of *Ta'ady*.¹⁴⁶ To put it in another way, on this view *Ta'ady* is only required in cases of indirectly caused harm but not in cases of directly caused harm. However, this view appears to contradict the general view of classic Islamic jurists. As discussed earlier with regard to *Ta'ady*, they stipulate that for establishing delictual liability the action causing the damage must be in breach of the legal duty not to cause unjustified harm and this applies to both direct and indirect causation without distinction.

In addition, Islamic jurists exclude the exceptions of liability such as the consent of victim and self defence. In all such cases the harm can be directly caused. However, there is no ground for liability as explained earlier. The connection to the act in cases of directly caused harm is explicit in the correct ascription of the action to the defender because of the absence of a mediator or intervener between the act and the harm that results. Islamic jurists did not need to provide further explanation or make a stipulation of *Ta'ady* as it is inherent in the direct act that causes harm without right or legal justification. Therefore, there is no need for further discussion and analysis as in the case of indirectly caused harm.¹⁴⁷

4.5.3.2 Indirect Causation

On the other hand, harm can also be caused indirectly or in a preparatory manner, *Tasabub*. As Vogel states, 'Causation is indirect when between the act and the injury lies a chain of causation.'¹⁴⁸ In such cases, there is an obvious prospect for harm to occur by the 'preparatory' conduct even though this does not happen immediately the act is concluded unlike direct causation. Thus, it is the effect of the preparatory conduct not the conduct itself that causes harm to the claimant. For instance, if A falls into a hole dug by B without right or legal justification resulting in an injury to A, it is the hole that led to the fall and

¹⁴⁶ Al-Khateef note 102 supra at 65 and Az-Zuhayli note 36 supra at 196.

¹⁴⁷ S Moahmasani *Al-Nadhariyyah Al-'Aamah lil-Muujibaat wa Al-'Uqud* Vol 1 (Dar Al-'Ilm Beirut 1983) 182.

¹⁴⁸ Vogel note 9 supra at 128.

subsequent harm to A.¹⁴⁹ Vogel, like other modern writers explains that the requirement for establishing indirect causation is the location of ‘fault’ in the conduct of the defender. According to him:

for harms of indirect causation, liability depends on showing fault. The criterion of fault is whether the injurious act in some way trespasses against the shari’a (which includes general moral duty) as in placing a stone in the public road or digging a well on another’s property. Very often, the fault consists of negligence, but that usually is not stated expressly.¹⁵⁰

It is interesting to note that what Vogel referred to here as ‘fault’ is not the western sense of the term but rather, *Ta’ady* as discussed above since his explication clearly envisaged breach of legal norm as conceived by the *Shari’ah*. So, then, it is most appropriate to state that what will be required to establish liability in cases involving indirectly caused harm, is to trace the harm to the initial preparatory conduct of the defender.¹⁵¹

The question then is, what constitutes the difference between direct and indirect causation of harm? In theory, the difference between direct and indirect causation is that where the former is immediate, the latter can be properly regarded as ‘preparatory’¹⁵² thus requiring some form of tracing in order to establish liability or otherwise of the alleged defender. The analysis offered by Musleh-ud-deen serves to make the point clearer:

If one fact directly brings about another fact as its legal result, the former is regarded as a direct and effective cause of the latter. If, on the other hand, one fact leads to another not directly and immediately but remotely, the one that leads to another is called “*sababi*” or preparatory cause of the other.¹⁵³

This point about a preceding act may still leave some confusion as to how to identify cases of indirect causation since there will always be events or actions preceding the most immediate cause. Fortunately, the similarity between Islamic law of delict on this issue with Scots and English law is useful for making the point clearer. This is in relation to the operation of the ‘but for’ test applicable in Scots and English law. This is with regard to the

¹⁴⁹ Az-Zuhayli note 36 supra at 26-27, and Article 888 of Al-Majallah.

¹⁵⁰ Vogel note 9 supra at 128.

¹⁵¹ See Article 888 of Al-Majallah.

¹⁵² Musleh-ud-deen note 1 supra at 56.

¹⁵³ Ibid.

distinction between direct and indirect causation. As will be further discussed below, the form of direct causation under Islamic law is properly captured in the Scots and English law requirement of causation in fact. Specifically, in Islamic law, direct causation (as distinct from indirect causation) only requires the positive establishment of the ‘but-for’ test with the additional layer of immediacy in the harm for which compensation is sought. Also in relation to indirect causation, in Islamic law, like in Scots and English law, the chain of causation must remain unbroken to establish the liability of the defender; an intervener’s action may act to negate liability.

In some cases the harm may result from more than one cause. Some scholars hold the view that in such cases, the liability for delict will be fixed only on the party that directly caused the harm.¹⁵⁴ An example that is usually given in the literature is where A digs a well in the public highway and B prods C’s animal, thereby causing the animal to fall in to well, leading to the death of the animal. In the circumstances, B is responsible for the death of the animal and no liability rests with the person who dug the well.¹⁵⁵ On this view, the justification for the approach is the override that occurs in terms of the liability for the *actual* damage suffered by the claimant.

It is relevant to note that there is a view of some Hanafi scholars that *Ta’amud* intention or deliberation is a requirement for establishing liability for indirectly caused harm.¹⁵⁶ However, this is contested on the basis that the concept of intent (*Ta’amud*) is foreign to the Islamic law of obligations. What the court examines where a delict is committed is whether unjustified harm has resulted from the conduct of the alleged defender. Similarly, in cases of alleged breach of contract, the court examines whether the contract was actually breached or not, rather than the intent of a party.¹⁵⁷ Conversely, intent plays a significant and functional role in criminal law, as particularly evident in homicide cases through recognition and differentiation between murder and manslaughter. Hence, it is the general principle for instance that Islamic Law in this area holds a person with diminished liability such as of unsound mind liable for delictual conduct.¹⁵⁸ It is apt at this point to consider the

¹⁵⁴ Musleh-ud-deen note 1 supra at 57 and Al-Zarqa note 80 supra at 83.

¹⁵⁵ Article 90 of Al-Majallah.

¹⁵⁶ Z bin Nujeem *Al-Ashbah wa al-nadhair ‘la Madhab abi Hanifa Al-N’man* (Dar Al-Kutub Al’Ilmiyah Beirut 1999) 243 and Article 93 of Al-Majallah.

¹⁵⁷ N Saleh ‘The Role of Intention (Niyya) Under Saudi Arabian Hanbali Law’ (2009) 23 Arab Law Quarterly 347, 347-351.

¹⁵⁸ Al-Zarqa note 80 supra at 76-77 and Az-Zuhayli note 36 supra at 198-201. Part of the justification for this can be found in the very nature of criminal law which is prescriptive and though some manifests in harm to individuals, is regarded as infringement of a legal norm mainly as result of prescription. Thus for instance, it is possible offences which cannot be properly considered as resulting in harm to another (or others) but yet remain infringements of the law.

issue of vicarious liability as well as corporate liability especially since the study centres on delictual liability of the state which necessarily acts through its servants and agents.

4.6 Vicarious Liability

As stated earlier, the general rule on liability for delict is personal liability. However, the question is does Islamic law recognise what is analogous to vicarious liability and if it does, is this as exception to the basic rule? Some writers have suggested that it does.¹⁵⁹ They cite in reference an authenticated *Hadith* (sayings) of the Prophet:

Everyone of you is a guardian and is responsible for his charge, the *Imam* (ruler) is a guardian and is responsible for his subjects, the man is a guardian in the affairs for his family and responsible for his charges, a woman is guardian of her husband's house and responsible for her charge, and the servant is a guardian of his master's property and is responsible for his charge.¹⁶⁰

However, while it can be argued that Islamic law does recognise what is equivalent to vicarious liability -particularly in the context of the master-servant, employer-employee relationship -, it is very doubtful that this *Hadith* is the appropriate authority for that proposition. Rather, this *Hadith* should be understood as stipulating that the responsibility of the guardian mentioned in it is the duty to look after the welfare of those under his care and secure their rights. It does not mean an obligation to bear their delictual liability. According to a leading scholar of the science of *Hadith*, Imam Sharafadeen An-Nawawi, 'the guardian [in this *Hadith*] is the trustee and protector of the well-being of those he is responsible for. Therefore, each person entrusted with the care of anyone or anything is required to do so fairly, in order to safeguard their religious and worldly interest.'¹⁶¹ Where there is failure of the duty, then, there is room to attach liability to the respective 'guardian.' Otherwise, there is no automatic liability for the conduct of the ward where the guardian has fulfilled his obligation as trustee.¹⁶²

¹⁵⁹ See for instance Amin note 5 supra at 128, A bin Mohammed 'Vicarious Liability: A Study of the Liability of the Guardian and His Ward in the Islamic Law of Tort' (2002) 17 Arab Law Quarterly 39, 40 and bin Mohammed 'Vicarious Liability: A Study of the Liability of Employer and Employee in the Islamic Law of Tort' (2000) 15 Arab Law Quarterly 197, 199.

¹⁶⁰ Al-Bukhari note 29 supra Vol. 1 at 304.

¹⁶¹ S An-Nawawi *Al-Mnahaj fee Sharh Sahaih Muslim bin Al-Hjaaj* Vol. 13 (Dar Al-Kaihr lltba'ah wa alnasher, Beirut 1994) 529.

¹⁶² Faidullah note 77 supra at 172-173 and Az-Zuhayli note 36 supra at 265.

The expression ‘vicarious liability’ does not occur in the work of the classic Islamic jurists. However they recognise the liability for animals of the owner for harm caused by his animals and the liability of the master for harm caused by his servant.¹⁶³ The latter at least may be thought of as a type of vicarious liability. In any event, although the general principle is not to bear the burdens of others, this is not interpreted so strictly as there is conventional vicarious liability as in the master and servant relationship.

Importantly too, Islamic law allows an exception to personal liability for securing compensation in manslaughter cases. In manslaughter cases, Islamic law provides for payment of compensation in peaceful settlement of the crime to the victim’s heirs. This is known as the *Diyah*, blood money. The Qur’an states in this regard: ‘And whoever kills a believer by mistake, it is ordained that he should free a believing slave and pay blood-money to the deceased’s family unless they remit it freely.’¹⁶⁴ The obligation of compensation may be difficult or even impossible to enforce where the offender has limited resources. This obligation is then extended to the ‘*aqilah*’ of the offender. The ‘*aqilah*’, refers to a person’s kin, his relatives collectively. The ‘*aqilah*’ is required to contribute a portion of the *Diyah* in the bid to ensure compensation to the heirs of the deceased. It is relevant to note two points regarding the ‘*aqilah*’. The first is how it embodies the adoption of a cultural practice which was adopted by Islam from Arab custom. The second is that only adult, male members of the ‘*aqilah*’, who can afford to contribute are obligated to do so in making up the compensation.¹⁶⁵ It is of interest to note that legitimisation for the contemporary practice of Islamic insurance, *Takaful*, can be located in the mechanism of ‘*aqilah*’ and *diyah*.¹⁶⁶ According to Manjoo:

Takaful... is inspired from the ‘*aqilah*’ and *diyah*’ systems whereby people of a given tribe would come to the financial rescue of one of its members should he face an unexpected liability such as paying for the blood money (*diyah*).¹⁶⁷

Moreover, the sources of Islamic law also provide in clear times for what is equivalent to vicarious liability for damage or injury caused by animals in certain circumstances. For

¹⁶³ Bin Mohammad note 159 supra at 40.

¹⁶⁴ Qur’an Chapter 4:92.

¹⁶⁵ A ‘*Audah At-Tashri al-Jinai al-Islami Muqaran bil al-Qanuun al-Wadi’i*’ Vol. 1 (Muasasst Al-Risalah Beirut 1986) 671-678.

¹⁶⁶ N Swartz and P Coertze ‘*Takaful: An Islamic Insurance Instrument*’ (2010) 2 (10) *Journal of Development and Agricultural Economics* 333, 335.

¹⁶⁷ F Manjoo ‘*Why Different Takaful Models in the World?*’ (2007) 10 *ICMF Takaful* 1.

instance a Hadith states that ‘It is the duty of the owners of the property to keep and protect their property in the day time, while it is the duty of the owners of animals to keep them (from trespassing) at night. If any injury is committed by animals at night, its liability shall be borne by their owners.’¹⁶⁸ Likewise, another Hadith states that ‘He who stationed an animal on one of the roads of the Muslims or in one of their markets and the animal injures somebody with its fore legs or hind legs is liable.’¹⁶⁹ This principle came up for consideration by the General Court in *N v B*.¹⁷⁰ The claimant claimed that a third party (a customer) rented a car from their car-rental enterprise. The client crashed the car into the defender’s camels at 7 pm as the animals were crossing a road. As a result, the car sustained damage estimated by the traffic-agency at thirty-three thousand Saudi Riyals as the depreciation value of the car following the accident. The traffic-agency decided that the responsibility for the incident fell exclusively on the defender. The defender accepted the liability. Since the defender agreed and accepted the claimant’s claim, the court ordered him to pay the depreciated value of the car.

In another case, *S v R*¹⁷¹ the claimant claimed that fire broke out in the shop where he worked as a result of negligence on the part of workers at the defender’s establishment where they were welding an air-conditioner’s frame. A spark shot through a hole down to the basement of the shop, resulting in a fire that burnt the claimant’s entire body. The claimant demanded that the defender should be made to pay for his treatment in compliance with Islamic Law. In response, the defender stated that his establishment was not responsible for the fire and its cause, directly or indirectly.

The court wrote to a hospital for consideration and clear definition of the injuries and disabilities sustained by the claimant, so expert injury valuations could be worked out. It was argued for the claimant that the defender was liable because the fire broke out in the course of the defender’s workers’ work-hours, and hence he is responsible for their actions.¹⁷² The claim was upheld. According to the court, one of the principles of *Shar’iah* is ‘gains carry losses’ or ‘profits offsets costs’. This means that the establishment’s owner is responsible for his workers’ actions as they carry out their duties just as he benefits from

¹⁶⁸ S Abu Dawud *Sunan Abi Dawud* (Makatabah Ibn Hajir Damascus 2004) 721-722.

¹⁶⁹ M Al-Shawkani *Nayl Al-Awtar* Vol. 5 (Dar Al-Kutub Al-‘Ilmiyyah Beirut 1999) 347.

¹⁷⁰ (2005) Case No 151/33 *Mudawanah Al-Ahkam Al-Qadhaiyyah* (1st ed Ministry of Justice 2007) 106.

¹⁷¹ (2007) Case No 64/1229/13 *Mudawanah Al-Ahkam Al-Qadhaiyyah* (3rd ed Ministry of Justice 2008) 145.

¹⁷² Ibid. at 147-151.

their work financially. Therefore, he must put in place appropriate safety measures during the work so as to avoid all harm.¹⁷³

The court went further to state that the general interest of society requires that each establishment's owner must be held responsible for such incidents as this arising from work undertaken by his worker or employees. This is the spirit and principle of *Shar'iah* which aims to protect people physically and financially. People's lives would not be appropriately safeguarded unless wrong-doers are held to account for negligence occasioned in the course of executing a contract or other form of paid work. However, the court also stated that the defender has the right to sue the worker or workers whose neglect caused this accident and damage leading to loss he suffered from compensation paid out by his establishment.¹⁷⁴

4.7 Corporate Liability

It is important to examine the operation of the general rule in the age of the corporation and the institution and powers of the state. Saudi Law grants the status of juristic persons to corporations in a similar way to western countries. The establishment and operation of various types of businesses and companies is provided for and regulated by the Saudi Companies Law.¹⁷⁵ In the same way as in Scots and English corporation law, the Saudi Companies Law regards the acts of the employees of the corporation as that of the corporation.¹⁷⁶ Like in Scots and English law, the corporation is treated in the same way as a private individual and the act of the servants or employees in the course of their employment is attributed to the corporation unless the servants exceed their authority. This follows the classic formulation of what amounts to corporate liability in Islamic law.

Although the term 'corporate liability' is not found explicitly by Islamic jurists, an equivalent concept was developed through which public bodies, and eventually corporations came to be seen as legal entities, with legal rights. The doctrine of *dhimmah* 'a presumed or imaginary repository that contains all the rights and obligations relating to a person'¹⁷⁷ can refer to a human person or other entity associated with (i.e. maintained by) human persons. It was out of the necessity of public interests, *al-Maslaha al-Mursalah*,

¹⁷³ Ibid. at 155-156.

¹⁷⁴ Ibid. at 156.

¹⁷⁵ Royal Decree No. 6/M (1965) as variously amended.

¹⁷⁶ Article 13 of the Law of Companies.

¹⁷⁷ M Zahraa 'Legal Personality in Islamic Law' (1995) 10 (3) Arab Law Quarterly 193,202-203.

that the public institutions like trusts and charities (*waqf*), orphanages, hospitals, mosques and treasuries (*bait al mal*) were seen to have an associated ‘*dhimmah*’ and therefore a legal status. As without this juristic personality ‘such entities will find immense obstacles in performing their rights and duties and become *de facto* redundant.’¹⁷⁸ However, over time as these institutions grew, having such a juristic personality became the norm, e.g. through established *waqf* ministries in the case of trusts.¹⁷⁹

According to the classic jurist, Ibn Qudammah, state officials represent the people as agents. The wrongdoing of the agent is borne by the principal being represented by the agent.¹⁸⁰ In Islamic jurisprudence, a public officer is a representative of the nation or government in whatever he is tasked with. Carrying out his duties, within the boundaries of common good and public benefit, his actions are actually government actions. Hence, any wrong-doing, in such circumstances, are not his personal wrong. Any compensation incurred therefore is guaranteed by the government, and is payable from its treasury. This is because a public officer works for the good of society or the nation as a whole, and to achieve public benefit for all citizens. Thus his wrong is carried by them and so is any compensation. The leader is responsible for any public-duty actions of his subordinates that may cause harm or damage to any citizen. Compensation in such cases is guaranteed and is payable from the state treasury as stated in the previous chapter regarding the action of the Prophet as well some of his successors in relation to the wrongs committed by state officials like soldiers and tax-collectors. This is cited in proving the state’s liability for its public officers’ actions, since they are regarded as representatives of the Muslim public, and since an officer’s mistakes or wrongs will increase with his increased duties and actions. Indeed, the concept of corporate liability, it can be argued, is the basis for state liability for delict.

4.8 Comparison between Saudi Law and Scots Law

This section takes forward one of the objectives of this study, namely the comparison, where relevant, of aspects of Scots law and Saudi law. The first part generally compares various issues around the key concepts relating to the scope of liability for delict between the two systems. The second focuses on the relevance of the difference between the key

¹⁷⁸ Ibid. at 205.

¹⁷⁹ Ibid.

¹⁸⁰ Ibn Qudammah note 93supra Vol. 14 at 257.

concepts of *Ta'ady* and fault as elements of delict in the respective systems and the implications of each for liability.

4.8.1 Scope of Liability in Saudi and Law and Scots Law- Some Remarks

It has been stated above that the recognition of delictual liability in Islamic law stems largely from the declaration of the Prophet affirming the inviolability or respect for life, property, health and honour of every person. Interestingly, some scholars of Scots law have noted how these same principles are the very foundations and nature of delict in Scots law from its Roman origins in *actio legis aquiliae* and *action injuriarum*.¹⁸¹

Again, in broad terms, it can be said that the key constitutive elements of delict in Islamic Law, *Ta'ady*, *Darar* and *Ifdah* are similar to the essentials of delict as identified by scholars of Scots private law.¹⁸² At least the key elements in their essence can be said to approximate the concepts of breach of legal duty not to cause unjustified harm, harm and causation. However, differences of scope and application may result in sometimes substantial difference in the determination or otherwise, of liability for delict within the two systems of law.

The discussion above on the concept of *Ta'ady* (which approximates to breach of legal duty in Scots Law not to cause unjustified harm) provides insight on how an otherwise similar basic concept may result in a wider or more limited liability in two different legal systems. In considerations of *Ta'ady* some acts which do not require any proof of individual fault (in the western sense) constitute the basis of liability. In other words, they are basically considered 'wrongous' in the sense of that word in the Scots law of delict.¹⁸³ However, while delict in Islamic law can be properly said to share this aspect of the commission of a *wrong* with Scots and English law, liability in Islamic law for delict is broader than in Scots and English law. A major difference in this regard as discussed above is how liability attaches to persons who lack full capacity.

¹⁸¹ See for instance Walker note 84 supra at 31-32, The Laws of Scotland Stair Memorial Encyclopaedia Vol 15 (The Law Society of Scotland Edinburgh 1996) 126-127, J Thomson *Delictual Liability* (4th ed Tottel Publishing Ltd West Sussex 2009) 6 and W J Stewart *Delict* (4th ed W. Green & Son Ltd. Edinburgh 2004) 8-9.

¹⁸² Walker note 84 supra at 31.

¹⁸³ As the author Thomson has noted, for an act to constitute the basis of liability in delict, it must be regarded as 'wrongous' i.e. declared or deemed as being unlawful, impermissible. Thomson note 181 supra at 1.

There appears to be convergence between Islamic law and Scots and English law with regard to persons of full capacity. It does appear as if they will generally only be liable for actions over which they have control. There are exceptions to this in Islamic law, for example, a person of full capacity will be liable for damage caused while sleeping. However, most instances of liability appear to relate to ‘wrongful’ conduct of a type the liable person has chosen to engage in. Thus, while there is a different notion of legal responsibility operating with Islamic law having a wider notion of legal responsibility for delictual harm, there will often be similar outcomes in respect of liability. This is arguably so because not only will many situations which are actionable in negligence in Scotland or England also be actionable in Saudi Arabia, conceivably, most incidences of delictual liability will originate from the *wrongful* conduct of persons with full legal capacity.

Another interesting issue for consideration is *Ifdah* and causation as elements of Saudi Law and Scots and English Law respectively. Causation has two aspects in Scots and English law;¹⁸⁴ factual or actual causation, and legal causation, also referred to as cause in law or remoteness of damage.¹⁸⁵ Factual causation refers to the requirement to satisfy the ‘but for’ test. In cases where the damage in issue has resulted from multiple causes, the courts adopt the ‘but-for cause’ test to determine factual causation. In other words, the claimant is required to establish that ‘but for’ the negligent act of the defender s/he would not have suffered the injury or harm for which compensation is sought. This is to ensure that the defender is held liable only for the harm (s) his/her action caused the claimant.¹⁸⁶ It is the principle that the cause, the action of the defender, must be one that can be connected to the injury suffered by the claimant. As Weir stated, the principle may be regarded as quite straightforward. It involves ‘imagining a counterfactual’ situation. The question to be posed is basically whether the harm suffered by the claimant would still have occurred ‘if the defender behaved properly.’¹⁸⁷ If the harm would have occurred, the defender is usually absolved at this stage. But this is not always the case.¹⁸⁸ The standard of proof required is that of the balance of probabilities.¹⁸⁹ Once factual causation is established, the courts proceed to examine legal causation.

¹⁸⁴ Some authors dispute this. See generally, J Steele *Tort Law: Text, Cases and Materials* (Oxford University Press Oxford 2007) 168-170.

¹⁸⁵ S Deakin, A Johnston and B Markesinis *Markesinis and Deakin's Tort Law* (6th ed Oxford University Press Oxford 2008) 244, Booth and Squires note 138 supra at 252 and Steele note 184 supra at 168.

¹⁸⁶ Deakin *et al* note 185 at 120-121.

¹⁸⁷ T Weir *An Introduction to Torts Law* (2nd ed Oxford University Press Oxford 2006) 71.

¹⁸⁸ Deakin *et al* note 185 at 244.

¹⁸⁹ Booth and Squires note 138 at 252.

Legal causation also referred to as remoteness of damage, is the requirement that the claimant establishes that the damage which he suffered is sufficiently connected to the act or omission of the defendant as to result from it. In other words, the harm must not be one that is too remote a consequence of the defender's wrongdoing.¹⁹⁰ To achieve this, the claimant has to show that the damage suffered that which is a reasonably foreseeable result of the negligent conduct of the defender. Further, the 'chain of causation', the nexus between the negligent act and the harm must not have been broken, otherwise liability will not lie with the defender.¹⁹¹ As stated earlier, under Islamic law, there are two forms of causation; direct and indirect, compared to the two requirements in Scots and English law. However, it is suggested that the two requirements of causation in Scots and English law provide a useful frame for analysing the forms of causation or causal connection in Islamic law discussed below.

It is suggested that the form of direct causation under Islamic law is properly captured in the Scots and English law requirement of causation in fact. In other words, direct causation only requires the positive establishment of the 'but-for' test with the additional layer of immediacy in the resulting damage. The key point to note in all cases of direct causation, is that not only is the act causing harm directly attributable (without intervention of anyone or anything else) to the defender, but also, the harm done is immediate. Looking at Scots and English law in this regard, the question of remoteness of damage is not at all in issue. The basis of liability here is that the impact of the direct act of the defender caused immediate harm. Once both are present and the resulting damage is in violation of the duty not to cause unjustified harm, liability attaches automatically.

As stated earlier, recourse to Scots and English law requirements on causation can help in understanding the nature of indirect causation in Islamic law too. Like direct causation, it is required to satisfy the 'but for' test. As in Scots and English law, the court also goes further in the Islamic system to enquire whether there is a link between the 'preparatory' act and the damage that was suffered by the claimant. This is to establish whether the act in question was in breach of the duty not to cause unjustified harm. Specifically, the delay or time-lag between the defender's act and the occurrence of harm raises uncertainty about the liability or otherwise of the defender. As a result, there is a semblance of an inquiry similar to that, even if not a total one, carried out under Scots and English law on legal causation; the remoteness of damage. This is because, like in Scots and English law, to

¹⁹⁰ Ibid.

¹⁹¹ Ibid. at 252-253.

establish the liability of the defender, the chain of causation must be intact. Where the chain has been broken due to the act of an intervener, there may be no liability.

Finally on the issue of causation, the justification under Islamic law for the liability of an intervener discussed above can be usefully compared with the position of the law under Scots and English law with similar results. If the facts of the example mentioned earlier on the act of a person (B) who prods another's animal (C) into a well dug by A on the public highway are related to Scots and English law, it is possible to categorise this as an example of a break in the chain of causation. The intervention of B, namely by illegally causing the animal to fall into the well, effectively breaks the chain of causation. Thus there is room to suggest some congruence in the effect of the application of aspects of key concepts within the two legal systems despite the scope for divergence of results due to their differences. Fault is a very influential concept in considerations of various forms of delictual liability. It is relevant to now turn to a consideration of its place in Saudi Law of delict.

4.8.2 Delict and Ideas of Fault: The Influence and Extent of its Role in Saudi Law

The role of fault is a key issue in Scots and English law. It has also found its way into the Saudi Law of delict, even if notionally. Fault has been referred to by many Arab legal systems as *Khata*. It is important to examine the extent of its influence and relevance in Saudi Law in view of the references to it as well its implicit connection with the concept of negligence. The issue of *Khata* it will be argued has clouded judicial analysis of the concept of *Ta'ady* in contemporary adjudication in virtually all Arab countries with specific regard to delictual liability. The history and influence of the concept as well as its influence on the Arab Civil Codes and Saudi Law on delict will be considered below.

4.8.2.1 The meaning of *Khata* in Arabic language and Islamic law

Khata literarily means mistake¹⁹² and its literal opposite is '*Amd* 'intentional.' It is a fundamental principle of Islamic Law that acts of worship are judged by intent, something regarded as being entirely in the realm of the spiritual and determinable only by the Supreme Creator, Allah, for whom such acts must be sincerely directed. This is the case even where the physical manifestation of the intention is different to the observer. The

¹⁹² *Oxford Word Power* (2nd ed Oxford University Press 2006) 497.

Prophet stated that ‘the reward of deeds depends upon the intention and every person will get the reward according to what s/he has intended’¹⁹³ this position is restated in a number of places in the Qur’an. For instance, ‘there is no sin on you concerning that in which you made *a mistake* (*Khatatum*), except in regard to what your hearts *deliberately intend* (*ta’amadat qulubukum*).’¹⁹⁴

It is from this juxtaposition of an intentional against an unintentional act that Islamic law jurists refer to and use the term *Khata*; a mistaken act without intention and thus, no liability (from the spiritual perspective). But there is another sense too in which the classical scholars used *Khata*, and this is to denote intention or absence of it in homicide cases. Where the mental state in a homicide is described as *Khata*, this is regarded as manslaughter. In other words, where there is a *mistake* or generally where an absence of intention to kill or cause death is inferable from the facts, the classical (and modern) scholars of Islamic law return a verdict of manslaughter. On the other hand, where it is determined that the facts disclose intention to kill or cause death, meaning there is no *Khata*, the verdict is murder. The supplanting of this word from the French influence (a point which will be returned to below), in fact gives a totally different doctrinal meaning to *Khata* as used in the Arab countries like Egypt that imported it into their civil codes.

Beyond linguistic preferences however, there is the more fundamental issue of replacing the term *Ta’ady* with the term *Khata* as the conceptual basis of liability. It has led to complications in understanding the doctrinal basis of liability in Islamic law of delict. It is enough here to state that *Khata* is not one of the elements of the Islamic Law of delict both in its literal and technical meaning. It is curious that *Khata*, mistake, a recognised basis for ‘no responsibility’ (from the spiritual perspective) came to be regarded as *the fundamental basis* of liability in delict (and contract) in those countries. In other words, the meaning placed on *Khata* in those codes has assumed a fundamentally different concept from what is understood by the use of the same term by Islamic law jurists.

4.8.2.2 The use of *Khata* in many Arab Countries

As stated earlier, *fault* as the essential basis of liability for delict has been adopted by the law of some Arab countries, most notably Egypt.¹⁹⁵ The situation as regards the nature of

¹⁹³ Z A Az-Zubaidi *Summarized Sahih Al-Bukhari* (Translated by M M Khan Maktabah Dar As-Salam Riyadh, 1994) 49.

¹⁹⁴ Qur’an Chapter 33:5. Emphasis mine.

¹⁹⁵ Amkhan note 37 *supra* at 173-174.

the breach of a legal norm is well captured by the statement of the position of relevant laws in many Arab countries today particularly where (as is commonly the case) civil liability has been codified. Such codes refer to *Khata*, fault, as an element of delictual liability. According to Amkhan, the ‘earlier codes’ of civil liability proceed on the view that ‘fault *per se*’ is an indispensable requirement for liability.¹⁹⁶

These codes, best represented by the Egyptian Civil Code, do not however define *Khata*. The duty of defining it has been left to legal writers and the courts. Legal writers have adopted the view that fault as conceived by those codes is ‘an abnormal conduct that a normal person would not follow’ if placed in the position of ‘the author of the damage.’ The courts in such jurisdictions, it has been noted, have also been known to adopt the same view. The hallmark of this position is that fault, ‘in its subjective manifestation,’ with only limited exceptions, is regarded as a prerequisite for establishing liability in delict.¹⁹⁷

The opposing view on the nature of liability as stated earlier is the objective theory. Amkhan states that this is found in ‘more recently enacted codes’ on civil liability in some Arab countries. Jordan is an example of this. For these codes ‘it is sufficient’ he notes, ‘for liability to arise, that an act or omission has caused the damage in question.’ Musleh-ud-deen¹⁹⁸ agrees with Amkhan that this is the classic position on the nature of delictual liability in classic Islamic Law.¹⁹⁹ However, as it has been indicated above, the correct statement of the law appears to be that *unjustified* harm characterises delictual liability in Islamic law. It is on this interpretation that the objective view can be considered an accurate statement of the position of the law on this point.

As Amkhan has rightly observed, the supplanting of certain terms has brought some confusion to the jurisprudence of the law of delict in Arab countries. It has led to the situation whereby the ‘Arabic legal literature’ on the nature of civil liability basically ‘repeats the doctrinal discourse which exists among French writers.’²⁰⁰ This is the case with the supplanting in some cases of the term *Khata* for *Ta’ady* in the jurisprudence of the Board. Suffice it to say at this point that the Board’s use of the term can be considered redundant more than anything else when subjected to critical analysis as will be discussed in the next chapter.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. at 171-173.

¹⁹⁸ Musleh-ud-deen note 1 *supra* at 53.

¹⁹⁹ Amkhan note 37 *supra* at 173.

²⁰⁰ Ibid at 171.

Amkhan's observation is significant because it indicates the source of the apparent confusion in some of the Board's judgements; the introduction of a foreign element into the jurisprudence of Islamic Law on civil liability as a whole due to historical factors. The supplanting is traceable to the training of the pioneer scholars of law and legal studies in some Arab countries by French teachers. Even more significant is the fact that these teachers collaborated with some of their best Arab students to codify the civil law of those countries as borne out by the process of codification of the Civil Code of Egypt.²⁰¹ Vogel has made the important point that while some Muslim countries like Turkey, Syria, Lebanon and Jordan at one time or the other used the *Majalla*, a codification of Islamic civil laws for some period in their colonial history, Egypt did not. It rather adopted a civil code 'inspired by the French civil code for its National Courts in 1883.'²⁰²

With specific reference to Saudi Law, it is relevant to note the place of fault in considerations of delictual liability on two fronts; cases between private persons/bodies and those between individuals/private persons and the state/public authorities. The observations here relate mainly to the first category of cases. The second category, determined by the Board, is considered in the next chapter. First, it must be acknowledged (as some judges of the *Shari'ah* Court pointed out to the researcher),²⁰³ that claims of delictual liability between private persons are quite few and far between. Secondly, the cases which are determined by the General Courts are not reported. However, from the few available cases, and certainly from those considered in this chapter, it is apparent that the General Courts do not at all use or refer to the term *Khata* as an element of delictual liability.

While admittedly, the term *Ta'ady* itself does not appear in the cases, the General Courts, on close consideration of their reasoning in determining delictual liability do not limit the basis of the breach of a legal duty to fault, but rather generally investigate whether the conduct in issue amounts to breach of a duty not to cause unjustified harm; *Ta'ady*. Thus, unlike in most of decisions of the Board, as will be discussed later, it can be argued that *Khata* is alien both in notion and substance to the cases of delictual liability between private parties as decided by the General Courts. Furthermore, it has been advanced that the use of the term *Khata* can, and has actually led to some confusion in the jurisprudence

²⁰¹ E Hill 'Al-Sanhuri and Islamic Law- The Place and Significance of Islamic Law in the Life and Work of Abd al Razzaq Ahmad Al-Sanhuri: Egyptian Jurist and Scholar, 1895-1971' (1988) 3 Arab Law Quarterly 33, 42.

²⁰² Vogel note 9 supra at 213-214.

²⁰³ During numerous interactions during a research visit in the summer of 2010. The Judges of the court who insisted on anonymity were very kind to even make enquiries around on this issue from others elsewhere.

on delictual liability. The nature of the confusion that can arise will become apparent in the discussion of cases of lawfully caused but unjustified loss in the next chapter.

4.9 Conclusion

This chapter has attempted to present an insight into the main principles of delict under Saudi law. Delictual liability as an aspect of civil liability is a fundamental feature of Islamic Law and has three elements *Ta'ady*, *Darar* and *Ifdah* each of which must be established to sustain a claim for liability. A crucial point that emerges from consideration of the main principles of Islamic law of delict is the complex nature of the concept of *Ta'ady* which is a principal element for establishing liability in this area of law. This complexity derives in part from the very nature of Islamic law as a religious one which integrates moral norms into legal duty. A direct result of this integration is the way it overrides the distinction in Scots and English law between acts that are considered voluntary or intentional and therefore attributable to an actor with those that would be considered non-voluntary and thus incapable of grounding liability.

A related point which the foregoing discussion brings to mind is that all legal systems, and certainly, in the law of delict, choices are made between competing values. The Islamic legal system is no different in prioritising certain values over another. With specific regard to delict, the value of choice, it appears, is to ensure that unjustified harm, even where it emanates from those with diminished liability, must attract compensation. This is based on the notion of justice in Islamic law which emphasises an even-handed approach in achieving the objective of social harmony promoted as a cardinal feature of the Muslim society. Thus, just as those with diminished responsibility are entitled to compensation for harm, they are contra-wise liable for the unjustified harm resulting from their conduct. In addition, it is common to find that in cases where a crime is suspected to have been committed, the right to individual liberty is somewhat compromised with the detention pending or during trial based on a range of considerations despite the principle of a person being deemed innocent until proven guilty.

On questions of liability, the investigation turns generally on whether the conduct of the defender has resulted in unjustified harm. From the discussion above it is clear that delictual liability in Islamic law is not restricted to fault as obtains in Scots and English law. However, it is also interesting to note that most of the situations in which liability would be established in Scots and English law either on the basis of negligence or on the

basis of some intentional wrongs would also lead to liability in Saudi law. The result is often a finding that demonstrates the important place of fault because of the nature of a good number of the cases. However, as stated earlier, a finding of liability does not and need not always turn on a determination of fault at all. The difference between the two systems in this regard derives essentially from the wider reach of the concept of *Ta'ady*.

With regard to the role of fault in the Islamic law of delict particularly in comparison with Scots and English law, the position is that the concept of *Ta'ady* takes its place and is wider than fault. In other words, what constitutes *Ta'ady* inasmuch as it represents the breach of a legal duty not to cause *unjustified* harm will in a good number of cases simply amount to an instance of fault under Scots and English law. However, it is critical that *Ta'ady*, and this is the point of departure from Scots and English law, is wider. It includes case in which liability would not be established in Scots and English law. This includes cases in which the delictual liability of persons of unsound mind and children will be upheld because their conduct, though not constituting fault because of their diminished responsibility (as would be upheld in Islamic criminal law for instance) does amount to causing unjustified harm. This is also the case sometimes even with persons of full capacity whose acts may have been involuntary or unconscious but whose conduct results in unjustified harm to the claimant. Examples have been given on this with regard to a sleeping person whose acts results in unjustified harm (loss).

Chapter Five: Delictual Liability of the State and the Decisions of the Board of Grievances

5.1 Introduction

An important point that has emerged from the examination of the nature and basic elements of delictual liability in Islamic Law in the previous chapter is that delictual liability appears to be essentially victim-focused. There is considerable emphasis on the need to ensure compensation for unjustified harm, irrespective of what is considered ‘fault’ in the western perspective. In other words, there appears to be substantial emphasis on ensuring compensation for breach of a legal norm not to cause unjustified harm even in cases where ordinarily legal responsibility would not be attributed to the defender in a fault-based system.

This chapter describes and analyses delictual liability of public authorities in Saudi law. It investigates the application of the concept and principles of delictual liability in Saudi Arabia law in claims made against public authorities. This is based on the analysis of a number of selected judicial decisions of the Board of Grievances and also draws on relevant references to Scots and English law as appropriate. The conceptual framework for the analysis that follows is derived from Scots and English law. It is important to note that this conceptual framework is different from that which has generally been used to explain non-contractual liability in Islamic law adjudicatory system as generally practiced and specifically, in the case of Saudi Arabia. However, it provides a useful tool for analysing and evaluating the law in Saudi Arabia.

In discussing decisions of the Board of Grievances, an attempt has been made to analyse the extent to which decisions are consistent with the sources on delictual liability, and whether it is applying the same rules as are applied in disputes between citizens. As discussed in the last chapter, in theory, it is expected that if the Board is deciding cases consistently with the sources, it should apply the same rules to cases involving public bodies as are applied in disputes between citizens. With this in mind, wherever possible an attempt is made in the discussion of cases, to hypothesize whether the same outcome would have been achieved if an analogous dispute had arisen between private citizens.

The discussion below reveals that in comparison with Scots and English law, the state of the law on delictual liability in Saudi Arabia is at a relatively elementary stage. Thus most cases that have arisen in Saudi Arabia would be considered as straightforward examples of liability posing no great difficulties of analysis in Scots or English law, and there have not been equivalents of many of the types of claim that have been made in the UK, for example, claims against state child protection services arising from alleged negligent performance of statutory functions. However, the fast pace of economic development, the continued expansion of government provision of social welfare services and an increasing awareness of ordinary people in this age of globalisation is likely to generate more sophisticated types of delictual claims against the state. Thus there will be some engagement with possible cases that may arise in the future which the court would have to handle in terms of the principles of Islamic law, as required of them.

A close look at the workload of the Board of Grievances reveals that claims for unintentional delict or more specifically, what would be considered claims for negligence in Scots or English law, dominate the cases brought against public authorities in Saudi Arabia. Although there are no reliable statistics, preliminary investigation shows that most of the claims are against local authorities in the discharge of their functions. As stated in chapter two, these functions include physical development and beautification of cities and towns, maintenance of public hygiene and promotion of general well-being. Others involve licensing, monitoring and regulation of businesses as well as constructing and maintaining public parks, gardens, public swimming pools and related amenities. Another line of cases that feature prominently in the case-load of the Board are those against security agents for alleged unlawful detention.

The researcher recognises and acknowledges the apparent divergence in the historical and social context of the jurisdictions and the need for caution in applying his chosen approach, the model of Scots and English law. Consequently, it is important to note from the onset that the categorisation provided in this regard by Scots and English law is strictly of comparative and analytical value. An important justification for this research that is at least implied throughout the study is the fact that the current practice and application of the Islamic law of delict in Saudi Arabia (and indeed other jurisdictions where Islamic law is central to the judicial system) lacks a means of systematic presentation. This thesis is therefore a significant attempt at reviewing, in a critical and systematic way, the current practice of the Board of Grievances in relation to its adjudication of cases involving delictual liability of public authorities in Saudi Arabia.

Recourse to the Scots and English model in the course of the foregoing analysis (and what follows) principally is to highlight the distinctive features of Islamic law and to provide a framework for systematic analysis of the Board's decisions. However, it is important to identify a departure from the Scots and English model adopted here, in one important respect; this is in the area of so-called 'lawfully caused harm'. In this regard, French law has been used as the comparator in this study, for the analysis of an important aspect of the Board's decisions. The motivation for this stems from the argument that this particular area the French law relating to state liability for administrative or delictual harm is more highly developed.

The chapter is divided into three major parts; the first part deals with the nature of delictual liability of public authorities. The second part examines the types of delictual liability of public authorities. Drawing on the first two parts, the third part considers whether Saudi law - based as it is on Islamic law - has been successful in dealing with the liability of public authorities and whether it can continue to be successful in future.

5.2 Nature of Delictual Liability of Public Authorities

Public authorities are also referred to as administrative authorities or statutory bodies.¹ As stated in chapter three, the current position under Saudi Law accords with the definition of a public authority given by Booth and Squires as a 'body whether or not created by statute, which exercise powers in the public interest.'² Public authorities provide services for the public as agents of the state. Their employees in the course of performance of their duties may commit errors or faults, thereby causing damage to individuals.

It was stated in the introduction that Scots and English law can provide a comparative template for the analysis of public authority liability in Saudi Arabia. The next section sets out the nature of the delictual liability of public authorities under Scots and English law - a considerably well-developed system - as a useful starting point to secure understanding of this issue.

¹ Thus, I will refer to administrative authorities, public authorities/bodies, and statutory authorities/bodies interchangeably.

² C Booth and D Squires *The Negligence Liability of Public Authorities* (Oxford University Press Oxford 2006) 1.

5.2.1 Nature of Delictual Liability of Public Authorities under Scots and English Law

To begin, one should understand that Scots and English law are not identical. Although, they often have the same result in terms of whether liability is imposed in particular fact-situations, there are cases where, although the outcome is the same, the doctrine has developed in a different way. There are also situations where the doctrine results in different outcome. Scots and English law historically took different approaches to categorisation. English law evolved as a series of separate torts. The area which today shows the greatest similarity is the law of negligence. In other areas comparing delict to the law of torts shows significant differences.³

Public authorities under Scots and English law may be delictually liable for loss arising both intentional and unintentional conduct. Intentional delict arises from specific action that the doer knows can cause harm to the victim's person or property. As a result, it is easier to establish liability for intentional delict. There are three classes of intentional delict namely, delicts relating to persons, delicts relating to property and the economic delicts. According to Thomson, the intentional delicts relating to persons include assault which protects the bodily integrity of an individual from non-consensual invasion, seduction and entrapment which deals with a form of assault that would ordinarily disclose consent but where consent was obtained fraudulently. Others are enticement, injuries to liberty which deals with unlawful detention, and finally harassment which could be verbal or by conduct.⁴ Intentional delict relating to property consists of delict of heritable (immovable) property referred to as trespass to land and delict relating to moveable property which deals with interference with moveable properties like vehicles and equipment, the delict of good will or passing off and the emerging delict of the duty not to disclose confidential information.⁵ The economic delicts include inducing breach of contract, conspiracy and fraud.⁶

The categories of unintentional delict which are most relevant to public authorities are negligence, and breach of statutory duty. In some circumstances there may also be strict liability. Special rules apply in certain contexts, e.g. liability for animals, occupier's

³ D M Walker *The Law of Delict in Scotland* (2nd ed W. Green & Son Ltd Edinburgh 1981) 30.

⁴ J Thomson *Delictual Liability* (4th ed Tottel Publishing Ltd West Sussex 2009) 11-22.

⁵ *Ibid.* at 22-39.

⁶ *Ibid.* at 41-57.

liability (i.e. arising from occupation of property). In this chapter, I will concentrate on negligence and breach of statutory duty. Fault is at the heart of liability in the law of delict in Scots and English law. It is a basic principle of the law of delict and it must always be kept in mind when considering the concept. Scots law uses the term '*culpa*' to describe fault whether it is intentional or unintentional but careless conduct that causes harm to another.⁷ As Smith has noted,

Culpa is the basis of all liability for patrimonial loss inflicted through the means of human conduct, or through the means of moveables or immoveables, for which the defender was responsible.⁸

Writers as well as judges use the terms '*culpa*' and 'negligence' inter-changeably. They generally mean the same thing, the breach of a duty of care which a defender is owed in the circumstances of a particular case.⁹ In order to succeed in a negligence claim, certain criteria must be fulfilled by the claimant. These include that the defender owes the claimant a duty of care; that this duty has been breached; the breach has caused damage or loss to the claimant; and the damage must not be too remote.¹⁰

At first sight, the range of unintentional conduct that results in delict would appear quite wide. In order to overcome this problem, the law, through the introduction of certain principles, has limited the categories of people that can be recognised as suffering from the careless acts of another. The most important of these principles is the concept of the duty of care.¹¹ The duty of care has been defined as:

The duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.¹²

The basic statement of the duty of care is the proposition that it is only a person to whom the defender owes a duty of care who can sue in delict for harm which results from the

⁷ Ibid. at 1 and T Smith *A Short Commentary on the Law of Scotland* (W.Green&Son Ltd. Edinburgh 1962) 663.

⁸ Smith note 7 supra at 663-664.

⁹ Ibid. at 664 but cf. W J Stewart *Delict* (4th ed W.Green & Son Ltd.Edinburgh 2004) 16-17.

¹⁰ J Steele *Tort Law- Text, Cases and Materials* (Oxford University Press Oxford 2007) 110.

¹¹ Stewart note 9 supra at 11.

¹² Smith note 7 supra at 668.

careless conduct of the defender.¹³ Thus, in delict, the existence of a duty of care is central to establishing fault. In other words, where there is no duty of care, an obligation to make reparation cannot be established though damage or injury has been caused unless the liability falls under strict liability. The court will use the test of a 'reasonable man' in assessing whether there is a duty of care. The test means any person in the position of the defender would reasonably foresee that a person in the position of the claimant would be affected by the acts or omissions of the defender. However, in applying this principle, the court will also be influenced by policy consideration as well as legal principle.¹⁴

The current state of the law on the duty of care is generally agreed to have been set out in *Caparo Industries Plc v Dickman (Caparo)*.¹⁵ The House of Lords, in *Caparo*, introduced the tripartite test to limit the category of persons who can claim damages for harm done by another's unintentional acts.¹⁶ The tripartite test requires, firstly, foreseeability, secondly, proximity of relationship, and finally, it must be fair, just and reasonable to impose a duty of care in the circumstances.

Breach of statutory duty is a distinct type of liability that arises from the breach of a duty created by a statute. The tort is viewed as arising under a statute by virtue of legislative intent.¹⁷ Under this tort, a claimant must prove four basic elements to sustain an action for liability against either a private person (or body) or public authority. The four elements have been stated by Howes to be as follows:

- (i) That he is one of the class of persons whom the relevant statute is intended to protect
- (ii) the duty was specifically imposed on the defender by the statute
- (iii) the duty was breached by the defender
- (iv) the breach of the defender caused the damage in issue.¹⁸

There are several possible advantages in suing for breach of statutory duty rather than negligence although whether any of these apply depends on the terms of the statute. They include that the categories of persons to whom the duty is owed may be broader than the

¹³ Thomson note 4 supra at 61.

¹⁴ Ibid.

¹⁵ [1990] 2 AC 605 HL.

¹⁶ Thomson note 4 supra at 59.

¹⁷ S Deakin, A Johnston and B Markesinis *Markesinis and Deakin's Tort Law* (6th ed Oxford University Press Oxford 2008) 426.

¹⁸ V Howes 'Liability for Breach of Statutory Duty- Is there a coherent Approach?' (2007) 1 Journal of Personal Injury Law 1, 2.

categories who would be owed a duty of care at common law, and there may be no need to prove fault or the standard of performance required by the duty may be more exacting than the common law standard of due care.

Although the general principle of delict under Scots and English law is ‘no liability without fault’ any rules imposing strict liability constitute exceptions.¹⁹ Strict liability has been defined as ‘forms of liability that do not depend upon proof of fault.’²⁰ Under the concept of strict liability, the defender is still held liable for unforeseeable harm despite taking all necessary or reasonable care to avoid harm that can be foreseen. This is why liability is described as ‘strict.’²¹

5.2.1.1 Liability of Public Authorities and the Equality and/or Distinctiveness Debate

Generally, under Scots and English law, liability in delict or tort may be established for the acts or omissions of administrative authorities in the same way that individuals can be held liable for fault. In other words, public authorities and their employees are not exempted from civil liability. Employees of public authorities can thus be held liable for breach of the general duty of care as established in *Donoghue v Stevenson*²² and subsequent cases as well as other specific duties imposed on classes like occupiers and employers or other categories of people specifically provided for under statute.²³ This means that private parties and public bodies are treated alike by the law of delict. However, since the 1970s there has been a debate amongst both judges and scholars in the UK as to whether (i) the principles of delictual liability applicable to public authorities are really the same as those applicable to private parties, and (ii) whether they ought to be the same.

This is largely because of the tension within the notion of *public* delict. Delict as an area of law has been developed as an aspect of private law in the province of individuals *inter se*. Public authorities on the other hand, are necessarily neither individuals nor private persons. While they perform acts which are similar to and may thus result in harm which can be done by private persons, public authorities also carry out functions and exercise powers

¹⁹ Smith note 6 supra at 635.

²⁰ M A Jones *Textbook on Torts* (8th ed Oxford University Press 2002) 390.

²¹ Ibid.

²² 1932 SC (HL) 31, 1932 SLT 317. This is a Scottish case but accepted as the leading case in both Scots and English law. In turn, key subsequent decisions of the House of Lords such as *Caparo v Dickman* have been accepted by the Scottish courts.

²³ For a recent discussion of the theme, see generally T Cornford *Towards a Public Law of Torts* (Ashgate Hampshire 2008).

which 'have no clear analogue in the private sphere.'²⁴ These include powers to make decisions to grant or withhold licences, confiscate property, detain people for security and related reasons, impose and collect levies, taxes and fines, award and distribute social benefits, etc. All of these can be carried out in a way that raises questions of damage or harm to individuals or groups. None of these are carried out by private persons.²⁵ Thus, they have *distinctive* functions. Due to the peculiar nature of public authorities, there is some dispute as to whether it is appropriate to apply the same principles to public authorities as are applied to private persons for delictual liability. The traditional approach has been to apply the same principles to both.²⁶

In recent decades the courts have sometimes seemed to be developing a different approach to public bodies, but with a lack of consistency, and this has led to lack of certainty on the position of the law on the matter. Academics are divided into three groups. Some consider that the private law principles are perfectly adequate to resolve disputes involving public bodies, while others claim that the ordinary principles of tort/delict are likely to give insufficient protection to public authorities and that special principles are required. Yet others hold the view that the ordinary principles of tort/delict give insufficient protection to individuals harmed by the actions of public authorities.²⁷

The first view advocates that public authority liability should be treated in the same way as private persons. This according to Cornford is based on 'Dicey's equality principle' which he argues, has been 'effectively' abandoned by the courts except in relation to the issue of liability to pay compensation when dealing with delictual liability of public authorities.²⁸ A leading proponent of this view was Stephen Bailey²⁹ who has argued that 'ordinary negligence principles' were adequate for resolving the liability of public authorities once 'due regard' is paid to their 'special position.'³⁰ Thus, on this view, while public authorities do perform functions which were clearly different from ordinary persons, this did not justify a restrictive application of torts law to them. If anything, accommodation can and

²⁴ Ibid. at 3.

²⁵ Ibid. at 3-4.

²⁶ Ibid. at 3.

²⁷ Ibid. at 6-7.

²⁸ Ibid. at 3.

²⁹ It is noteworthy that he seems to have now modified his view more towards development of separate mechanism for dealing with public authority liability. See S Bailey 'Public Authority Liability in Negligence: The Continued Search for Coherence' (2006) (26) (2) Legal Studies 155.

³⁰ M J Bowman and S H Bailey 'Public Authority Negligence Revisited' (2000) 59 (1) Cambridge Law Journal 85,103.

should be found for holding them liable for harm suffered by those who are negatively affected in their persons or property by their work.

While proponents of this view concede the sometimes distinctive nature of the functions of public authorities, they maintain that the ordinary principles of torts like those of negligence for instance contain the required flexibility to maintain the necessary balance between the interest of the private claimant and defender public authority. In other words, the private tort approach provides mechanisms to protect the claimant's right to compensation for harm while simultaneously taking due account of public authorities responsibility to act in the public interest. Thus the introduction of a 'public law hurdle' to be satisfied by claimants against public authorities, as will be discussed later, has been criticised by proponents of this view.³¹

Bailey and Bowman have criticised the creation and operation of a 'policy/operational' dichotomy that seeks to impose barriers or restrict the opportunity for securing the liability of public authorities for tort in the same way as private persons through the general principles of tort.³² Brodie has condemned it as rendering the duty of care owed by public authorities 'superfluous.' Like Bowman and Bailey, he argues that the imposition of the private law position on the duty of care to public authorities is appropriate to achieve the same aim of maintaining high standards in service delivery. He emphasises that it is 'wholly appropriate to regard the imposition of a duty of care as a legitimate means of encouraging holders of powers under statute to exercise due care in deciding when and how to make use of them.'³³

Holding public authorities liable in torts in accordance with private law rules and practice means they are not only accountable, but they also may be obliged to review their practices through such challenges to ensure optimal performance. While courts may not view damages as the most appropriate remedy, there remains much support for the view that it is 'usually the best the law can do.'³⁴ In light of public expectations that public authorities are established to serve and 'protect' them, there should be no question of the propriety of a further expectation that the latter would pay compensation where they fall short of that

³¹ Ibid. at 85-132.

³² Ibid.

³³ D Brodie 'Compulsory Altruism and Public Authorities' in D Fairgrieve M Andenas and J Bell *Tort Liability of Public Authorities in Comparative Perspective* (British Institute of International and Comparative Law London 2002) 541, 547.

³⁴ Ibid. at 547-548.

duty in the same way.³⁵ As with private persons, the liability of public authorities and the damages they ought to be mandated to pay for their delictual conduct are amenable to and should be subjected to private law. To do otherwise by considering their liability through a public law approach is not only unnecessary but undesirable, as it would lead to complications.³⁶ Arguably, such a conclusion is correct, the indecisiveness of the courts on which approach to adopt had created complexities and, to an extent, confusion.

As has been indicated above, a second group of scholars hold the view that the ordinary principles of tort/delict are likely to give insufficient protection to public authorities and that special principles are required. A notable proponent of this view is Tony Weir. According to Weir, the 'extension of government torts...have been bad not only for government but for the law of tort as well.'³⁷ Two distinct currents drive the position adopted by Weir in his specific focus on torts law and the liability of public authorities in the United Kingdom. First is the 'tension' between the public and the private sector. Second is the 'tension' between central and the local government.³⁸ However, as will become clear both appear to have the central feature of a concern about (unjustified) cost implications on government finances.

On the tension between the public and private sector, Weir is concerned that in recent years, many governmental functions have been increasingly ceded to the private sector including the provision of health services and even the regulation of activities of the private sector. The expectation on the face of such increase is that the private sector will in this event bear an increased amount of tort claims arising from this shift since the private sector now functions in many more areas hitherto exclusively or largely the province of government. Yet, in many instances the structure of torts law, particularly, the operation of the concept of subrogation, has led to an increase, rather than a corresponding decrease in the liability of government for torts committed properly so to speak, under the watch or by the agency of private parties.³⁹ As Weir stated:

at present the law of subrogation and the law of contribution, both the products of so-called equity, operate, as equity so often does, against the public interest and the public purse, in cases where, if the question were put

³⁵ Ibid. at 551.

³⁶ Ibid. at 553-5.

³⁷ T Weir 'Governmental Liability' (1989) Public Law 40.

³⁸ Ibid. at 40.

³⁹ Ibid. at 40-45.

properly, openly and directly, namely, “Should the authority have to pay this person, insurer or tortfeasor, for his economic loss due to the authority’s negligence?” the answer would be an unequivocal “No.”⁴⁰

On the second ‘tension’ he notes that in contrast to former times when power struggle between the centre and the constitutive parts resulted in a victory of the centre, the centre has become relatively weak while more governmental functions have been ceded to the latter. Ironically, while Crown Immunity operates at least to reduce the liability of the centre, no such immunity is available to local authorities where most of the ‘action’ takes place. As he laments, the result is that ‘local government is much more important than central government. Local government may decide less, but it does more, and tort liability attaches to people who do rather than to people who decide.’⁴¹ To complicate matters, local governments are having to progressively reduce their staff while they have more areas, to supervise even if notionally, and ensure policy made from the centre is appropriately implemented again leading to wider exposure to claims in delict.

Further, Weir makes a direct case against the appropriateness of treating public authority liability differently in light of the complex or volume of work they have to handle. He considers that the strenuous and, or, specialised nature of those functions indicate a restrictive rather than a liberal approach to imposing liability on public authorities performing them. The activities of public authorities not only attract claims, but also their business is ‘big’. In other words, the range of functions they must administer is exceedingly large. Thus, he notes for instance how ‘Birmingham Corporation was processing 20,000 requests per year, yet ‘when it got one wrong’, it ‘had to pay for it.’ Similarly, while ‘other people and bodies occupy land,’ local authorities do so more than any other. Despite their large-scale holdings, unlike others, local authorities ‘make so much of their land available for recreational purposes, with no power to exclude liability.’⁴²

In sum, the current developments in the law of torts (and delict) over-burden local authorities, at a time when a considerable part of governmental functions are being wholly or in part undertaken by private players. Maintaining the current level of development is not healthy. Further, Weir concludes that ‘the presence of local authorities as defendants

⁴⁰ Ibid. at 40-45.

⁴¹ Ibid. at 47.

⁴² Ibid. at 57.

has been bad for the law of tort.’⁴³ It is, however, relevant to note that Weir’s article was written in 1989 and the law has moved on since then.

Some scholars hold a third view on the nature of the liability of public authorities for delict. This has arisen due to one of two reasons. The first is frustration with the reluctance of the courts to move away from the traditional approach of dealing with public authorities through the so called ‘Dicey’s equality principle’ discussed above. The other is scepticism about the capacity of torts to deal with the liability of public authorities. The view is that a distinct mechanism be developed for holding public authorities accountable for harm caused in the exercise of their powers and conduct of their duties. It is interesting to note that Bailey, as indicated earlier, was one of the strongest advocates of holding public authorities accountable through the first approach highlighted in the above paragraphs. He does however now seem to concur with this third view of developing or utilising a different approach to dealing with the liability of public authorities. Bailey aptly captures the first strand of this approach:

The story thus far does not show the common-law method of developing the law in a flattering light. Recurrent features of the case-law include... fundamental errors of analysis, the introduction of complex and ultimately unworkable sub-principles into the picture and a persistent confusion between public and private law principles.⁴⁴

The considerable resources allocated to litigation on the liability of public authorities both by claimants and the public authorities have largely gone to waste as the outcomes have ‘commonly provided neither the remedy sought by the claimant nor sufficient clarity for the future.’⁴⁵ While the case law has seen some positive development in dealing with the liability of public authorities, substantial confusion remains in the case law as to the proper approach to dealing with the liability of public authorities. To achieve coherence and certainty in this area of law, it has become more pressing to develop appropriate alternate mechanisms for compensation arising from the liability of public authorities for harm with the benefit of the case law on the matter. This would involve recognition of ‘extra-judicial

⁴³ Ibid. at 61.

⁴⁴ Bailey note 29 *supra* at 156.

⁴⁵ Ibid.

remedies’ on the part of the courts and the development of a more precise legislative regime for public authorities’ liability by Parliament.⁴⁶

Perhaps a more formidable advocate of this view is Carol Harlow who represents the mainstream of the third approach. This group of scholars, the most prominent of whom is Patrick Atiyah, appear to harbour a strong aversion to many aspects of tort law in general.⁴⁷ Atiyah for instance, criticised the ‘blame culture’⁴⁸ which the system of tort law has been used to promote and sustain. He notes that in the recent past, the courts have progressively ‘stretched’ tort principles to accommodate and favour claims against public authorities wrongfully. ‘Individuals,’ he advocates, ‘must accept responsibility for their *own* problems.’⁴⁹ He criticised what he considered an undue leaning of some judges towards ‘left-wing welfare culture of the 1960s.’⁵⁰

Harlow argues that it is inappropriate to seek to use tort law for what amounts to ‘distributive justice.’ While tort is properly invoked for securing stopping of harm, it is quite wrong to seek to use it to achieve the redistribution of wealth or support the less privileged in society, yet this is what the current system of tort claims against public authorities does. The current state of the law on the liability of public authorities in the United Kingdom developed as result of the welfare-state system which saw the public, especially the less privileged social class, depending heavily on public authorities for housing, unemployment benefits and a wide range of social services including education and health.⁵¹ With the continuous and substantial reduction of these benefits, recourse is being made to tort law to fill the gap

Within the shrinking boundaries of the welfare state, tort law was assuming a ‘last ditch function’ of filling gaps in declining welfare services. It had become machinery for distributive justice. Tort law was being asked to supply for the few what retreating public services were taking from the many.⁵²

⁴⁶ Ibid. at 155-184.

⁴⁷ See generally, P Atiyah *The Damages Lottery* (Hart Publishing Oxford 1997).

⁴⁸ Ibid. at 157-158.

⁴⁹ Ibid. at 142 emphasis in original.

⁵⁰ Ibid.

⁵¹ C Harlow *State Liability: Tort Law and Beyond* (Oxford University Press Clarendon 2004) 1-5.

⁵² Ibid. at 5.

In short, the current regime of public authority liability in tort, developed against the backdrop of a 'risk-averse,' 'paternalistic' and 'victim-oriented' society. State functions came to be conducted in an atmosphere where all (possible) forms of risks were to be anticipated and addressed as standard.⁵³ In other words, government activities and regulatory functions were expected to create a 'risk-free environment.'⁵⁴

Furthermore, Harlow advances the argument that while the Diceyan doctrine of equality has instinctive appeal, its application to tort law is inappropriate. Those who disregard the limits of the equality principle and insist on applying it to tort law must be prepared to face the problems that arise from such 'sworn allegiance.'⁵⁵ Tort law is inadequate and inappropriate for determining public authority liability through a functional analysis. According to Harlow, tort law has proven 'uneconomic,' 'inefficient' and 'ineffective.'⁵⁶ Utilising tort law for dealing with public authority liability with its '*individuated*'⁵⁷ nature should be curtailed. Tort law should be used as a last, rather than preferred option, and as an avenue for 'corrective'⁵⁸ rather than 'distributive' justice.

In place of the continued expansion of tort law to deal with problems of state liability for which it is ill-suited, Harlow suggests the development of extra-judicial compensation to redress harm arising from state activity.⁵⁹ To achieve this, a 'concordat' for a new system which upholds 'collective responsibility and social solidarity' should be produced through the cooperation of judges, policy-makers, academics and legislators. This will make for a less aggressive system than that posed by the present claims approach.⁶⁰

Certain common ground can be deduced from the three different positions analysed above. Perhaps the most obvious is recognition of the fact that public authorities can and do cause harm in the discharge of their duties even in the face of the divergence on the *proper* approach to addressing or dealing with this. Another, even if less obvious point of agreement is that some form of redress or *deemed* redress should be made to victims. Again, the divergence seems to rest on the appropriate *limits* or sometimes *nature* of such redress. The interaction of these two critical issues which form the points of departure of

⁵³ Ibid. at 5-6.

⁵⁴ Ibid. at 125-126.

⁵⁵ Ibid. at 7.

⁵⁶ Ibid.

⁵⁷ Ibid. at 8.

⁵⁸ Ibid. at 11-40.

⁵⁹ Ibid. at 127.

⁶⁰ Ibid. at 8-9.

each of the three views is clearly visible, some more prominently than others in the cases highlighted below.

It is important to note that before the 1970s, the assumption was that public bodies and private parties were treated alike in tort/delict. In the 1970s and 1980s the courts appeared to take the view that public authorities needed to be treated differently in a series of cases. The next phase was the imposition of broad exemptions from liability on policy grounds. Then in the late 1990s, the House of Lords appeared to change its mind and reject these blanket immunities thus making it easier to establish a duty of care, but also setting a high threshold for establishing breach of duty. From around 2000s onwards, the courts appeared to explore a variety of ways of limiting the scope of liability by for instance finding a duty of care not established for lack of proximity, and the courts continue to use policy reasons to exclude a duty of care but in a more subtle way than before. Thus for example, by refusing to find a duty of care exists where that would undermine the main purpose for which statutory powers had been conferred.⁶¹

Furthermore, in dealing with the question of negligence liability of public authorities, the courts are faced with the problem of the interaction of public law with private law. Precisely, they have to determine whether a public body, created usually under or performing functions created by statutes, should be held liable for negligence. According to Booth and Squires, the dilemma is:

Should the courts preclude public authorities from being held liable in negligence because the claimants have failed to satisfy what are known as public law ‘hurdles’ or ‘filters’?⁶²

The core of the hurdle is that before a claim can be brought, the claimant must show that the action of the public authority is unlawful at public law. To achieve this, the claimant must demonstrate that the action of the public authority is irrational and thus not covered by the scope of the discretionary powers of the public authority. In other words, what the courts have set up is the question of justiciability of the claim, the justiciability or what the Law Commission has referred to as the *ultra vires* test.⁶³

⁶¹ See Booth and Squires note 2 *supra* at 21-28.

⁶² *Ibid.* at 13.

⁶³ The Law Commission *Administrative Redress: Public Bodies and Citizens* (Consultation Paper No.187 17 June 2008) 36.

‘Justiciability’ has been defined as the ‘institutional competence of the courts to decide a case.’⁶⁴ In order to determine whether to proceed with a claim in tort (or other legal claims for that matter), the court will examine whether the matter is one over which it has power to determine. It is a preliminary issue. Basically, where the case relates to ‘policy’ or the manner in which resources are allocated, the courts will generally decline jurisdiction.⁶⁵

In earlier cases, like *Dorset Yatch Co. Ltd. V Home Office*,⁶⁶ *Anns & Ors v Merton London Borough Council*⁶⁷ and *X (Minors) v Bedfordshire County Council*,⁶⁸ the courts strictly applied the public law hurdle or the justiciability test on the question of liability of public authorities. This meant that unless a public authority was acting illegally, ‘irrationally,’ at public law, a claim in negligence could not be sustained against it.⁶⁹

There are two aspects the courts will consider on the issue of justiciability as it relates to the negligence of public authorities. The first is with regard to whether the claim is within the technical competence of judges to deal with since there are a number of bodies like regulatory ones that could be in a better position to handle such claims. In particular cases it may be that such other bodies are better suited to handle such claims in which case it is preferable to decline jurisdiction and have those bodies handle the complaint.

The second relates to the concern that the courts in taking on certain claims may be interfering with the democratic process though technically, the issues arising from the claim may be within the competence of the courts. In order to resolve these concerns, the courts have developed certain tests on the issue of justiciability of negligence claims against public authorities. The tests have themselves not been free from problems in their application to specific facts.⁷⁰

The foregoing attitude of the courts in recent times as to the issue of justiciability is well reflected in the decision of the House of Lords in *X v Bedfordshire County Council*.⁷¹ Lord Wilkinson stated:

⁶⁴ Booth and Squires note 2 supra at 33.

⁶⁵ Ibid. at 29.

⁶⁶ [1970] AC 1004 HL. This case is regarded as the beginning point of the present focus of the courts on justiciability as it relates to negligence of public authorities see Booth and Squires note 2 supra at 31.

⁶⁷ [1978] AC 728, HL.

⁶⁸ (1995) 2AC 633.

⁶⁹ Booth and Squires note 2 supra at 13.

⁷⁰ Ibid. at 30-31.

⁷¹ *X v Bedfordshire* note 68 supra.

Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the court to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law if the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability...*a common law duty of care in relation to the taking of decisions involving policy matters cannot exist...a common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.*⁷²

He went further to state that where the factors relevant to the exercise of the discretion relate to matters of policy, the court cannot adjudicate on such matters. Nor can they reach the conclusion that the decision was made outside the parameters of the statutory discretion. This is because the statutory framework prescribing the duties of the public authority will be relevant to the determination of the justiciability or otherwise of the claim.⁷³ On the first aspect, the courts have stated certain kinds of issues which cannot be effectively resolved through judicial intervention. These include security measures taken by the Home Office in relation to the safe custody of prisoners,⁷⁴ and also a highway authority's handling of road infrastructure.⁷⁵

The second aspect as noted earlier, relates to the place of courts in a democratic society. In this respect, the central issue is the view that unelected judges should not, even where it can be taken that they technically have jurisdiction, substitute their opinions for that of elected representatives of the people, since this would amount to interfering with the public will. Such decisions are regarded as 'political,' and unsuitable for judges to make.⁷⁶ According to Booth and Squires, 'the primary concern is that...It is the legislature and not the courts that ought to decide questions of policy involving utilitarian calculations of the public good and resource allocation.'⁷⁷ Suffice it to say that it is only after there is a positive determination of the issue of justiciability that the matter proceeds to trial.

⁷² Ibid. at 738-739. Emphasis mine.

⁷³ Ibid. at 740.-141.

⁷⁴ *Dorset Yacht* note 66 supra.

⁷⁵ *Stovin v Wise* [1996] AC 923, HL. See also *Marcic v Thames Water Utilities Limited* [2004] 2 AC 42, HL.

⁷⁶ Booth and Squires note 2 supra at 40.

⁷⁷ Ibid.

The public law hurdle has been quite problematic in its operation in this area of the law and the courts have had considerable difficulty with it for some time.⁷⁸ It is only when this is resolved positively that the court will then proceed to examine whether a duty of care is owed the claimant by the public authority. However, from the 1990s, there has been a noticeable movement away by the courts from the ‘public-law hurdle’ in the determination of the liability of public authorities for negligence. Two cases in particular have been noted for establishing this new trend; *Barrett v Enfield London Borough Council*⁷⁹ and *Phelps v Hillingdon London Borough Council*.⁸⁰ The decisions of the House of Lords in the two cases have been credited with the view that the public law hurdle as set up in the earlier cases, particularly *Dorset*, *Anns v Merton* and *X v Bedfordshire* is not appropriate for determining the liability of public authorities in negligence.

After considering justiciability, the court assesses whether there exists a duty of care. Where a duty of care can be shown and falls into an established category of liability, the court will impose a duty of care. If the claim is ‘novel’ then the courts consider whether to impose a duty of care according to the *Caparo* test. Claims may be defeated at any of the three stages of the *Caparo* test. In considering the application of the third limb of the *Caparo* test, the courts are likely to look at public policy considerations.⁸¹

With reference to public policy, Booth and Squires have pointed out that policy arguments to limit the liability of public authorities operate somewhat like a ‘menu’⁸² from which courts choose options they prefer in the determination of claims against public authorities. Despite this, they suggest that it is still possible to distil two types of policy arguments in the practice of the courts on this point; ‘consequential’ and ‘separation of powers rationales.’⁸³

One type of consequential policy argument appears to be that identified by Deakin, Johnston and Markesinis that the claim in issue may be better borne by another person or body rather than the public authority since paying compensation may require diversion of substantial resources away from general public services or lead to an increase in taxation.⁸⁴ This is commonly the case where insurance can take care of the damages suffered as the

⁷⁸ Ibid. at 13.

⁷⁹ [2001] 2 AC 550, HL.

⁸⁰ [2001] 2 AC 619, HL.

⁸¹ Booth and Squires note 2 supra at 5.

⁸² Ibid. at 167.

⁸³ Ibid.

⁸⁴ Deakin *et al* note 17 supra at 400.

court held in *Stovin v Wise*.⁸⁵ Lord Hoffman delivered the decision of the majority in which he agreed that some of the arguments against liability for omissions do not apply to public bodies like a highway authority. However, he maintained that there are important reasons why the distinction requires the two should be treated differently by the courts.⁸⁶

Their Lordships felt that it would cause a distortion in the budget of local authorities to impose a duty of care on them as highway authority for failure to exercise a power, even if such failure is ‘due to irrationality.’ It would also impact negatively on their overall services to their constituents. According to Lord Hoffman:

This would *distort the priorities of local authorities*, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal accidents. They will spend less on education and social services. I think that *it is important, before extending the duty of care owed by public authorities to consider the cost to their community* of the defensive measures which they are likely to take in order to avoid liability.⁸⁷

Lord Hoffman further noted that the denial of liability by the local authority does not leave the claimant unprotected. There was compulsory insurance to provide compensation for victims.⁸⁸

The views expressed by Lord Steyn in *Gorringe (by her litigation friend June Elizabeth Todd) (FC) v Calderdale Metropolitan Borough Council*⁸⁹ provide another instance of the consequential policy argument, the ‘floodgates’ argument. The case centred mainly on the breach of statutory duty by a public authority. Lord Steyn identified the dilemma the courts face on the matter in this way:

On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called “the rule of public policy which

⁸⁵ *Stovin v Wise* note 75 supra.

⁸⁶ *Ibid.* at 946.

⁸⁷ *Ibid.* at 958. Emphasis mine.

⁸⁸ *Ibid.* at 958.

⁸⁹ [2004] 1 WLR 1057.

has first claim on the loyalty of the law; that wrongs should be remedied.”⁹⁰

Another dimension of the consequential policy argument for the limited immunity for delicts granted to administrative authorities is the need to protect them from being disturbed by many cases that may be largely without merit. Allowing many cases that can fall in this category to be brought against public authorities can lead to the huge waste of time and money in the pursuit of their defence.⁹¹

The separation of powers argument is directed at protecting the policy-making powers of public authorities which ordinarily should not be subjected to judicial review for the proper functioning of such authorities.⁹² This is to ensure that the democratic will of the people declared through their representatives in Parliament are not frustrated or ‘undermined by the imposition of liability on a public authority.’⁹³ In the discharge of their functions, public authorities cause loss to individuals through their actions or omissions to act. In some cases the issue is straightforward, as where the public authority is under a statutory duty to act in a particular manner or otherwise. While performing their duties, public authorities can sometimes affect the interests of particular groups in the general public interest, it would result in undue interference to allow an unlimited class of actions against them in the exercise of their powers.⁹⁴ Unless there is a clear statement in a law made by Parliament according a right of action to a specified class, it would be contrary to the intent of Parliament for the courts to impose liability on the public authority.⁹⁵

In other instances, it may be difficult to determine how to deal with situations where the public authority has neglected to act due to what could be considered as sound political reasons. This may be the lack of resources or the priority to be accorded to allocation of scarce resources for instance. There is thus an important issue of whether the case in question is *justiciable* before the courts.⁹⁶ This is particularly the case because the courts may not be in the right position to determine the proper allocation of resources or direction of policy, at least in the context of a democratic state.⁹⁷

Additionally, there are specific legal issues that have been raised about the distinctive

⁹⁰ Ibid. at 1059.

⁹¹ Deakin *et al* note 17 *supra* at 400.

⁹² Ibid. at 401.

⁹³ Booth and Squires note 2 *supra* at 167-168.

⁹⁴ Ibid. at 10.

⁹⁵ Ibid. at 168.

⁹⁶ Stewart note 9 *supra* at 153.

⁹⁷ Deakin *et al* note 17 *supra* at 401.

character of administrative liability. One of the legal reasons for restricting liability of public authorities was articulated by the House of Lords in *X v Bedfordshire County Council*⁹⁸ which was heard by the House of Lords as part of five appeals all dealing with claims for negligence and some involving claims for breach of statutory duty. The principle, according to the House of Lords is that where statutory discretion was conferred on a public authority, nothing done by the authority within the ambit of the discretion was actionable at common law. However, where a decision complained of was so unreasonable that it fell outside the statutory discretion, it could give rise to common law liability.

X v Bedfordshire concerned allegations that a local authority had failed to take children into care despite evidence of neglect and abuse by their parents. In this case, the House of Lords stated that when local authorities perform statutory functions, a common law duty of care might arise. Any claimant basing his claim on a careless exercise of a statutory duty had to show the existence of circumstances giving rise to a duty of care under common law. The courts will not impose a common law duty if it was inconsistent with, or had a tendency to discourage, the due performance of a statutory duty.⁹⁹ Another important consideration in extending or restricting the liability of public authorities is whether it appears there would be no other remedy for breach of statutory duty as Lord Wilkinson stated:

If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care.¹⁰⁰

Another legal reason that has been raised for limiting the liability of public authorities is that the law may provide certain immunity from the principles of common law liability in tort. This would appear to be the case where the issue turns on liability in nuisance or it is consonant with the principle in *Rylands v Fletcher*.¹⁰¹ In that case, the House of Lords established the principle that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable for damages. On the other hand, if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in

⁹⁸ *X v Bedfordshire* note 68 supra.

⁹⁹ *Ibid.* at 730-740.

¹⁰⁰ *Ibid.* at 751.

¹⁰¹ LR 3 HL 330 (1868).

so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. Thus, the presumption is that an activity that is provided for by law when conducted negligently will give rise to liability.¹⁰²

In order to establish the breach of statutory duty against a public authority, the courts construe the statute to determine whether it was the intention of parliament to confer a right of action on any class of individuals. It further determines whether the claimant belongs in that class. The effect of this approach, it has been noted, is that it limits the number of possible claims that can be brought against public authorities in the performance of their duties¹⁰³ which are regarded as been done in the general public interest.¹⁰⁴ Another implication of the approach of the courts is that it leaves the court with wide powers to declare what the intention of Parliament (which is usually not a straightforward matter to determine), is in making the relevant statute. This leads to the result that the principles becomes difficult to predict what the finding of the court will be on the existence or otherwise of the liability of public authorities for the tort in any given case.¹⁰⁵

In actions for breach of statutory duty by public authorities, the claimant is usually entitled under English law to injunction, mandamus or a declaration¹⁰⁶ and in some cases, damages.¹⁰⁷ However, a claim for damages will succeed only if the claimant can show that s/he is also owed a common law duty of care by the public authority or there are provisions of a relevant statute that provides specifically for damages.¹⁰⁸ The courts approach the determination of the question of damages, again, from finding out the intention of Parliament on the issue as only a few statutes contains any reference to civil liability.¹⁰⁹ This was confirmed by Lord Browne Wilkinson in *X v Bedfordshire*.¹¹⁰ Though the torts of negligence and breach of statutory duty are separate, with respect to public authorities, they commonly come up for consideration together.

All of the foregoing and related issues concerning the liability of public authorities, given their (sometimes contested) *distinctive* character, have led to divergence of opinions on the

¹⁰² Deakin *et al* note 17 *supra* at 402.

¹⁰³ *Ibid.* at 426.

¹⁰⁴ K M Stantom *Breach of Statutory Duty in Tort* (Sweet & Maxwell London 1986) 73-74.

¹⁰⁵ Booth and Squires note 2 *supra* at 291.

¹⁰⁶ C Harlow *Compensation and Government Torts* (Sweet & Maxwell London 1982) 68. Scottish remedies are interdict, implement and declarator.

¹⁰⁷ Booth and Squires note 2 *supra* at 289.

¹⁰⁸ *Ibid.* at 290.

¹⁰⁹ *Ibid.* at 291.

¹¹⁰ *X v Bedfordshire* note 68 *supra* at 731.

appropriate approach to deal with their liability in delict. With this comparative insight which will be explained later in section four, it is appropriate to return to the nature of the liability of public authorities in Saudi law and the work of the Board of Grievances.

5.2.2 Nature of Delictual Liability of Public Authorities under Saudi Law

As indicated in the discussion on the Board of Grievances, the liability of public authorities is recognised and enforced in Islamic Law. Under the Islamic political system (as in others), public authorities are required to act on the authority of the state and are thus bound by the principles that bind the state. One of the assumed foundational principles of the Islamic social system is the need to maintain what has been referred to as ‘equipoise’ in society.¹¹¹ The concept requires that every segment of society be dealt with in a manner that achieves justice equitably. This aspect of Islamic law no doubt constitutes a challenge given the dynamic nature of social experience where the context of the society inevitably plays a role in conceptions of what is just or equitable. Based on this fundamental principle, it has been argued that in the area of delict, the public interest may not be allowed to trump or override individual interest but rather, they are to be treated equally. Musleh-ud-deen states in this regard:

The peculiarity of Islamic Law is that it has absolute standards of justice...It cannot move towards more stress upon social interest and cast liability upon someone deemed better able to bear it.¹¹²

On this view, the individual as well as the collective or the community are to be equally protected.¹¹³ As a general rule, all individuals, private, public or group are required to bear the same level of responsibility for their delictual acts. This may be considered a literalist view, an attempt to keep to a strict construction of the sources, which is the most basic function of any adjudicatory process. In this regard, it is relevant to note that the general tenor of the law with respect to delict is that considerations of public-policy which play a prominent role in common law, have not played such a role in the Islamic legal system particularly as operated in Saudi Arabia.

¹¹¹ M Musleh-ud-Din *Concept of Civil Liability in Islam and the Law of Torts* (Islamic Publications Ltd Lahore 1982) 51.

¹¹² Ibid. at 51-52.

¹¹³ Ibid. at 51

It is not entirely clear what have been the determinative factors of the liability of public authorities in Saudi Arabia. As stated in chapter three, the jurisdiction of the Board, in accordance with Article 48 of the Basic Law provides that:

The courts shall apply to cases before them the provisions of Islamic *Shari'ah*, as indicated by the Qur'an and the *Sunnah*, and *whatever laws not in conflict with the Qur'an and the Sunnah which the authorities may promulgate*.¹¹⁴

The law conceivably gives wide latitude for development in this area in particular and legislative development in the country generally. The clause providing for the judiciary to enforce laws not in conflict with the sources is a codification of a fundamental principle of Islamic jurisprudence, namely that whatever is not prohibited is allowed. On this basis, it has been argued that this principle of Islamic law makes the legal system dynamic and adaptive to social change as a necessary aspect of its claim to be intended for all times and situations.¹¹⁵

A study of the cases dealt with by the Board suggests it has wide latitude in the exercise of its judicial powers with the central objective of achieving justice in accordance with Article 48 of the Basic Law. An important indication of the Board's interpretation of the nature of its powers is provided by the views expressed in a relatively old appeal decision in the context of the life of the Board. In *X v Ministry of Health*,¹¹⁶ it declared that balancing public and private interests is a 'delicate' issue which must be handled with 'precision.' This case was in fact decided before the Board was constituted into an independent judicial body¹¹⁷ but is worth further consideration.

The defender rented a property from X for a certain term and before the expiration of the term, X notified the defender that he did not wish to renew the lease. The defender did not respond to his correspondence and overstayed the term. The claimant then filed a suit claiming rent for the overstayed period in accordance with the operative market value which was higher than the contractual rent. The defender refused to pay the 'market value'

¹¹⁴ Italics mine for emphasis. This position of the Basic Law has been affirmed in the proposed Bill of Proceedings and Procedures of the Board.

¹¹⁵ F E Vogel *Islamic Law and Legal System- Studies of Saudi Arabia* (Koninklijke Brill NV Leiden the Netherlands 2000) 3-4.

¹¹⁶ (1979) case No 266/1/Q 1399 *Majmu'ah al-Mabadi al-Shar'iyyah wa al-Nadhamiyyah* (The Board of Grievances Riyadh 1980) 61.

¹¹⁷ It was at the time, a judicial body but part of the departments of the Council of Ministers. .

rent insisting on the amount in the contractual rent. The Board held that the defender was entitled to some reasonable time to vacate the property following the expiration of the term and awarded the claimant the same rents for that period. It went further however, in holding that the defender was liable to pay the market value-rents for the period from the end of the 'reasonable time' until its actual vacation of the property.

The defender appealed the decision to the appellate court of the Board. The central issue on appeal was the argument for the defender that the Board was wrong to have determined a 'reasonable time' in the manner it did, as this amounted to creating new contractual terms for the parties. This, it was argued is *ultra vires* the court. The course open to the court was either to determine the old contract or order its renewal on the same terms neither of which it did.

However, the court upheld the judgement. It held that the defender should have to consider that the contract was terminated at the end of its agreed period, at the request of the claimant. It went further to iterate that success of administrative justice in its delicate task depends on wisdom and knowledge of the pre-requisites of good-governance and on achieving harmony and consistency between public authority and care for individuals and their legal rights. The lower court, it noted, had sought to reconcile public interest considerations and the requirements of good-governance. This includes the need to ensure the functioning of public services and facilities - as run by the Ministry - without interruption, to meet the needs of the general public, and the care for private interests of the claimant, which require that he receives a fair and adequate payment for the use of his property rented out to the Ministry, without prejudice or harm to his rights.¹¹⁸

Interestingly too, the Board went on to declare that a public authority should bear vicarious liability for damage arising from the misconduct of its employees in the course of their employment. Rather than seeking, as in this case, to deflect liability, it ought to take recourse to administrative procedures to discipline those involved. It pointed out that the State in assigning a mandate to an employee, has concern for the greater good of society. Hence, an employee should exercise care and due-diligence in carrying out assigned duties in order to achieve public good. S/he should also work in a way that does not adversely affect those interests that are the objective of the task or job. If an employee - through error, negligence or default at work - causes damage to public interest, such as burdening

¹¹⁸ *X v Ministry of Health* note 116 supra at 68.

the State Treasury with unwarranted expenditures; or if the default caused losses or damage to those dealing with the public authority, the employee ought to bear the responsibility of such. Consequently, it is up to the state (in a case such as this), if it so wishes, to reclaim its costs from the person who caused it, since it was his/her conduct which led to the expenditure from the public purse in the event that the conduct is unjustified.¹¹⁹

The significance of *X v Ministry of Health* cannot be overemphasised. According to the Board, in order to attain success in the difficult task of maintaining balance, the judges must exercise wisdom that comes from proper appreciation of the intricacies of administration and governance, which are distinct from private interactions between individuals.¹²⁰ The reference by the Board to the need for the balancing of a ‘delicate’ situation is important. It is indicative of the recognition by the Board of the need to maintain an approach that takes into account, the ‘equipoise’ suggested by Musle-hu-deen which apparently - at least in the experience of a well-developed legal system such as that of the United Kingdom - is a rather problematic process.

Of further significance, the Board noted that in dealing with cases where there is no clear legal rule governing the subject of the dispute on which it is to deliver a verdict, the court has the authority to devise a suitable solution in harmony with the facts of the dispute and the circumstances leading to it. It further stated that the judges should seek a compromise between disputing parties in such a way as to bring justice without being restricted by legal rules or regulations which were intended to organise individual relations only.¹²¹ In other words, the Board prioritises achieving justice over formalism or black-letter law. According to the Board this is required ‘...to provide harmony and coordination between the interests of the public authorities and the rights of individual’.¹²²

It remains unclear how well the courts have reconciled this challenge. This is however a task that is important because reconciling both interests prevents injustice and fosters peace in society. Commenting on this decision, Roslan has noted that the Board has the powers to devise its own legal rules to deliver a verdict on disputes over which it has jurisdiction and for which there is no text in *Shari’ah*, regulations or tradition.¹²³

¹¹⁹ Ibid at 70.

¹²⁰ Ibid at 68.

¹²¹ Ibid.

¹²² Ibid.

¹²³ A A Raslan *Al-Qanuun al-Idariy al-Saudi* (Ma’had Al-Idarah Al-‘Ammah Riyadh 1988) 121.

A further noteworthy, aspect of the Board's decision is the assertion that the defender was entitled to a 'reasonable time' to vacate the property and for which it was also liable only for the contractual rent. This clearly, as a judge of the General Court of Al-Madinah who preferred to be anonymous explains,¹²⁴ deviates from the position in law on such contracts between private parties. In such cases (which are determined by the *Shari'ah* courts), the defender will not be granted such 'reasonable time' and will be liable for the prevailing economic rent rather than the contractual rent. In this way, this decision appears to suggest that the liability of public authorities may be treated distinctively. At least, this was the tenor of the Board's decision.

X case reflects the recognition and importance of public interest in the jurisprudence of the Board. However, the jurisprudence of the Board is significantly different from Scots and English law on the treatment of public interest in the way it seeks, as mentioned earlier, to achieve a delicate but concrete balance between the public interest and the right of the individual to be compensated for unjustified harm.

A few years after this decision, a Royal Order¹²⁵ was passed establishing a Unified Code for Governmental Contract for Renting Property to Ministries or any public authority. Article 2 of the legislation stipulates that such contracts will be renewed for the same period as the original lease or less according to the agreement of the two parties in a new contract. The owner of the property has a duty to inform the public authority (tenant) 90 days before the expiration of the contract if s/he does not wish to renew the contract. Otherwise, the tenant has the right to stay in the property till the period required after such expiration but not exceeding 90 days from that date. This Royal Order does not, however, address the circumstances of the *X* case in which the tenant remained despite the owner having given the full contractual period of notice.

The decision in the *X* case is however primarily concerned with contractual liability, and the extension of the above arguments to the case of delictual liability is an open question. Despite the decision in *X*, it is contended in this chapter that the subsequent cases decided by the Board continues to support the view that the liability of public authorities in delict remains similar to that of private individuals. In other words, the jurisprudence of the Board on the issue has remained the same as the classic Islamic law position which can be regarded as the 'literalist view'. It is now relevant to examine the decisions of the Board

¹²⁴ An interview conducted during a research visit in the summer of 2010.

¹²⁵ No. 5171 issued on 12/4/1407 (1985/1986).

with regard to delictual liability of public authorities through a categorisation adopted from Scots and English law as mentioned above.

5.3 The Board of Grievances and Delictual Liability of the State

Broadly speaking, Islamic law seems to have an uncomplicated scheme of liability in which the key concept is indemnity for unjustified harm that is caused by breaching the legal duty not to cause harm. The application of this basic principle, as the discussion of the last chapter has shown, covers both intentional and unintentional harm (as those concepts are explained in Scots and English law)¹²⁶ though it is not explicitly stated in either the classical literature or even in a contemporary system like that of Saudi Arabia. The fact that there is no distinction seems to be quite an important issue in Islamic law and it seems that particularly with relation to unintentional delict, the basis of liability might be broader than in many western legal systems. Though some hold the view, as stated earlier, that intention is required either under civil liability in Islamic law generally¹²⁷ or in the case of indirect causation specifically.¹²⁸

Obviously all systems punish intentional wrongdoing but for unintentional harm under Islamic law, the scope of liability seems to go further. Thus it includes persons of unsound mind and children, ordinarily subjects with diminished liability. Individual rights against unjustified harm are protected irrespective of the circumstances of the nature of the conduct of the violator and the basic principle remains the same without regard to whether the breach of duty not to cause unjustified harm results from an intentional act or through fault or negligence.¹²⁹ In both cases of intentional and unintentional harm, once the harm is unjustified in law, liability is considered to be established and compensation is due.

5.3.1 Intentional Delict

Intentional delict is fairly straightforward. Similar to the Scots and English position, the decisions of the Board strongly suggests that this is delictual liability resulting from specific action that the doer knows can cause harm to the victim's person or property. Common examples are assault, trespass to land and deprivation of liberty arising from

¹²⁶ See page 118 supra.

¹²⁷ See page 82 supra.

¹²⁸ See page 100 supra.

¹²⁹ A Al-Qasem 'The Injurious Acts under the Jordanian Civil Code' (1989) 4 Arab Law Quarterly 183, 192.

cases of unlawful detention.¹³⁰ Thus, it is again easier to establish this form of delict as compared with unintentional delict.

In relation to public authorities, what comes to mind is conduct authorised by statute which would otherwise constitute intentional delict and would, therefore, be unlawful. Where the conduct causing harm is authorised by statute such as the exercise of police powers, *Ta'ady* is not established. This is the case even where such implementation is by way of preventive acts which are deemed legal and the operation of the law *infringes* on or indeed, limits the scope of the exercise of individual rights. In this case the implementation of the law constitutes the 'right' or 'legal permissibility' to cause the harm. In *Y v Hael Police*¹³¹ the Board of Grievances reaffirmed the principle of the lawfulness of a harmful act which is occasioned by the implementation of the law. It dismissed a claim of unlawful detention for over five years on a charge of murder. During this time, the claimant had been tried but not found guilty by the *Shari'ah* Court. The trial had involved appeals to the highest court with criminal jurisdiction in the country. He claimed that he suffered psychological harm and financial loss as a result of the detention. The Board held that the defender had acted within its powers and in accordance with the relevant regulations which required detention on charges for murder until final determination of the case.¹³²

Another example involving a municipality is *R v Municipality of Dammam*.¹³³ The claimant claimed that he obtained an official license from the defender to open a grocery store. He then equipped, stocked and opened the store. Several years later, he was surprised to receive a written warning from the defender demanding that he must close the grocery store within two days. The defender subsequently sealed up the store on expiration of the notice period. The claimant demanded compensation for loss of earnings and the products that were destroyed in the process.

The defender claimed it had issued the claimant a temporary license which had expired. The defender informed the claimant that it would not complete the procedures for issuing a permanent license since the shop was a source of nuisance, annoyance and harm to the neighbours. A warning was issued to him to empty the grocery store of all foodstuffs within two days, and since that date was followed by a weekend, the claimant had a grace

¹³⁰ A bin Mohammad 'The Types of Torts Against the Person: A Study According to English and Islamic Law of Tort' (2000) 44 Islamic Quarterly 507.

¹³¹ (2004) Unreported Case No. 2762/1/Q/1427.

¹³² Ibid. at 5.

¹³³ (1996) Unreported Case No. 160/3/Q 1416.

period of four days. He was warned that, if he did not empty the store, he would bear all consequential losses in the event the said store was closed. The Board upheld the defence. It held that the closure was legal and the defender was excluded from liability on the facts and dismissed all the claims.¹³⁴

In deciding cases of unlawful detention, where a public body exceeded its power, the Board refers extensively to relevant statutory provisions requiring due process¹³⁵ in the detention of persons. The most common statutory provision the Board refers to is Article (36) of the Basic law of Governance which states that:

The State shall provide security to all its citizens and residents. A person's actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law.

The Board refers to Article 36 in virtually all cases of alleged unlawful detention as a starting point. But it also considers other statutory provisions as well to determine whether the breach of a statute has occasioned liability on the part of a public authority in such matters. Thus, in *N v Ministry of the Interior*¹³⁶ the Board observed that:

putting people in prison means restricting and taking their personal freedom away and these are the rights Islamic Law principles and regulations of the State came to preserve and not to deny.¹³⁷

Furthermore, after construing various constitutional provisions and relevant legislation which in substance secured the right to liberty, it held that since the defender did not follow due process with regard to the claimant but instead detained the claimant for all of this (alleged) period, its conduct amounted to *Khata* because it was in breach of the relevant law. That *Khata* caused the claimant harm resulted in restricting his freedom and depriving him of running his business and caring for his family.¹³⁸ It is interesting to note in this regard that the deputy-head of the Saudi Arabia Human Rights Commission while submitting the country's human rights report to the UN Human Rights Commission

¹³⁴ Ibid. at 5-6.

¹³⁵ There are a number of similar terminologies for these e.g. *al-Maslak an-Nidhaami*, *al-Toreequl an-Nidhaami*, *al-Ijraa An-Nidhaami*, etc. The Board has used some of these in different cases.

¹³⁶ (2005) Unreported Case No. 2589/1/Q/1426

¹³⁷ Ibid. at 4.

¹³⁸ Ibid. Emphasis mine.

recently, declared that the government has paid out about 100 million Riyals¹³⁹ as compensation to formerly detained terror-suspects who were found to be innocent at the end of 2008.¹⁴⁰

The Board adopted a similar line of reasoning in other cases of wrongful detention. In *I v Hael Police*¹⁴¹ the claimant, a judgement-debtor was detained for eight months by the Hael Police on the complaint of the judgement-creditor for failing to pay the judgement-debt. The defender also seized his monthly salaries for the repayment of the debt even though the Province of Hael, which is responsible for enforcing such judgements had directed that he pay half his monthly salaries until the debt is repaid in full. The claimant claimed that he suffered substantial psychological harm and financial loss as a result of the detention. He demanded compensation from the defender for this. The defender's position was that Hael Police had detained the claimant because he had failed to carry out the terms of the judgement against him. Following his arrest the claimant had alleged he was insolvent but his claim was dismissed by the *Shari'ah* Court of Hael Province. The defender claimed it acted in accordance with relevant laws and requested that the claim be dismissed.

In line with its earlier judgement in *N v Ministry of the Interior*, the Board held that putting people in prison means restricting and taking away their personal freedom and these are rights guaranteed by Islamic Law principles and regulations of the State. It referred to Article 36 of the Basic law of Governance mentioned above as well as Article 7 (3) of the Provinces Law which provides that 'the Governor of each province shall assume the administration of the province according to the general policy of the State and in accordance with the provisions of the Provinces Law and other laws and regulations.' The law further provides that the Governor has to guarantee rights and freedom of individuals, refrain from any action affecting such rights and freedom 'except within the limits provided by the *Shari'ah* and regulations.'

According to the Board, putting an individual in prison serves one of two functions; either as a punishment applied after a final judicial decision has been taken; or as an interim measure for custodial purposes to allow further investigation and prosecution. A basic principle in Islamic law, according to the Board, is that individuals are entitled to the right

¹³⁹ Circa 20 Million GBP.

¹⁴⁰ 'Non-Muslims "Free to Worship in Private"' *Saudi Gazette* (9 February, 2009) available at: <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentID=2009020928824&archiveissue date=09/02/2009>. (Site visited 18 February 2009)

¹⁴¹ (2006) Unreported Case No. 747/1/Q/1427.

to their liberty and their freedom is not to be restricted. In other words, freedom of individuals comes first. Preventive detention is considered an exception to be used only when necessary. Individuals are not to be deprived of their rights under any reason except with the authority of law and for specified periods. According to the Board, this position is further reaffirmed by Section 2 of the Criminal Procedure Law which provides that:

No person shall be arrested, searched, detained, or imprisoned except in cases specified by the law. Detention or imprisonment shall be carried out only in the places designated for such purposes and shall be for the period prescribed by the competent authority. A person under arrest shall not be subjected to any bodily or moral harm. Similarly, he shall not be subjected to any torture or degrading treatment.

The Board went further to state that the law also stipulated the cases, under which an individual can be detained, one of these cases being detaining a judgement-debtor. Article 230 of the *Shari'ah* Courts Law of Procedure¹⁴² provides that if a judgement-debtor refuses execution of the judgment against him for a reason other than insolvency, and it is impossible to execute on his property, the judgment-creditor may request the detention of the judgment-debtor by filing a petition with the competent administrative governor. The Governor shall then order the detention of the judgement-debtor for a maximum of ten days. Where the judgment-debtor persists in refusing execution after that period, such judgement-debtor shall be referred to the court having jurisdiction over his place of residence to consider whether to continue his detention or to release him according to the prescriptions of the *Shari'ah*. In addition, Article 231 of the law further provides that:

If refusal of execution of judgment is by reason of insolvency, the judgment debtor shall be referred to the court that had issued the judgment for the determination of whether or not he is insolvent.

The Board held that the defender failed to demonstrate compliance with the provisions of the relevant legislation mentioned above, but rather detained the claimant without any judicial determination authorising the detention. Therefore, the action of the defender was in violation of law, causing harm to the claimant by restricting his liberty and from working at his job and looking after his family. These have resulted in psychological

¹⁴² Royal Decree No. 21/M (2000).

suffering and humiliation of the claimant. Therefore, the elements of liability have been established in this case. This decision, according to the Board, derives from the established jurisprudential and judicial principle that when the *Khata* of the administration causes harm to any individual, the victim deserves compensation to repair the material and immaterial harm suffered. In other words, the defender had acted recklessly with regard to the claimant. It was liable for illegal detention since it acted without complying with statutory requirements on the matter. The Board awarded damages to the claimant for the whole period of his unlawful detention taking into account his loss of earnings.

The foregoing cases appear to have been determined principally on the basis that the defenders were in deliberate breach of due-process. It is of interest to consider the possible outcome in instances where the defender claims to have acted under an honest mistake. The claim of honest mistake was an issue in *H v Saudi Airlines*.¹⁴³ The defender, a public corporation, entered into a contract for the hire of one of its jets to a person with the same names as the claimant. The said individual had failed to pay for the hire. The defender obtained the national identity number of the person with the name in question from the Immigration Department. Under the impression that these were the particulars of its absconded debtor, the defender then sent the particulars to the Ministry of the Interior seeking recovery of the debt under the powers conferred by law on the Ministry for the recovery of public debts. Subsequently, the account of the claimant was frozen and his salary was sequestrated in payment for the debt. On the claimant's petition, the account was unfrozen after it was discovered that he was not in fact the debtor in question. The claimant brought this action for compensation for material and immaterial harm arising from the freezing of his account. This included the claim that he and his family suffered financial difficulties during the period of the freezing of his accounts and sequestration of his salary. The defender blamed the Immigration Department for the mistake.

The Board requested that the claimant prove the harm he claimed, and that he provide the statement of his account for the period in question. The relevant documents requested also included the medical records for the psychological illness he claimed. He did not provide this or any other documents. The Board declared that failure to provide the proof of damage was fatal to the claim and dismissed the case. The judgment itself was silent on the defence of honest mistake made by the defender. However, it had requested proof of damage from the claimant which implied that it was prepared to award damage for the

¹⁴³ (2007) Unreported Case No. 2684/1/Q 1427.

claims on being satisfied of the occurrence of unjustified harm.

It is noteworthy that this case is different in one important way from the detention cases since it does not involve a security agent as a defender. It would have been more interesting to have a security agency like the Immigration Department for instance (which arguably should have been a defender on the facts) as a defender in the case. In the absence of a directly relevant case or one of precedent, it is not clear what the approach of the court would be were the claimant to provide evidence of damage.

It would appear from the cases above that where intentional delict is concerned, the Board is willing to award damages. This is, however, only the case when the public body has exceeded its statutory powers. Provided the public body has acted within its statutory powers, there is no ground for liability. Such cases, therefore, certainly appear to be clear and relatively straight-forward. It would even appear that the Board is willing to award damages in cases where there has been an honest mistake. This would be the correct approach because the public body has not acted diligently and has caused unjustified harm to the claimant.

5.3.2 Unintentional Delict

This section begins with a brief discussion of the three categories of unintentional delict which are most likely to form the basis of claims against public authorities in as much as they are identifiable in the cases determined by the Board. This categorisation has been borrowed from Scots and English law, and Islamic law has not hitherto been explained in terms of these categories. However, this approach is appropriate for three reasons. First, although the Board's rules of practice as well as substantive principles of Islamic law do not appear to require such categorisation as a condition for sustaining claims in delict, neither do they seem to prohibit it or be inconsistent with it. Secondly, such categorisation affords clarity of discussion and, in some cases as shown in the discussion that follows, the court does expressly refer to *Taqsir*, negligence or *al-Masuliyah al-Taqsirriyah* which means delictual liability at a conceptual level or put simply, negligence in specific contexts. Thirdly, it is envisaged that with further development of this aspect of law in Saudi Arabia, categorisation of unintentional delict can assist in mapping out the specific approach of the courts to appropriate forms and facilitate a more predictable outcome of cases that come before the Board for decision. This has multiple advantages for various stakeholders (including academics), the general public and public authorities. These

include providing a clear structure for the subject which will help judges to understand this area of law better, assist academic analysis and facilitate learning by students.

Claims for unintentional delict dominate the cases brought against public authorities in Saudi Arabia. Again, like the cases brought in the Scots and English courts, claims brought before the Board of Grievances for unintentional delict deriving from the conduct of public authorities can be presented under three headings corresponding to three causes of action in Scots and English law:

- I. Negligence (Fault)
- II. Breach of Statutory Duty
- III. Lawfully caused but unjustified loss.

However, the Board does not explicitly categorise cases in these terms. In practice, the court does not dwell on whether the delict claim is derived from negligence, breach of statutory duty or strict liability though it is possible to allocate the cases decided by it to the foregoing categories. This is because, as mentioned earlier, the Board's emphasis appears to be on the need to ensure compensation for unjustified harm rather than technicalities of categorisation that may result in shutting out legitimate claims for compensation for unjustified harm. In other words, it makes no significant difference what form delict takes. Unlike English law in this area which historically developed from a system of mandatory adoption of a form of action as a procedural requirement,¹⁴⁴ the claimant is not required to, and in practice, hardly ever presents a case under a particular heading in order to sustain the claim. There is thus a unified approach to the matter and such claims are compositely regarded as claims in delict. What is crucial is to determine the existence of breach of a duty not to harm others. This appears to be in keeping with a key principle of Islamic law and its conception of justice which require a straightforward application of law devoid of as much technicality as possible.

Given that Islamic law is supposed to operate on the basis that the same rules for determining liability apply to public bodies and private persons alike, it would be beneficial to make comparison between the adjudication of delictual liability claims between private persons and claims by private persons against the state. However, it is rather difficult to do this because delictual liability claims against individuals or private

¹⁴⁴ F W Maitland, A H Chaytor, and W J Whittaker *Maitland- The Forms of Action at Common Law: A Course of Lectures* (Cambridge University Press Cambridge 1997).

persons/bodies are rare in Saudi Arabia, as indicated in chapter four. The situation is complicated by the absence of a case reporting system in the General Courts which handle such claims. However, wherever possible, when discussing cases in the following sections, an attempt will be made to hypothesize whether the same outcome would have been achieved if an analogous dispute had arisen between private individuals or bodies.

5.3.2.1 Negligence

Commenting on ‘negligence’ as an aspect of unintentional delict, Zoubi, states that it is the occurrence of damage as a result of falling short of an objective standard or lack of due diligence in carrying out a specific act. According to him ‘unintentional *ta’adi* ‘is accomplished with the occurrence of the damage when the damage was the result of neglecting to do what should have been done, or where the person has acted without observing the precautions which he should have observed.’¹⁴⁵ Before proceeding with an analysis of the Board’s jurisprudence in this area of delict, one crucial matter will be examined. This is the issue of *Khata* which has been partly considered in the last chapter. The Board often refers to the term *Khata*, meaning fault when referring to the requirement of *Ta’ady* as an element in the cases. However, as was sought to make clear earlier, this is essentially a product of history more than anything else. Indeed, as highlighted in the chapter, there appears to be a general confusion in the civil-code system of virtually all Arab countries on this point.

As has been indicated above and will become obvious in the analysis that follows on a number of cases, the Board does in fact refer sometimes to what is properly called *Ta’ady* in the sense of breach of duty not to cause unjustified harm generally rather than *fault* in the technical sense as understood under a western system like Scots and English law. As a result, several decisions can be found today which take a similar approach in earlier cases sometimes stating either *Khata* or *Ta’ady* as an element of delict. For instance, in *X v Ministry of Information and Culture*¹⁴⁶ the Board stated that in order to succeed in his claim, the claimant was required to establish the existence of the elements of ‘delictual liability, namely *Khata*, harm and causal link.’¹⁴⁷

¹⁴⁵ M Zuobi ‘Liability of Direct Defender and Causal Defender of Act in Jordanian Civil Law’ (1987) 2 (1) Mu’tah Journal for Research and Studies Mu’tah University 187,194-195 quoted in Al-Qasem note 129 supra at 192.

¹⁴⁶ (2000) case No 902/2/Q 1420 *Majmu’ah Al- Ahkam wal Mabadi Al- Idariyah* (The Board of Grievances Riyadh 2008) 1911.

¹⁴⁷ Ibid. at 1921.

Saudi Arabia aspires to follow the classic Islamic law position on delictual liability. Thus, it is logical to expect that unjustified harm will constitute the key element of liability for delict because as stated earlier, this represents the classic Islamic law position. Interestingly, an analysis of the decisions shows there is some confusion on this important issue. The courts appear to have been struggling with the issue of what constitutes the basis of liability. Even an informed observer of the Saudi legal system may find this rather strange considering that the apparently preference of the system is for the classic Islamic thought.

There is reason to suppose that the confusion has mainly historical rather than theoretical roots. A historical excursion into the founding of the Board makes this clear. Article 2 of the Law of the Board of Grievances 1982 (the previous law) provided for ‘an adequate number of technical and administrative employees’ to be attached to the Board to facilitate the discharge of the Board’s functions. As both Al-Hudaithy¹⁴⁸ and Al-Jerba have noted, under this provision and before it, the Board in its early years, lacking in much required expertise and experience, recruited a number of foreign legal advisers especially from Egypt. These advisers served as consultants who provided legal opinions on questions of law referred to them for their views by the members of the Board. Though they acted in an advisory capacity, their opinions substantially and frequently found their way into, or even formed the judgements of, the Board in many cases.¹⁴⁹ Through these rather potent though informal means, the jurisprudence from countries with a civil code influenced by western concepts like *dolus* and *culpa* as in the case of Egypt thus found their way into the judgements of judges otherwise trained in classical Islamic law.¹⁵⁰

The correct statement of the law was made by the Board in a recent (2008) case, *M and N v Ministry of Health*.¹⁵¹ On the issue of *Khata*, it clearly stated the position thus

Islamic jurists say the core of liability for delict is the occurrence of harm regardless of *Khata*. It is for this reason that liability can be established

¹⁴⁸ I Al-Hudaithy ‘Historical Review of Saudi Administrative Contracts’ (2002) 3 Public Procurement Law Review 186, 198.

¹⁴⁹ M Al-Jerba *The Board of Grievances: A Study of the Institution of Diwan Al-Madhalim of Saudi Arabia with Particular Emphasis on its Administrative Jurisdiction* (PhD law Thesis University of Essex November 1992) 177-178. However, this author, through his conversations with current members of the Board, has found that the role of the Advisors was completely eliminated approximately in 1998.

¹⁵⁰ A Amkhan ‘The Concept of Fault in Arab Law of Contract’ (1994) 9 Arab Law Quarterly 171, 173.

¹⁵¹ (2008) Unreported Case No.777/1/Q/1426

from the actions of the under-aged or mentally imbalanced even though they do not have legal responsibility in Islamic Law.¹⁵²

The Board in this case used the word *Khata* in its proper sense. In fact the Board went on to make the position even clearer when it stated further that:

Islamic jurists also impose liability on a party whose direct act causes harm even where such harm is not intended as long as the occurrence of harm results from such act.¹⁵³

It is suggested that the somewhat confused statement of the position in the cases by the Board is traceable to its mainly Egyptian sources. However, it is interesting to note that one of Egypt's most distinguished modern jurists, 'Abdul Al-Razzaq Ahmad Al-Sanhuri, a renowned authority on reformation of law in Arab countries in the 20th century, comments negatively on the fact that matters of civil liability are dealt with by the Egyptian approach (as is also the case in many Arab countries). Al-Sanhuri affirmed that the requirement of *Khata* as an element of liability for delict is not necessary because it is not only difficult to prove, but more importantly, in his view, intent is not required in Islamic Law of delict. 'Compensation,' for delict, Al-Sanhuri points out, 'is compulsory without the necessity of proving fault.'¹⁵⁴

It is relevant to note however that despite the redundancy of the term, the use of *Khata* in place of the more comprehensive and appropriate term, *Ta'ady*, persists in the jurisprudence of the Board. The contention here is that the Board has, for both historical and other reasons discussed later, been confused in the application of this key term in its jurisprudence. Beyond the confusion in terminology, the more objectionable aspect of this is the possibility in future for the substance of *Khata* to be substituted for the wider concept of *Ta'ady*, thereby leading to a substantive change in the content of the law which the Board is required to follow. The later discussion on the cases of lawfully caused but unjustified harm further buttresses the point that the Board's current confusing use of *Khata* is essentially a case of mis-labelling.

¹⁵² Ibid. at 5

¹⁵³ Ibid.

¹⁵⁴ A Al-Sanhuri, 'Le Droit Musulman Comme Element de Retonte du Code Civil Egyptien' Recueil D' Etues en L'Honneur D' Edouard Lambert (Vol.3 Paris L.G.D.J 1938) 633 quoted in E Hill 'Al-Sanhuri and Islamic law The Place and Significance of Islamic Law in the Life and Work of Abd al Razzaq Ahmad Al-Sanhuri: Egyptian Jurist and Scholar, 1895-1971' (1988) 3 Arab Law Quarterly 33, 63. C/f Amkhan note 150 supra at 179 also on this point with regard to contractual liability in Islamic Law.

There are many cases in which the Board has found liability established which would be classified as ‘negligence’ in Scotland or England. These are reflected in decisions of the Board across a spectrum of activities and service provisions. These include education, highways, health and public safety, and welfare and social services.

a) *Education Cases*

As discussed in chapter two and in accordance with Article 30 of the Basic law, the government of Saudi Arabia has put in place a system of public education that provides formal and vocational education and training from pre-primary through tertiary and university education. Thus, it is not surprising that a number of education related cases have come for resolution before the Board.

In *A v Ministry of Education*¹⁵⁵ the claimant claimed that the defender had failed to carry out its duties towards the Special Education Academy (the Academy) in Riyadh, an institution for children with learning disabilities. He stated that his son, who was dumb, studied in this academy. One day, after his son returned from school, he noticed that the boy seemed very drowsy, listless and imbalanced in his walk. On entering the house his son threw himself in his mother’s lap and grasped her hand. He held out his left hand and started crying and was visibly in immense pain. There was a noticeable impression of an injection in his left hand. He further stated that the Academy further violated the minor’s rights when it presented a picture of his son for public display at a workshop titled ‘How to Deal with the Autistic Child’ held at the Medical Centre Hospital in Riyadh without parental consent. The claimant was very worried and wrote a number of letters to the coordinator of the Academy to explain what happened to his son, but the coordinator did not respond. The claimant then lodged a complaint with the Director of Special Education in the Ministry of Education whose office he believed had supervisory authority over the academy. Despite the repeated calls and successive letters, there was still no response to his complaints from that office. In the meantime, his son developed a hatred for studying in the Academy. Further, the claimant stated that he had to take leave from his work and move his whole family in order to enable his son to obtain access to the special education facilities that were available only in Riyadh. His moving to Riyadh caused him further expense. He demanded compensation for his son and the family’s sufferings from the Ministry of Education for the damage they had suffered for failing to carry out its duties.

¹⁵⁵ (2005) Unreported Case No. 3679/1/Q/1426.

The defender maintained that it had observed all the required legal procedures when the claimant submitted his complaint and denied liability.

The Board dismissed the claim. According to the Board, it is an established judicial rule that to award compensation for *al-Masuliyah al-Taqsirriyah*, (which here referred to negligence liability as it does in specific contexts as mentioned above under the discussion on unintentional delict), the harm requiring compensation must be certain and capable of being linked to the conduct of the defender. The occurrence of the harm that is caused to the victim must be a direct result of the conduct of the defender. If the harm is uncertain or is not as a result of the defender's action, the claim for compensation is not valid. The Board held that since the claimant's claim for compensation depended on the ministry's *Taqsir*, negligence, in not following up its duties and taking the legal steps against the school in which his son studies, this negligence - assuming that it happened- is not a direct reason for the damage. The school is not part of the Ministry. It is a private school and the supervisory power of the ministry over it does not make the ministry liable for its conduct. If the claimant claims that the malpractice of the school employees caused damage to him, the claim should be against the school and its owners, not against the ministry. In other words, the Ministry is the wrong party to have been sued because it cannot be held liable for causing the alleged harm. The Board however urged the Ministry to seriously follow up on the activities of special schools like the one in question to ensure they properly carry out their function of training and teaching children with special challenges who are in dire need of special education.

A number of points require comment regarding this decision. First, it does appear that the decision of the Board could easily have gone in favour of the claimant if the school in issue was a public one because public schools are run directly by the Ministry so that acts of staff in public schools are treated as acts of the Ministry. The Board it appears takes the view that in the absence of explicit provisions stipulating a specific duty, it would be unreasonable to impose liability on a public authority, even though the performance of such a duty may be desirable. Thus, in the case where a traffic accident occurred because of straying camels from an illegal market, the Board held the municipal authorities which had a duty *inter alia* to 'maintain the area's good health, comfort and *safety*' liable for the accident.¹⁵⁶

¹⁵⁶ *Q v Municipality of Riyadh* (2008) Unreported Case No 1029/1/Q 1428. Emphasis mine.

The second issue of interest is the fact that though the Board did not attach liability to the defender on the facts, it urged the defender to ensure closer supervision of the privately owned schools of the type in issue. In another case, *M v Ministry of Education*¹⁵⁷ the Board similarly dismissed a claim for *Taqsir*, negligence against the defender but went on to advise it to take appropriate measures to forestall the occurrence of the incidence (use of narcotics in schools) complained against by the claimant. The point that needs to be made is that the Board, as Al-Jarbou rightly notes, in contrast with the French *Conseil d 'Etat* and the Egyptian *Majlis al-Dawlah*, does not have an advisory jurisdiction.¹⁵⁸ Neither the Basic Law nor the Law of the Board grants it such jurisdiction. Hence, this prompts a question as to the source of this advisory turn in these decisions. It does appear again that this is a product of the historical factors surrounding the establishment of the Board with the introduction of some foreign elements from French law by Egyptian experts, as this notion of providing advisory opinions is one of the functions of the Egyptian *Majlis al-Dawlah*.¹⁵⁹

An even more interesting issue is the fact that the Board did not make a finding on whether the issues complained of amounted to *Ta'ady* on the part of the school as a substantive matter, beyond its tentative statement on it, that is. Perhaps a substantive consideration albeit that it held the school was the appropriate party to defend the claim, would have led to a different finding. The Board may have found that the conduct of the school amounted to conduct in which the current defender failed in the obligation of supervision given that the school ostensibly operates on licence granted by the defender. The central issue in the determination or otherwise of its liability for the conduct of such licensees would be an investigation of its adequate or inadequate supervision of them. This, it is submitted with respect, ought to be the approach rather than the assertion that the public authority cannot be liable even where such negligent conduct emanates from the licensee of the public authority. There is also the other issue raised by the defender as to the appropriate public authority responsible for the supervision of such institutions.

Had a case been raised by a parent/guardian of a child against the private school itself, as opposed to the Ministry, the outcome may well have been different. This is because the

¹⁵⁷ (2005) Unreported Case No. 2586/1/Q/1426.

¹⁵⁸ A M Al-Jarbou 'Judicial Independence: Case Study of Saudi Arabia' (2004) 1&2 Arab Law Quarterly 19, 25-26.

¹⁵⁹ E Hill 'Majlis al-Dawla: The Administrative Courts of Egypt and Administrative Law' in C Mallat *Islam and Public Law* (Graham & Trotman Limited London 1993) 207, 216-218 and E Hill 'Al-Sanhuri and Islamic law The Place and Significance of Islamic Law in the Life and Work of Abd al Razzaq Ahmad Al-Sanhuri: Egyptian Jurist and Scholar, 1895-1971' (1988) 3 Arab Law Quarterly 182,194.-195.

School was itself directly responsible for the conduct complained about which resulted in the claimed unjustified harm. Had the school not given the child an injection and used a photograph of him in training courses without consent then such harm would not have occurred. The unjustified harm is, therefore, clearly linked to the conduct of the school (the defender) and since these would be the acts of the staff of the school, it is likely that the court would have held the defender liable.

The facts of *M v Ministry of Education*¹⁶⁰ in contrast with *A v Ministry of Education* involved a public school. The claimant claimed that the principal of the public secondary school where D - his son - studied accused D of dealing in hard drugs. The principal's accusation was then spread among students, teachers, the supervision centre and education management staff. However, the Government's Narcotics Office cleared D of any involvement with hard drugs in response to the Principal's correspondence with it. Despite this, two weeks later, the school authorities deducted 15 marks from D's Conduct-Grades. The defender accepted this action despite having also received the letter from the Narcotics Office on the issue. The claimant's several complaints to the defender on the matter were rejected as baseless. He demanded the Board investigate the defender's officials, and identify everyone who had been negligent in the handling of his complaints. He also demanded compensation for defamation of his son's character.

At the trial, the defender presented some documents which proved the son's wrongdoing. It argued that the claimant's case for compensation ought to be dismissed. It maintained that the defender's son had been warned in accordance with regulations about several acts of misconduct and his parents notified accordingly. He was then penalised when he failed to correct his behaviour. The defender affirmed that its actions were in accordance with relevant regulations.

The Board dismissed the claim because the facts did not disclose *Khata* on the part of the defender. From the known facts, the defender was entitled to pass on evidence to the Narcotics Office against the student with regard to the discovery of substances suspected to be hard drugs. This it had done. It condemned the acts of misconduct of the student which were not befitting a student. It however, urged the defender to initiate measures to prevent or reduce to the minimum, opportunity for students to engage in such gross misconduct as had been established against the son of the claimant. On the demand for investigation and

¹⁶⁰ *M v Ministry of Education* note 157 supra.

accountability of the defender's officials, the Board held that it lacks jurisdiction to make such orders.

The decision of the Board in this case appears to be based on the position that while the school clearly falls within the supervisory jurisdiction of the defender, the facts do not disclose *Ta'ady*. The decision here would appear to satisfy the test set by the Board in *A v Ministry of Education* on the need to establish a clear case of conduct causing harm on the part of the defender to ground a claim in negligence.

It is suggested that if this case had involved a private school, as opposed to a public school, the outcome would have been the same. That is to say that the school would not have been found to have acted negligently. This is on the basis that an investigation was undertaken which revealed criminal conduct on the part of the student concerned. The school acted in an appropriate manner in order to address serious issues of suspected drug abuse. Indeed, failure to take any action in a case of this kind may have resulted in negligence on the part of the school, public or private.

b) Highways

With the increase in road network and better facilities for road transportation in Saudi Arabia in recent times, coupled with a considerable increase in the number of vehicles, there has been a marked increase in the number of highways cases decided by the Board on the liability of the state for delict. In *I v Municipality of Al-Madinah*¹⁶¹ the claimant alleged that his car was damaged in a collision with a pile of asphalt left on the road by the defender without any warning signs or barriers to close off that part of the road which was under maintenance to traffic. The claimant demanded compensation for the damage done to his car. The defender claimed that they had placed re-direction signs and closed the road off to traffic as road-repair work was carried out, and thus the accident was the sole responsibility of the driver. The Board summoned witnesses from the traffic wardens and officers who attended the scene of the accident at the time. Those confirmed that, at the time of the accident, the road was not closed and that there had been no warning or re-direction signs, from the start of the repair project works to the spot where the accident took place. The Board found the defender negligent for failing to put up re-direction or warning signs to highlight the works area on the road and awarded compensation to the claimant on the facts.

¹⁶¹ (2001) Unreported Case No 1535/1/Q 1421. See also similar facts in (2006) Unreported Case No 3323/1/Q 1426.

A case brought before the General Court which had a similar set of circumstances but was against a private company is *G v Saudi Telecommunication Company*.¹⁶² The claimant alleged that the defender was liable for a traffic accident in which he and his family suffered injuries and damage to his vehicle. He argued that such damage was a result of the *Taqsir* negligence of the defender. This is because the defender was responsible for a hazard on the road, in the form of a raised manhole, which had not been levelled nor clearly marked as a road hazard. The general court referred to the Traffic Agency accident report which stated that the 75% of the responsibility for the accident was attributable to the company. This was because it had failed to either level the manhole with the road or warn drivers of the oncoming hazard through signs. The General Court held the defender liable for 75% of the accident and awarded damages to the claimant. The court also upheld the attribution of 25% of the liability for the accident on claimant because he ought on the facts, to have exercised caution in the circumstances. The road was well-lit and the hazard was at the entrance of a road-services station; with fuel station and some shops. In *F v Saudi Telecommunication Company*¹⁶³ another case involving the same defender, the claimant was awarded damages for the damage to his car as a result of an accident caused by the defender failing to cover a manhole for which it was responsible. These cases demonstrate how in the context of road accidents the same principles of delict under Islamic law have been applied to both public and private bodies by the Board and the General Court for delictual liability supporting the view argued in this study generally.

The Board also granted the claim for negligence on similar facts in *T v Municipality of Al-Qaseem*.¹⁶⁴ The claimant claimed that he had an accident with his car as a result of an artificial hump constructed by the defender on a curved and downhill road with no warning signs to alert motorists. The accident obliged him to sell off the car very cheaply following the evaluation of three different car dealers. The claimant demanded compensation for economic loss arising from the sale of the car as a consequence of the accident. The defender argued that the hump was legal in terms of its conditions and location. The cause of the accident, which occurred at night, was excessive speed on the part of claimant.

The Board held that elements of delictual liability namely *Khata*, harm and causal link were established in this case. It was proven from the accident report by the Traffic Agency

¹⁶² (2007) Unreported Case No. 117/2 1427.

¹⁶³ (2010) Unreported Case No. 181812451247320001 1432

¹⁶⁴ (2008) Unreported Case No 271/7/Q 1429.

that the defender was in negligence. The accident report confirmed the *Khata* of the defender to be 50% because the hump was not compliant with the legal specification for humps in addition to the absence of signs to warn drivers of its existence and location. It emerged that the defender had been informed by the Traffic Agency twice before the occurrence of the accident, about the failure of compliance of the hump with legal specifications. The Board in this case affirmed the basic principle that the defender was liable for harm resulting from its failure to place necessary road-signs where relevant, in this case, to warn the driver of a hump, worse still, one constructed in violation of standard legal specifications and conventions for such structures. Therefore, it must be liable in part for the accident.

It does appear that the Board has a fairly straight-forward approach to the determination of traffic accident cases. This is because the Board relies heavily on relevant expert evidence relating to the circumstances of accidents. Indeed, it does appear that the approach of the Board in cases of this nature is to set the applicable standard as compliance with relevant legal regulations. In this line of cases, the Board investigates whether there was compliance with applicable legal standards. Failure of compliance with legal standards or relevant regulations generally leads to liability on the part of the defender public authority.

The Board, in a recent decision, also seems to recognize a freak or rare incident which causes damage as an extraneous cause. In *R v Ministry of Transport*¹⁶⁵ the claimant was travelling with his family in his car along a mountain route when a rock suddenly fell on his car. On impact, the rock smashed the windscreen killing one of his sons and severely injuring the other. The incident traumatised his family and left the car seriously damaged. He demanded compensation for all the damage which he attributed to the negligence of the defender in carrying out the duty of maintaining the road for users. The defender submitted a report which was prepared by the police after the accident in which it was stated that the claimant and his wife had expressed their satisfaction that the rock-fall was an accident and they had no desire to proceed against any one in respect of it. The defender further argued that it had exercised the required care to maintain and monitor the road. The Board dismissed the claim based on the fact that the defender exercised due care by placing warning signs indicating the road hazards. It also provided maintenance of the road. It went further to hold that as the falling of the rock was a freak and rare incident, and the claimant had dropped his private right (to seek compensation) for the accident, the claim had to fail.

¹⁶⁵ (2008) Unreported Cases No. 6235/2/Q 1429.

The Board appears to have suggested, albeit in passing, that rare occurrences of this nature even where there is at least a remote, but real, possibility of its occurrence, will not be ground for liability against the potential defender. On relatively similar facts to this case is the earlier decision of the Board in *S v Municipality of Damaam*.¹⁶⁶ The claimant claimed that a date palm fell on his car causing damage to it. He traced the accident to a tree infection which eats away at the root of the date palm, and to the failure of the defender to maintain and treat the tree. He demanded compensation for repairing the car. The defender stated that the falling of the palm tree was an act of God and not negligence from it. It added that the nature of the infection was not easy to recognise. The Board held that the defender was in *Taqsir*, negligence of not treating the diseased tree which led to the accident. According to the Board, the defender ought to regularly monitor and maintain what is under its responsibility but the defender was in *Khata* on not treating the diseased tree. In other words, there is a duty of regular inspection not only a duty of action when the problem has become obvious. The Board awarded the assessed difference between the value of the car before and after the accident. It is arguable that with a little more diligence, the relevant public authorities would have identified and prevented the harm caused to the road users involved. The condition of the tree could be diagnosed from scientific observation, of the forestry services.

It is suggested that had circumstances of the *S v Municipality of Damaam* case arisen in a private setting, such as the grounds of a hotel, the decision would have been the same. This would be on the basis that it is possible to detect disease in the trees and to take preventative measures. Liability would only arise where the hotel owners or owners of such premises fail to take such preventative measures. A firm basis for this in classic Islamic law is the principle of *al-Taharuz* and *As-Salamah*, social harmony which as described in chapter four requires individuals, groups and institutions to conduct their affairs (and business) in a manner consistent with the safety, rights and privileges of others. Put in the context of Scots law, it is reasonably foreseeable that if the trees are not maintained they might fall and cause injury or loss to guests or staff.

c) *Health and Public Safety*

There have been a number of claims against public authorities for conduct allegedly resulting in unjustified harm in relation to health and public safety. These commonly arose in the circumstances of the use or enjoyment of public facilities, particularly beautification

¹⁶⁶ (2004) Unreported Cases No. 262/3/Q 1424.

projects and leisure facilities provided by public authorities, especially by local authorities. In *S v Al-Madinah Municipality*¹⁶⁷ the claimant claimed that his 3 year old son fell into an artificial waterfall constructed by the defender. The boy was submerged in dirty water for a while before being rescued by some people around at the time. The incident was reported to the Civil Defence Corps. The boy suffered serious brain damage and paralysis on a side of his body as a result of the accident. The claimant claimed that the height of the fence of the artificial waterfall fell short of general standards of safety for such structures. The claimant demanded compensation for the harm suffered by his son as a result of the defender's negligence in failing to put in place necessary safety measures while constructing the waterfall. The case for the defence was that the waterfall was constructed in furtherance of its duty to beautify the city and the construction was in accordance with required safety standards. The accident was rather due to the family's negligence. Thus, the claim ought to be dismissed.

The Board directed the Civil Defence Corps to provide it with a detailed report about the waterfall. The report indicated that their waterfall was poorly maintained and lacked adequate warning signs around it. It emerged also that the defender had been advised on several occasions by the Civil Defence Corps of the need to take necessary safety measures when constructing such waterfalls and fountains without positive action on the part of the latter. The Board sought and obtained a medical report from the hospital which treated the son of the claimant following the incident. The report confirmed the claims of the claimant regarding the effects of the accident on the boy.

The Board upheld the claim of the claimant. The facts disclosed clear *Taqsir*, negligence on the part of the defender in the construction and maintenance of the waterfall and fountain. In particular, the Board stated that the occurrence of two previous accidents within four years at the waterfall and the failure to act on the advice of the Civil Defence following each incident was clear evidence of *Taqsir*, negligence on the part of the defender. While it recognised the value of such waterfalls, it emphasised the need to secure and maintain them properly in the public interest. In all events, such safety and maintenance measures should not detract in any way from the value of such facilities. The defender was obliged to pay compensation to the boy for the loss of his physical and mental capacities.

¹⁶⁷ (2004) Unreported Case No. 2432/1/Q 1424.

In reaching its decision in *D v Al-Madinah Municipality*¹⁶⁸, the Board made an interesting comment. It explicitly referred to *S v Al-Madinah Municipality* stating that similar facts justified their judgment in the current case. This reference is important given the general reluctance in the courts of Saudi Arabia to accord precedent a status similar to that it enjoys within the common law system in particular. The facts and decision of the Board in the earlier case of *S v Al-Madinah Municipality* are indeed quite similar to *D v Al-Madinah Municipality*.

In this case the claimant claimed that his son drowned in a fountain in a public park due to failure of the defender to take necessary safety measures while constructing the fountain. The defender stated that the accident was due to the family's negligence. The Civil Defence Corps (Emergency Rescue Services) report provided at the instance of the Board confirmed the absence of barriers that should prevent pedestrians from falling into the fountain. Its report referred to the fountain as a 'potential graveyard' for children.

The claim was upheld by the Board. According to the Board, the facts revealed that the defender neglected its duty with regard to the construction of the fountain. It noted that the fountain had in fact been constructed in breach of health and safety advice issued by the Civil Defence to the defender on the structure. As a result, the defender is to be held liable for causing death of the child by drowning due to the failure to provide necessary safety measures required by law around the fountain.

The position in private law appears to be the same in cases of this nature. In this regard, it is relevant that a judge from the General Court of Al-Madinah, in the course of a research visit by this researcher to the court, recalled a case decided by another judge who has since been promoted to the Appellate Court. In that case the claimant's child was injured after falling into a hole dug on the road by a private contractor in the course of construction works along a major road. The defender was held liable for failure to take appropriate safety measures. In this case, like earlier ones discussed, the General Court applied the same general principle of delict in Islamic law in a case involving a private body just as the Board did on similar facts with public authorities.¹⁶⁹ Here again, it is germane to note that the principles of *Al-Taharuz* and *As-Salamah* earlier mentioned applies to impose the duty on the defender to be mindful of the safety of others in the conduct of his/her affairs.

¹⁶⁸ (2006) Unreported Case No. 276/5/Q 1427.

¹⁶⁹ Unfortunately, the case report was not available to adequately reference this case. However, it is assumed that the judge is a reliable source given his standing within the legal system and society.

d) Welfare and Social Services

The Board has also had to deal with a growing number of cases around the provision of welfare and maintenance of social services. This is not in the least surprising given the declared commitment of the Saudi state to welfarism as state policy. Articles 27, 30 and 31 of the Basic Law stipulate the obligation of the state to provide public education, care of public health, guarantee the right of the citizen in emergencies, sickness, disability, and old age. They similarly provide for social security system.

In a recent case, *M and N v Ministry of Health*¹⁷⁰ the claimants stated that they had spent around 12 years asking the Ministry of Health, Ministry of the Interior and the Eastern Province to search for their son. He had been kidnapped from his mother at his birth in a public hospital. The baby had gone missing after a lady dressed as a nurse requested to take him away for vaccination in another part of the hospital. The claimants were highly traumatised by the incident. They demanded that defender take serious responsibility for looking for their son whether he was alive or dead. They also demanded compensation for the trauma they had suffered from the situation.

The defender denied it had not taken the case of the missing baby seriously and detailed the efforts made to recover the baby. It had cooperated fully with the security agencies on the matter. The defender claimed it was still awaiting the results of the investigations being carried out by the security agencies since the case was criminal in nature. Thus, the defender demanded that the case be dismissed because it is as much a victim of loss of the claimants as the claimants themselves.

The Board noted that normally cases had to be brought within five years of the incident alleged to have given rise to liability. In this case, the case was brought after twelve years by the admission of the claimants, but the Board noted that Article 4 of the Rules of Procedure and Proceedings of the Board, which is relevant to the point, also makes provisions for exceptional circumstances. It provides that a case can still be accepted by the Board if the claimant has a legitimate excuse for any delay in bringing the proceedings but this must be proved beforehand. In this case the incident was the kidnapping of the baby twelve years ago. However, since the defender admitted that the search has been going on, the period of time is counted from the date of knowing the baby's fate. Thus, time is frozen

¹⁷⁰ (2008) Unreported Case No.777/1/Q/1426.

in the present since the baby's fate remains unknown and the five year rule can only apply from when the circumstances of the baby have been determined.

The Board continued that Islamic Law prohibits harming others or inflicting on them any form of injury. The defender is obligated to remove the harm and restore the victim to his/her normal situation if possible or compensate for any loss suffered by the victim or both. This is apart from any punishment due for a criminal act. The Board noted that the fact that the missing baby was kidnapped inside the hospital was not in dispute, and it was the hospital management's responsibility to keep this baby and all the patients safe. Where the baby is missing from the hospital, this is evidence of the *Taqsir*, negligence of the hospital in performing its duty as a result of which this incident had occurred. If the hospital had observed its duty properly felons would not have had the opportunity to commit this crime. Since the core of liability in Islamic law for delict and compensation for it is the occurrence of (unjustified) harm as stated earlier, and the occurrence of harm to the claimants in this case is a result of the negligence of the hospital, there is an obligation on the hospital to compensate the claimants. The Board stated that:

in cases where a party that directly commits harm does so in conjunction with another who took an indirect part in causing the harm, then the liability will be on the former. The latter will ordinarily not be liable except in certain special cases.¹⁷¹

According to the Board, such 'special cases' include where the former acted under duress. Another is where the direct act (causing harm) is a progression of the initial causal act. Another category of such 'special cases,' it is said, is where it is impossible to fix liability on the direct defender because his/her identity is unknown for example.¹⁷² Based on this last exception, the Board held the defender liable for *Taqsir* (literally 'falling short of required standard'), negligence. In rejecting the argument of the defender, the Board emphasised that the specific incidence of the baby going missing and the harm resulting from that to the parents, the claimants, necessitates compensation. For the Board, the fact that the baby had still not been found after such a long period as well as the mystery surrounding the perpetrator of the act (whether an employee or not of the defender) does not affect this position. Since the negligence of the hospital had been established and such negligence caused the occurrence of harm to the claimants, the Board held that the latter

¹⁷¹ Ibid. at 5.

¹⁷² Ibid.

had the right to demand compensation. The Board awarded the sum of SR. 200,000 (equivalent to 40,000 UK pound sterling) to console the baby's parents for their missing baby and to compensate for the psychological trauma and material loss they had suffered.

The classic jurist, Ibn Rajab, offers some insight on the situation here which on the face of it, appears to involve 'multi' causes. According to him, 'if the direct source of causation does not involve *Ta'ady* then there is no liability on its part and liability will be based on indirect source of causation (who is in *Ta'ady*). However, if the direct source of causation involves *Ta'ady*, then both sources of causation will be liable.'¹⁷³ The first part of the proposition is clear enough, the direct cause here would refer to a person becoming involved, whose intervention did not break the chain of causation. This is best understood in the context of the 'instinctive' intervener as decided for instance in the case of *Scott v Shepherd*.¹⁷⁴ In that case, the defender threw an explosive firework in a crowd. It landed in front of *D* who threw immediately picked it and threw it away. It then landed in front of *H* who did the same and it landed in front of and injured the claimant. The court held the defender liable on the premise that the intervening acts of *D* and *H* did not add 'new force' to the initial act of the defender. In other words, they had not broken the chain of causation as their reactions were instinctive, and the initial unlawful act of the defender was the cause of the injury to the claimant.

However, it is suggested that the latter proposition of Ibn Rajab is to be interpreted to mean that the indirect source of harm will be held liable along with the direct only where the chain of causation has not been broken by *novus actus interveniens*. In other words, this will be the case where intervention (the most recent cause in time), the *direct* cause, is itself unjustified, but it also operates in a manner that does not alter the delictual conduct of the indirect cause. The decision in *M and N v Ministry of Health* can then be justified on the grounds, as the Board held, of its negligence which could foreseeably result in harm. Thus even if the *direct* source of harm were to be later identified, a successful action could arguably be maintained against the two albeit on different grounds. In any event, the Board had emphasised that this was a special case which constitutes an exception to the general rule in the event that the direct source could not be traced.

Finally, it is relevant to consider what the General Courts would do given the foregoing facts when a private defender was involved. There is reason to suggest here again that if

¹⁷³ A bin Rajab *Al-Qaawa'id* (Dar Al-Kutub Al-'Ilmiyyah Beirut) 597.

¹⁷⁴ (1773) 96 ER 525.

the same circumstances arose in a private hospital, the outcome would have been the same. This is because the child being missing is clear evidence of the negligence of the hospital. Had the hospital acted diligently, the child would not have gone missing, irrespective of whether the person responsible was a member of staff or an outsider that is responsible. The private hospital, like the public one has the similar duty to secure the safety of its users; patients and visitors based on the principles of *al-Taharuz and As-Salamah* and would not be excused from it any more (or less) than its public counterpart.

5.3.2.2 Breach of Statutory Duty

As discussed earlier, the significance of the action for breach of statutory duty in Scots and English law is that the alleged delict arises from breach of a duty created by a statute. The breach is determined by consideration of the legislative intent. The question basically in such cases is whether the alleged conduct runs contrary to the intention of the legislature on the issue in question with respect to that public authority. Thus, the advantage it has over the action in negligence is that there is no need to prove fault or in some cases, the statute provides for a higher standard of care to be observed. The conditions required for a successful action of breach of statutory duty as stated above are first, whether the claimant belongs to the category of persons the statute is intended to protect, second, whether the duty was specifically imposed on the defender by the statute and third, the duty was breached by the defender. Finally, it has to be established that the said breach of duty caused the alleged damage.

Breach of statutory duty has to do with the role of the state and the extent of state involvement with the society. Although current governance in the Saudi state involves extensive interaction with the society, this is more recent than the United Kingdom where special powers and special duties were given to the public bodies hundreds of years ago as a result of industrialisation. Saudi Arabia had not gone through the process of industrialisation until recently and lacked a strong central government since it was previously a traditionally tribal society. Indeed, the current structures of governance have only been (and continue to be) developed in the last four or so decades. This has followed on the discovery of oil in the country and the considerable wealth that has flowed from that.

The result of the country's oil wealth has been the rapid transformation of a society which was essentially pastoral (in some cases, nomadic) into a modernised and developing country. The challenges of meeting the desire for social and infrastructural development and establishing the relevant state institutions for conducting the affairs of governance have been considerable. Many of the institutions, desirable as they may be, are essentially not grounded in the social experience of the people and inevitably gaps emerge which are either not contemplated or inadequately addressed. Thus the state-society relations are severely tested and the work of public authorities, also in the context of poorly developed civil-society structures, can be unduly problematic quite unlike what prevails in a country like the United Kingdom.

The gap between the capacity of the state to provide certain infrastructural and social services and the ability of the citizenry to engage appropriately with such provisions inevitably leads to difficulties on both sides. Thus, analysis of the work and liability of public authorities in Saudi Arabia in the contemporary period can be daunting given the state of development of law and social capital. Social capital according to Sander and Lowney is 'those voluntary means and processes developed within civil society which promote development for the collective whole.'¹⁷⁵ In the context of Saudi Arabia, the relevant civil society networks that assist the process of societal engagement with governance, as earlier alluded to, are few and very much in their infancy.

Notwithstanding the circumstances briefly described above, as has been mentioned in chapter two, the principles of Islamic law including *al-Maslaha al-Mursalah* are designed to make it possible to lay down laws or regulations in order to meet new situations and developments. Such legislation may define the powers and duties of public authorities. It is the construction of such legislation and where there have been breaches of them that can lead to claims of breach of statutory duty by public authorities. Currently, several regulations, resolutions and orders have been issued by the government of Saudi Arabia to organize the affairs of state and various matters affecting its citizens. Considerable effort has been made to ensure that they are in accordance with *Shari'ah*. Of specific relevance in this aspect of the research are the types of legislation that impose duties on certain public authorities.

¹⁷⁵ T. H. Sander and K Lowney 'Social Capital Toolkit' (2006) available at <http://www.hks.harvard.edu/saguaro/pdfs/skbuildingtoolkitversion1.2.pdf> (Site visited 8 August 2010).

In one case,¹⁷⁶ the law relating to immigration procedures for foreign domestic servants provides that:

After completing passport processing, Customs must hand female domestic workers over to their employers or sponsors, and contact employers who fail to attend to receive their workers. If an employer or his legal representative fails to attend to formally receive his workers, twelve hours after the arrival of the flight, Customs and Passport Department must move the domestic workers concerned over to the Domestic Workers Welfare Office, of the Ministry of Labour and Social Affairs which should contact the employer.

According to the Board, the defender, the Immigration Department failed to comply with this regulation. It did find out that the said maid (who escaped) was not with the group of domestic workers who were transferred from the passengers' arrival hall. Thus, the defender failed to ensure the movement of the domestic worker to the Domestic Workers Welfare office as prescribed by law. This failure resulted in the loss of the costs incurred in bringing the domestic worker into Saudi Arabia. The Board held that the defender was in *Khata* and was liable in damages to the claimant.

Similarly, in *Q v Municipality of Riyadh*¹⁷⁷ the claimant stated that while driving on the road, a camel suddenly got in his way, causing an accident in which his car was damaged. He pointed out that the scene of the crash was close to the camel market which was under the control of the municipality. The claimant requested that the defender should be made to pay him compensation for damage to his car. The defender's position that this was an unauthorised market was rejected by the Board. The Board found that there was a failure on the part of defender in ensuring the safety of lives and property within its territory in contravention of Article 5 of the Municipal Law which provides that:

The municipality shall perform all work relating to the organization, repair and beautification of its regional territory, and shall maintain the area's good health, comfort and safety; and in so doing it can take all necessary measures.

¹⁷⁶ *W v Immigration Department* (2006) Unreported Case No. 5020/1/Q 1427.

¹⁷⁷ (2008) Unreported Case No 1029/1/Q 1428. The case now on appeal.

In contrast to this, the court would seem to be prepared to recognise wide latitude to the exercise of power (which goes with discretion as against just duty) by security forces. The facts and decision in the recent case of *O v Directorate for General Security*¹⁷⁸ are relevant on this point. The claimant stated that his tractor was burnt down by arsonists in an area under the control and monitoring of the defender. He alleged the incident was a result of the *Taqsir*, negligence of the defender and claimed compensation for the value of the tractor. The defender argued that it had taken all appropriate measures when it received information about the incident. The Board held that the defender had taken all necessary steps on the issue. Importantly, it dismissed as unreasonable, the ground that the defender was liable based on its duty to secure the specific area where the incident occurred. It stated that the security agencies had the duty to secure the whole of the country and not just the area where there was unrest. However, this does not mean that the defender will be liable for all criminal acts of theft or loss or damage to property done by others. Rather, what is required of the security agencies is *badhl al-'inaayah al-mu'tadah*, the deployment of regular (or customary) measures to prevent crimes, apprehend and bring criminals to justice. This standard, it further held, had been met and there was no *Khata* on the part of the defender.¹⁷⁹

In general, cases of breach of statutory duty, unlike cases of allegedly exceeding statutory powers remain few and far between in Saudi Arabia. Recently however, the Board had to decide a number of claims from several members of the public on a property development scheme. *H v Ministry of Commerce*¹⁸⁰ is a fairly representative case on this incident. The claimant stated that a real estate agency announced the launch of real estate shares in mass media. Advertisements included references to a letter of authorisation by the Ministry of Commerce for the launch of this sale issued by the Ministry. The claimant participated in the share-holding project according to the said project's contract, bond and certificate, trusting the authorisation by the Ministry of Commerce for its launch. The claimant then found out that the share-holding project was related to a non-existent piece of land. The real state agency's owner who launched the project had disappeared after receiving the shareholders' funds, and that he was actually not the owner of the land. He claimed that the action of the defender was in violation of the regulations guiding the process.¹⁸¹ The claimant brought this case demanding compensation on the basis that the defender

¹⁷⁸ (2010) Unreported Case No. 268/2/Q 1430.

¹⁷⁹ The case is now on appeal.

¹⁸⁰ (2007) Unreported Case No. 3363/1/Q 1427.

¹⁸¹ Ministerial Resolution No. 5966 of 2/2/1424 and the Supplement by Council of Ministers Resolution No.7/D / 21149 – 8/09/1403AH.

breached the law by granting such authorisation to the real estate agent without verifying the ownership of the land as required by law.

The defender argued that all its actions regarding the scheme were taken in compliance with the relevant laws. The instrument the claimant referred to with regard to monitoring of real estate share-holding schemes does not stipulate that the agency launching the scheme must be the owner of the land. What was required by Article 1 of the Ministerial Resolution was that the land for which the share-holding scheme is launched must be owned by a valid legal instrument that meets the necessary legal conditions.¹⁸²

The Board dismissed the claim. It held that the relevant legislation did not require that the real estate agent must own the land. The amendment requiring the real estate agent to own the land was only made after the defender had acted on the law as it was at the time in granting authorisation to the real estate agent involved in the case. Thus there is no ground to sustain the allegation of breach of statutory duty leading to the claimant's loss.¹⁸³

Curiously however, in deciding *J v Ministry of Commerce*,¹⁸⁴ a similar claim based on the same incident, another judicial panel of the Board held that the default on part of the defender that the claimant alleges – even if proven - cannot be the direct cause of the alleged damage and for which compensation is demanded. It stated that from a jurisprudential point of view, there must be a direct causal link between the alleged damage and the act that caused the alleged damage. In other words, the damage must be a direct result of the act itself. The act of licensing the Real Estate Company is not the act that caused the damage of the claimant. If the Ministry's work is not the direct cause of the damage to be compensated for, the causal link between the conduct of the Ministry and the damage is not established. Therefore, the Ministry cannot be held responsible for such damage. Rather than leaving the issue in this case in the way it dealt with *H v Ministry of Commerce* as a case where there has been no breach of statutory duty, the court made what is at best an *obiter* suggesting causation was also in issue here.

This aspect of the decision, specifically that the action of the Ministry, even if taken under the new law would not make it liable is a failure to come to terms with the nature of

¹⁸² Following the incident but before the litigation, the government amended the legislation in this regard to require that such real agent must be the owner of the land. See Council of Ministers Resolution No. 220 - 22/08/1426AH.

¹⁸³ See also *D v Ministry of Commerce* (2007) Unreported Case No. 282/1/Q 1427 and *M v Ministry of Commerce* (2007) Unreported Case No. 4138/1/Q 1427.

¹⁸⁴ (2006) Unreported Case No.3231/1/Q 1426.

statutory duty of public authorities as specified. Where, as in the new law, the Ministry grants authorisation to a real estate agent without compliance with the relevant statute leading to loss by subscribers, that would constitute a breach of the duty imposed on it by statute for which it would be liable to a claimant in respect of such consequential loss. The public would be entitled (unlike the ambiguous position, under the old provisions) to assume that the relevant government agency had acted in compliance with law in granting such authorisation in the first place.

It is argued here that the correct approach on the facts would be to determine whether or not the act of the relevant public authority was carried out in violation of statutory provisions in the first place and whether this constituted an independent and/or continuing source of the consequential damage suffered by the claimant. Otherwise, it would mean regulatory authorities are allowed to conduct their functions without compliance with relevant statute and yet be free from responsibility for any consequential losses suffered by end-users of the services or products for which they have certified their providers.

In view of this, it can be argued that any breach of statutory duty that causes unjustified loss can lead to liability in Saudi Arabia on the part of the public authority. In comparative terms, however, breach of statutory duty potentially has a wider reach under Saudi law than under Scots and English. It is sufficient that the general requirements for liability (*Ta'ady, Darar, Ifdah*) have been established and there is no separate requirement, as there is in Scots and English law to prove that the claimant is within the classes of persons whom the relevant statute is intended to protect.¹⁸⁵ Indeed in *X v Bedfordshire County Council*¹⁸⁶ mentioned above, the House of Lords held that breach of a statutory duty did not automatically give rise to any private law cause of action. Yet such a right might arise where, on its true construction, the statute imposed a duty for the protection of a limited class of the public and there was a clear parliamentary intention to confer a private right of action for such breach, on members of the relevant class.

According to the Law Lords, there is no general rule for ascertaining whether a statute conferred such a right of action. The absence of a remedy for breach and a clear intention to protect the limited class, are indications that a private right of action existed. Even the existence of some other remedy was not necessarily decisive to preclude the existence of a

¹⁸⁵ Howes note 18 supra at 2.

¹⁸⁶ *X v Bedfordshire* note 68 supra.

private right.¹⁸⁷ The House of Lords was clearly faced with the prospect of extending the liability of public authorities in this case, a prospect which it resisted. This was the recognition of a novel category of liability of public authorities, namely liability for the mistreatment of children for whom they had statutory powers to protect.

It is interesting to consider how the Board would address a case of a similar claim under a similar statutory scheme should it arise in the future, particularly given its responsibility to apply the principles of Islamic law of delict. Would a public authority be held responsible for any failure to act and protect the best interests of the children? In view of the principles of Islamic law of delict, the Board would more likely than not, decide the case differently from the House of Lords. This is because, as stated above, any breach of statutory duty that causes unjustified harm could attach liability on the part of the public authority unless of course the court declares such duty inconsistent with the *Shari'ah* in which case the issue goes back to the constitutionality of the relevant statute in the first place. This is specifically when a public body had a duty rather power which the latter would lead to a different result. Any neglected child clearly suffers unjustified harm by the conduct of the prospective public authorities failing to protect their interests where there has been clear evidence of mistreatment. Had the prospective public authority taken appropriate steps to protect the interests of the child based on the available evidence, the child would not have suffered the unjustified harm. The existence of the unjustified harm and the failure of the public authority to act on an issue within its statutory remit would have grounded liability on the part of that public authority under Islamic law of delict in the same way that such liability would have attached to a private person under similar facts.

From the foregoing, it appears liability for breach of statutory duty is wider in Saudi law than in the UK. This may be due to the fact that the legal concept remains in its infancy and has yet to evolve as it has in the UK. Under Saudi law, in order to establish a breach of statutory duty the key component regarding the intention of the legislature is not currently closely scrutinised. Importantly, in cases involving the security services, the Board has shied away from imposing duty but has preferred, instead, to consider statutory powers. This is because the security services have a wide degree of discretion in respect of carrying out their responsibilities which public bodies, in other settings, will not have.

¹⁸⁷ Ibid. at 728-735.

5.3.2.3 *Responsabilite Sans Faute*: ‘Lawfully’ Caused but Unjustified Loss

The focus in this part of the chapter is on liability arising specifically in the context of the nature of the functions of public authorities. In carrying out their assigned duties and exercise of their powers, they may in the ordinary course of events cause loss, sometimes of a serious nature, to individual members of the public. These are activities of public authorities which cause damage to an individual or (a few) individual members of the public but which are intrinsically ‘not unlawful in a public law sense.’¹⁸⁸ The loss or harm occasioned by such legally sanctioned activities (and this would include administrative decisions) would not normally lead to liability in Scots or English law under the principles of negligence or breach of statutory duty. In Scots and English law, liability without fault (strict liability) is confined to a limited range of situations and does not help a claimant where the conduct causing the loss has been authorised by statute as it often will be in cases brought against public authorities. Specifically, in the case of some statutory powers exercised for the public benefit it is likely that a few individuals will suffer special loss. Their loss is a consequence of attempts to improve public welfare. They are, therefore, bearing a burden in the public interest.

In his study on state liability in tort, Fairgrieve regretted the difficulty of comparing this area of law which he refers to as ‘lawfully caused loss,’ in English and French law. This is due to the different conceptions of the concept of *faute*, fault in both systems of law.¹⁸⁹ The attitude of the UK courts on this issue is substantially conditioned by the reasonableness test. As Booth and Squires have noted:

...to establish liability for the tort of negligence it must generally be shown that the defendant has acted unreasonably. *If a claimant is exposed to the risk of harm by the activities of a public authority, but the authority was not acting carelessly, the authority will ordinarily not be held liable pursuant to UK tort law.*¹⁹⁰

The result of this approach is that only very few claims can be maintained against public authorities under the type of situations envisaged here. Two notable underlying factors can be identified for the preferred approach of the courts on this matter. They both go to the root of the dilemma the courts have faced in dealing with public authority liability. The

¹⁸⁸ D Fairgrieve *State Liability in Tort A Comparative Law Study* (Oxford University Press Oxford 2003) 136

¹⁸⁹ Ibid.

¹⁹⁰ Booth and Squires note 2 *supra* at 249. Emphasis mine.

first lies in maintaining a necessary balance between the pull of ‘two competing impulses,’ namely the need to prevent a ‘floodgate’ of litigation molesting public authorities and impeding the performance of their function on the one hand, and ensuring compensation for deserving victims of ‘serious failures’ of public authorities, on the other hand.¹⁹¹

The second lies in the fact that courts are obliged to protect the principle of parliamentary sovereignty in the UK legal systems. This indeed may subsume (at least in an implied way) the first. As actual or deemed creations of the parliament, public authorities in the Scots and English legal system are to be given the latitude to carry out the duties and exercise the powers granted to them by parliament without hindrance as a key expression of the doctrine.¹⁹² As Booth and Squires have further noted, this is not the case in some other legal systems.¹⁹³

By contrast, in French administrative law the concept of *faute* has been given a wider interpretation and French administrative law has also developed a concept of responsibility based on risk. As a result, the French administrative courts may award compensation in a range of situations where the administration’s actions would not count as fault in Scots or English law. It therefore provides an appropriate frame of reference for investigating Islamic law constructions of public authority liability in relation to cases of the nature described above. This may be due in part to what has been identified as the likely historical link between the two. It will be recalled that some scholars have made the point that *Diwan al-Madhalim* is akin to the French *Conseil d’etat*.¹⁹⁴ Indeed, there is more than a passing connection between the Islamic and French legal systems in the past and present in some respects.¹⁹⁵

Aside from the historical factor, the Board appears to have accorded considerable recognition to what can be referred to as ‘lawfully caused loss’, much in the French sense of *responsabilit  sans faute* but which it is preferred to refer to in this study as ‘lawfully

¹⁹¹ Fairgrieve note 188 supra at 144-145.

¹⁹² Ibid.

¹⁹³ Booth and Squires note 2 supra at 249.

¹⁹⁴ See chapter three supra. However, it has been noted in this study that the reverse is more accurate to the extent that the *Diwan* historical predates the *Conseil*.

¹⁹⁵ There is indeed literature that suggests the Islamic legal system in North Africa and Sicily influenced other parts of continental Europe and even United Kingdom. See for instance J A Makdisi ‘Islamic Origins of the Common Law’ (1998-99) 77 North Carolina Law Review 1635 and M Lima ‘English Common Law and Islam- A Sicilian Connection’ (2008) Best of Sicily Magazine available at: <http://www.bestofsicily.com/mag/art283.htm> (Site visited 15 August 2010).

caused but unjustified loss.’¹⁹⁶ Even more relevantly, the Board has directly referred to the concept of *al-mas’uliyah ‘ala asas al-makhatir*, ‘risk-based liability’ and *mabda musawah al-afraad amam al-takaleef al-‘aamah*, ‘egalite devant les charges publiques’ both of which have been identified as the two distinct (though sometimes conflated) principles constituting *responsabilite sans faute*.¹⁹⁷ The foregoing brief exposition is the basis for the adoption of the frame of French law for the following analysis of this aspect of the Board’s work.

The Board has demonstrated a readiness to award compensation for lawfully caused but unjustified harm to individuals across virtually the entire spectrum of government activities, particularly those of a nature that involve potentially dangerous activities. Thus a number of decisions around individual loss arise from activities such as infrastructural development, provisions of social services like water and fire-fighting.

Expectedly, the Board has been guided by certain considerations in coming to a decision on this line of cases. A useful way to commence an analysis of the jurisprudence of the Board in its determination of lawfully caused but unjustified loss is to interrogate whether Islamic law forms its basis. This is important in view of the implication of the finding on that for the jurisdiction of the Board since it is required to determine cases on the basis of Islamic law. The approach here will be to examine the Board’s own cases for answers to these two questions.

The Board has clearly stated the recognition in Islamic law of lawfully caused harm in many of the cases. In an old case, *Z & 29 Ors v Municipality of Riyadh*¹⁹⁸ the municipality constructed a multiple-floor parking in a residential area. The residents of the area brought this action complaining about the project alleging that it blocked their access to some streets leading to the main road and violated their privacy as users of the park had virtual complete view of their compounds. The building also blocked off the sun and the air and separated their homes from the commercial centre which led to depreciation of the value of their properties. They complained to the defender who did not respond. They made a claim to the Board and demanded compensation for their loss. The defender argued that the parking was far away from the homes of the claimants and it agreed to erect screens to address the complaint of privacy.

¹⁹⁶ Or ‘lawfully caused but unjustified harm.’

¹⁹⁷ See Fairgrieve note 188 supra at 137-138 who has also noted that the two principles are not mutually exclusive.

¹⁹⁸ (1985/86) Unreported Case No. 458/1/Q 1406.

The Board granted compensation to the claimants on the basis of the Islamic law principle that '(unjustified) harm must be removed' in accordance with the Hadith '*la darara wa la dirara*.' According to the Board:

... it is unfair to leave an individual or a group to bear the damage caused by lawful administrative activities when the damage exceeds a certain level and it is proven the individual did not commit any *Khata* or contribute in the harm emanating from the administration's activities.¹⁹⁹

Recently, the Board reaffirmed this view in *T v Municipality of Makkah*.²⁰⁰ The claimant alleged that he owned a plot of land and the defender did some asphaltting works in the area where his land was located. As a result, the street which the land looks out onto was raised. This resulted in the destruction of the front-view section of the fence, damage to the gate and the electricity meter, and covering over asphalt work the claimant had done before. The defender also filled and covered over the water well which had been in the land. The claimant demanded full compensation for all the damage to his land.

The Board upheld his claim. It stated that it had no doubt the objective of the defender was to achieve public good and to benefit a great number of citizens by easing their travelling on even, paved roads though where the action, which is in the public interest negatively affects the private interests of some individuals. According to the Board, this is what the public authority is expected to do. The Board further held that the damage done to the claimant as a result of the defender's work were not the result of *Khata*. However, since there is established damage arising directly because of the defender's conduct compensation is due because

there is another kind of compensation based on more comprehensive and expansive foundations – *although it is rare and less than that which depends on Khata*. This is the principle of equality amongst people regarding public expenses.²⁰¹

The Board went on to explain that this means that if a public authority took an action for the public good and caused damage to an individual, it is not fair for that person to bear the

¹⁹⁹ Ibid. at 12-13.

²⁰⁰ (2004) Unreported Case No. 3746/2/Q 1425.

²⁰¹ Ibid.

cost alone. The individual ought to be compensated for such damage. This, it reiterated, is based on the saying of the prophet ‘There should be neither causing of harm nor reciprocation of harm.’ The principle of ‘removing harm’ declares the importance of removing harm, because it is a form of injustice, and hence it is forbidden in Islamic law (*Shar’iah*). Such injustice should be prevented from taking place, and if it does, it should be removed.

There are other cases that make the same point and direct attention to the distinctive nature of this line of cases. The Board stated in *S v Civil Defence Corps*²⁰² that *al-mas’uliyah ‘alas al-makhatir* ‘risk-based liability’ requires only establishing the (unjustified) harm and the causal connection between the harm and activity of the public authority. The property adjacent to the claimant’s caught fire. In accessing it, the defender (the fire-fighting division of it) had to pass its hose and related equipment over the claimant’s mud-built house. In the process, the house of the claimant was damaged and actually collapsed. He demanded compensation for the loss of his house. The defender stated that during the process of extinguishing the fire, the house on fire which was a semi-detached property with that of the claimant, collapsed. This led to the subsequent collapse of the claimant’s house. It was only carrying out its duty without intent to cause damage or injury.

The Board found for the claimant despite holding that the incident was not due to *Khata* of the defender. It stated that the conduct of the defender in the fire incident was lawful but the harm occasioned by it to the property of the claimant was unjustified thereby necessitating compensation. This is in line with the Islamic principle that (unjustified) harm must be removed.²⁰³ Thus it can be concluded that Islamic law does recognise lawfully caused but unjustified harm. ‘Lawful’ in the sense that there is a valid power or duty granted to the public authority to act in carrying out the activity leading to the harm but unjustified (even in the absence of negligence) because it causes harm to an individual or group and prejudices their interest in a *special* way.

Similarly, in *B v Municipality of Abha*²⁰⁴ the Board stated that:

The defender is obligated to remove such harm and compensate the claimant for the loss he suffered as a result of this work *which was not*

²⁰² (2006) Unreported Case No. 3843/1/Q 1426.

²⁰³ Ibid. at 4.

²⁰⁴ (1983/84) Unreported Case No. 740/1/Q 1404. Emphasis mine.

aimed at benefiting him alone but the public at large. It is not fair for him to bear the cost and the harm or damage alone. The cost must be distributed on all those who benefited from this work by the defender. This derives from the comprehensive ‘root’ principle of ‘necessity of the removal of the harm’ which forms one of the principles which Islamic jurisprudence depends on.

The Board went further to note that its judgment is ultimately based on the principle of ‘removal of harm’, regardless of *Khata*, on the defender’s part. The reference in this case and in the earlier ones as well as others on the absence of *Khata* is of interest. It has been noted above as well as in the last chapter that references by the Board to *Khata* were redundant in as much as they were intended to refer to the more comprehensive concept of *Ta’ady*. The statement of the Board in this line of cases that there is no *Khata* while it went on to affirm the presence of *unjustified* harm is clear reference to *Ta’ady*. Otherwise, there would be no basis for the finding of liability in each of the cases discussed here on the part of the lawful acts of the various public authorities which have been impugned here. In other words, it is only the concept of *Ta’ady* as against *Khata* that captures the basis of liability of the defenders in this line of cases.

A number of interesting parameters have been developed by the Board in its adjudication of this line of cases. First is the requirement of substantiality of the harm or the loss occasioned by the lawful conduct in issue. These decisions refer to the need for not just the occurrence of harm, but harm that is ‘substantial’ or a ‘certain level’ or ‘abnormal’ ‘excessive’ and so on. Interestingly, none of these alternative terms is defined in the judgements where they occurred. In *B v Municipality of Abha* the claimant claimed that when the defender constructed roads in the area covering the claimant’s land, the level of the road ended up being over 4 meters lower than the level of his land. This, in turn, due to its inaccessibility, led to depreciation in the value of his land by approximately 25% from its original value. The claimant demanded compensation for the damage or levelling out of his land to the level of the road. The defender argued that the claimant does not merit compensation because his land is located in a mountainous area with slopes and heights. The harm occasioned is of such a nature that the ordinary person should bear it in order to achieve the public interest.

In upholding the claim, the Board held that the damage (or harm) was *substantial*. It stated that what happened to the claimant’s land exceeds the limit of *ordinary* harm or damage which should be borne by the individual as a result of public works. It represents a *severe*

case of harm which should be removed and compensated for. Indeed in a subsequent case Al-Jerba reported that the Board stated:

The review [appeal] committee would like to highlight one of the accepted rules relating to liability of the administration in the process of carrying out public services or projects, in the interest of the public, there is an obligation on the part of individuals involved to bear some of the burden of any insubstantial damage that they may suffer as a result of carrying out such services provided that the burden is not of such grave consequences that it is beyond the individuals' capacity to bear.²⁰⁵

As Al-Jerba has rightly noted, it can be deduced from this statement that the Board distinguishes between substantial and insubstantial damage which may result from a legal act of the administration but the questions remains as to 'substantial' and 'insubstantial' damage and whether it differs from case to case and from individual to individual.²⁰⁶

While the reference to the need to remove harm is in order, it is argued that reference to 'substantial' harm, does appear to be redundant. The framing of the issue by the Board in this way is unsatisfactory. In the event that the Board (as its judgements state) is of the considered opinion that the basic principle of Islamic law of delict on the need to remove unjustified harm is applicable to this distinct category of cases then there should be no requirement of 'substantial' damage. This is because embedded in the application of the principle is the need to determine that an individual in any given case has suffered *disproportionate* harm on behalf of the public in order to be entitled to compensation. The Board will find it difficult to ground this in Islamic law with the emphasis on compensation for unjustified harm. Indeed, it has completely abstained from any attempt to define or set such a standard.

This leads on to the related issue of the actual *value* accorded to the principle of substantiality in the Board's decision in the lawfully but unjustified loss cases. The weight of the 'substantiality' requirement remains rather unclear. Remarkably, in none of the cases has the Board determined the element was missing to warrant depriving the claimant compensation. One would have expected that given the disproportionality test of the

²⁰⁵ Al-Jerba note 149 supra at 245.

²⁰⁶ Ibid.

responsabilit  sans faute principle it referred to, at least a few of the cases would have fallen short of the ‘standard.’ The very absence of this determination of disproportionality in the decisions of the Board strongly supports the argument that the idea of risk-based liability was not in fact imported from French law as such, but simply the terminology as stated earlier. What has happened in reality is that both the Islamic and French systems share a risk-based liability for delict which have independently developed within both systems in their application.

It appears that Saudi law generally recognises the need for compensation in any instance of official acquisition of or interference with private property. This view is implicit in Saudi law generally and is made clear in a major legislation, the Law of Dispossession and for the Public Good and Temporary Property Acquisition (Acquisition Law).²⁰⁷ Article 1 of the Acquisition Law provides that:

Ministries, governmental authorities and other institutions which represent public authorities have the right to acquire properties for the public good in return for a fair compensation.

This is only after the public authority has exhausted available opportunities to refrain from interfering with private property rights in delivering a project for public benefit. Further, Article 7 of the law states that where a public authority intends to acquire a property for public purposes, it shall cause to be established an independent, broad-based committee of experts to determine appropriate compensation for the proposed acquisition. Interestingly, such a committee must also be formed for similar compensation purpose where a property is not to be acquired but where it may be negatively affected or harmed, by a proposed public project. Equally important is the provision of Article 20 of the Acquisition Law which states that:

It is permitted to temporarily acquire properties for fair compensation that is not below commercial value as determined by the committee referred to in Article 7 in cases of emergency, natural disaster, epidemic and similar situations, or for the implementation of urgent public-interest projects which require such temporary acquisition.

²⁰⁷ Royal Decree No. 15/M (2004).

Thus, the law recognises the need for compensation for temporary dispossession of property for public purpose even where this arises as a matter of emergency or natural disaster, matters arising outside of the control, design or will of the public authority. Further to this, Article 23 of the Acquisition Law mandates compensation for any harm that may be caused to property temporarily acquired pursuant to Article 20. Finally, Article 24 confers on an aggrieved party a right to appeal the decision of any committee or public authorities concerned with the Acquisition Law to the Board of Grievances. Equally important is the provision of Article 18 of the Basic Law that:

The State shall guarantee private property and its inviolability. No one shall be deprived of his property except for the public interest, provided that the owner be fairly compensated.

In view of the foregoing provisions, it is something of a surprise to find suggestions of the existence of a theory of ‘substantial or insubstantial damage’ regarding the unjustified harm occasioned by public authorities in the decisions of the Board. The Board in these cases suggests that where a public authority has acted in a manner that causes harm to an individual while acting within its powers for the delivery of a project for public benefit or in the public interest, the claimant must show substantial damage to sustain a claim.

5.4 Saudi Law and Delictual Liability of the State - An Assessment

As Faigrieve has noted, the area of the liability of public liability authorities remains one which all legal systems are struggling with. This derives from the notorious fact of the complex nature of different aspects of law that combine in determinations of the issue on one hand, and the ever-expanding and complex nature of governmental activity on the other.²⁰⁸ The difficulty in making appropriate and just decisions regarding claims on liability of the state (in western legal systems at least) has been how to ‘balance the desire to provide redress for the victims of administrative wrongdoing with the need to take account of the public service frame work within which the defendants are operating.’²⁰⁹ Put in another way, the dilemma has been the desire to compensate individuals for harm done by public bodies and the desire not to intervene in the legitimate work of public authorities.

²⁰⁸ Faigrieve note 188 *supra* at 1.

²⁰⁹ *Ibid.*

This part briefly considers how or whether these two concerns have operated in the considerations of the liability of public authorities for delict under Saudi law. It attempts to consider whether Saudi law - based as it is on Islamic law - has been successful in dealing with the liability of public authorities and whether it can continue to be successful in this endeavour in the future. In proceeding, it is important to state that the discussion that follows is rather tentative and in recognition of the limitations of the context. By way of recapitulation, it is relevant to recall that the reason for adopting the Scots and English law framework for analysing the work of the Board of Grievances (which is at the heart of this study) is because the former has a better developed and experienced system on the issue of delictual liability of the state.

In contrast to the UK experience, it is evident from the foregoing analysis that many of the cases handled by the Board have been fairly straightforward. The Board has not encountered anything like the variety of situations that have been encountered in the UK courts. The Board has been far less troubled by the complexities of government that arise in the modern regulatory welfare state as experienced in the UK. As a result, there is far less material on which evaluations of success (or otherwise) in dealing with the liability of public authorities can be made than in the case of the UK jurisdictions. The types of situations in cases like *X v Bedfordshire* and *Barrett v Phelps* have not arisen in or been dealt with by the courts in Saudi Arabia. This circumstance necessitates some measure of speculation about how the Board of Grievances would deal with types of case that have not yet arisen but which may arise in the course of time given the expanding and sometimes changing nature and scope of governmental activities and state regulation of the private sector.

In general, the approach of the Board appears to lean very much in the direction of imposing liability on public authorities in the same way as private persons. However, there is at least one area where the nature of the duty created by statute is construed in a manner that may not attract liability to the public authority, even where harm has arguably arisen under the public authority's watch. In other words, *Ta'ady* is not easily established where a duty to act exists. This is in the area of security. It is important in this regard to note that there is no private sector equivalent of this sector of the public service. The decision in *O v Directorate for General Security* discussed above suggests that the standard required for performance of a duty that goes with power, and by necessary implication, discretion on how to perform the duty (for example, policing) is a liberal one. This is ostensibly so in recognition of the immense challenges such public authorities as the security agencies for

example, face and the limited resources at their disposal at any time for performing their statutory duties. In a sense then, this is at least one important area of public authority liability that appears to be influenced to some extent by some form of public policy.

One of the positions in the UK scholarly and judicial debate is that public and private bodies are to be treated alike, in other words, the Diceyan principle referred to earlier. This, it has been stated directly aligns with the Islamic law position on delictual liability of public authorities. UK experience suggests that this is a viable approach to public authority liability. Particular arguments would include, for example, that the ‘public law hurdle’ has proved unworkable so the courts have dropped it. However, the main principles of delictual liability in Islamic law as previously discussed in chapter four and above here, is wider in scope than the Scots and English position. The Islamic position encompasses different kinds of claims that will not be accepted under Scots and English law. An important example in this regard relate to the French law principle of *responsabilite sans faute* (which has a basis in Islamic law though the terminology was imported into the Board’s decision through the influence of Egyptian advisers as discussed earlier).

The recognition of this last type of action has an important implication for considerations of public authority liability given its explicit recognition that public authorities *are* different from individuals in their *nature*. Saudi law admits the need to address public authority liability as ‘distinctive’ to the extent that it is difficult if not impossible to find equivalence in private law for treatment of public authority liability. However, Islamic law generally subjects the consideration of such liability to the *equality* principle inasmuch as that refers to securing compensation for unjustified harm based on the foundational principle of *la darara wa la dirara*, there should be neither causing of harm nor reciprocation of harm. In effect, there is a closer affinity between Islamic law and French law than between it and Scots and English law on this score even though its shares in some way, an attribute from both sides.

A possible consequence of a liberal approach to recognition of public authority liability that has encouraged a restrained approach from the UK courts is the possibility of a flood of litigation against public authorities and the possible fallouts of this. It is relevant to take this issue on board in relation to the considerations of public authority liability for delict under Saudi law. So far, the docket of the Board on this line of cases appear to be quite manageable and the nature of the claims, basic and straightforward. However, it is not clear that things would not change in the future both as regards the number and complexity of

possible claims given the increasing awareness of the people of the possibility of challenging government actions or conduct leading to harm.

It is suggested that these possibilities ought not to change the existing foundational principles on delictual liability of the state from what they ordinarily are now. It is in fact difficult to envisage that a radical change in the current principles will developed by the courts or argued by academics. Rather, it is posited that there are existing mechanisms in Islamic jurisprudence that will serve to maintain the much desired balance in ensuring that the legitimate aims of public authorities are achieved while individuals who suffer unjustified harm are duly compensated.

A relevant jurisprudential tool in this regard is the principle of *al-maslaha al-mursalah* discussed in chapter two. As earlier stated, this principle acts as a 'key turner' that moulds application and interpretation of Islamic law to serve the public welfare and interest to ensure the betterment of life and faith in Muslim societies over time and place. The mechanism is an important tool in judicial interpretation that facilitates the flexibility of Islamic law. In this way, the considerations of issues like opening the floodgate of litigation against public authorities, effect of imposing liability on the treasury, possibility of defensive governance and even separation of powers concerns can and hopefully, would be urged on or taken into consideration by the court in deserving cases without a radical deviation from the foundational principles of Islamic law on state liability.

One important reason for the foregoing view is the compensation regime applied by the Board. The approach of the Board to the award of compensation which has generally been (sometimes, as will be discussed, too rigidly) in accordance with the principle that damage should be clearly proven and compensated for without a view to profit. It is logical to argue that it is more equitable to the individual and society that the former be compensated in a manner that redresses harm done to him/her by the state without unduly prejudicing the state. This, in the Islamic view, stands a firmer chance of securing social harmony and peace, a fundamental objective of the *Shari'ah*, than otherwise.

Moreover, the argument of the danger of encouraging defensive administration through (a wider) recognition of public authority liability for delict can be relatively weak when considered closely. Indeed, it can be argued that a legal paradigm of equality before the law as advocated under Islamic law largely takes care of this concern. Under this paradigm, the defensive behaviour problem is not limited to public bodies but an issue for everybody,

public or private. Consider medical negligence which troubles doctors in their work for instance. This is an issue which may negatively impact on their willingness to take risks in treating their patients. It is not clear that it impacts so negatively on their overall service delivery. Indeed, it is logical to assume that in such 'risk-situations,' the patient is usually keen to take the risk (s) in cases of required medical treatment. No doubt, few cases may eventually result as a consequence of such risk-situations but overall, such cases will be in the minority. A similar argument can be made in the case of public authorities. Their implementation of one policy or the other may involve some risk which can attract litigation but in the normal run of things, they do not.

The threat of litigation acting as a justification not to undertake assigned or delegated responsibility can be regarded as illogical and inhibits socio-economic progress. Private bodies are also subject to litigation but in taking the risks associated with being proactive also benefit from great profit. An example of this may be the research and development undertaken by pharmaceutical companies. Where the risk is taken, a discovery may be made that will, in turn, benefit the public as well as increase profits. However, if it did not take the risk, because of a fear of litigation, there would be no further developments. Although there is a risk of litigation, as happen in cases involving thalidomide babies through use of the drug thalidomide,²¹⁰ other developments may have resulted in no litigation at all. In the interests of social progress, it would, therefore, appear better to have a system where there is equality between public and private bodies in determinations of their delictual conduct.

Finally, consideration has been given to the French law notion of *responsabilite sans faute*; the notion of 'lawfully' caused, but unjustified loss. As demonstrated through analysis of some decisions of the Board, this is recognised under Islamic law of delict. While UK law does not at present recognise *responsabilite sans faute* as a general principle, some scholars have suggested that the time may not be far off when this may change. According to Booth and Squires, in certain circumstances, 'the UK courts may be prepared to move in the direction of imposing liability on public authorities even where those authorities have not been negligent.'²¹¹ They went further to state that there are certainly a good number of cases where it is desirable for a public authority to take risks in the discharge of its duties but where it is inequitable to allow those who suffer harm as a

²¹⁰ W Lenz 'The History of Thalidomide' the Thalidomide Society available at: <http://www.thalidomidesociety.co.uk/publications.htm> (Site visited 8 August 2011).

²¹¹ Booth and Squires note 2 supra at 250.

result of such activities to be left without compensation. However, providing compensation in all such cases

constitute a substantial departure for UK law to take, and would effectively see a move away from fault being at the centre of the tort of negligence. It seems unlikely, as commentators have noted that a shift in UK law will occur in the foreseeable future. It nevertheless remains an interesting avenue for potential future development, and one towards which at least the *King* and *Dennis* cases suggest that UK courts may not be wholly antagonistic.²¹²

While this may be far from the minds of proponents of this view, it is argued that this prospect, and the current position of the law on ‘lawfully’ caused but unjustified harm under French law with regard to the liability of public authorities, supports the view that the principles of Islamic law of delict are relevant to and can be applied in this contemporary period beneficially as advocated in this study.

5.5 Conclusion

The examination of the delictual liability of public authorities under Scots and English law presents a rather complicated picture. It is not a straight forward matter to present a clear-cut position on the attitude of the courts to the issue of when and under what circumstances the courts will find liability against a public authority. The law has been evolving. At times, the courts appear to expand the boundaries of liability. But at other times they appear to contract them.

Legal and policy considerations play an important role in the judicial consideration of delict in general and as they relate to public or administrative authorities in particular. It is evident that public authorities face serious challenges in the discharge of their duties. In order to mitigate some of the difficulties that may arise from a broad imposition of the duty of care on public authorities, the courts developed the concept of the ‘Public Law Hurdle’ but this appears to have had limited application subsequently.

Due essentially to policy considerations, the courts have been torn in different directions on whether to extend or limit the liability of public authorities. This has led to uncertainties in

²¹² Ibid. at 251.

the position of the law on the liability of public authorities and the courts seem to have adopted an ‘incremental’ approach which requires a lot of case-by-case analysis to determine the law in this important area of the law. However, this approach, as rightly noted by the Law Commission recently, and a host of commentators, has led to uncertainties.²¹³

The traditional position of the law on the liability of the state under Islamic law has been that the same foundational principles of delict in Islamic Law could apply both to individuals and public authorities without distinction. Glimpses into the cases broadly suggest that the Board is striving to apply the principles of Islamic law of delict in a consistent manner. However, it is evident that the Board has become confused in respect of its use of legal principles, in particular with reference to *Khata* and *Ta’ady*. A formal theoretical and analytical framework similar to that which exist in western legal systems, need to be developed. Judges should be trained adequately in the law schools and continuing education programmes introduced along such theoretical and analytic framework. This is in order to ensure that they are able to consistently apply general principles of Islamic law to current, and in particular, future, and presumably, more complex cases of delictual liability.

A striking aspect of the discussion of the line of cases dealing with what is in French law referred to as ‘lawfully caused loss’ is the readiness of the Board to insist on compensation across a broad spectrum of loss occasioned by the lawful exercise of power and conduct of the duties of public authorities. It has been sought to show that a number of factors account for the tolerant approach of the Board to cases of this type. The first is the historical roots of the Board of Grievances. As stated earlier, the Board has a long historical pedigree in the Islamic system dating back to the very first two decades of the Islamic state. At an institutional level, it declined and disappeared about the 14th century along with other institutions of the Islamic state following the conquest of many Muslim lands by the west to resurface in post-colonial era in parts of the Muslim world like Egypt in a modified form, *Majlis Dawla* and in theory, was inaugurated under the office of the King by the modern founder of the Saudi state. This gap in institutional practice and the intervening incidence of colonialism has led to interpolation in the jurisprudence of an institution like the Board which declares fidelity to a different socio-legal system. The result is not always

²¹³ Law Commission Consultation Paper note 61 supra.

negative. However, it is sometimes unproductive as argued with regards to the reference to the principle of risk-based liability by the Board.

Underlying the creation of the Board in Saudi Arabia as earlier discussed, is an expression of an integral approach to organising the affairs of state along the lines of the classic Islamic system. That system in theory and practice emphasised as a principle of law, equality before the law. This extended to the person of the King. It envisages a state (government) under law, the *Shar'iah* with supremacy attributed not to any of the branches of government or the people, but rather God. The notion of justice is similarly built on this principle and thus it is easy to see how the institutions of state are deemed not be created at least, technically, and derive their legitimacy from their subordination to the higher authority of the *Shar'iah*. Both the governed and the government are *under* law in the literal and metaphoric sense of the law. Thus, the judiciary as an arbiter is not constrained in declaring governmental action, lawfully intended for the public benefit but which causes harm to an individual as unjustified and deserving of compensation.

Having considered the Board's decisions under different categories of cases involving public sector liability, including, for example, health, highways, education and others, it has become clear that the Board is attempting to apply consistently the principles of Islamic law of delict. However, there are some instances of unexplained deviation. This is understandable given the possibilities of error in judgement which is a criticism levelled at judges in virtually every legal system at some point or the other. Such errors may be more common within a legal system like the Saudi, which had traditionally not been known to subscribe to a system of law reports or following precedents though there is an indication this is slowly changing.

Finally, an important aspect of this study is the claim that the liability of both public authorities and private individuals or bodies is, and should remain the same under Islamic law. The (few) cases available from the General Courts, a good number of which have been referred to in the discussion above, provide support for that important claim of this study. It is at least fairly clear that the Board generally applies the same principles of delictual liability of private individuals to public authorities. However, it is important to investigate this theme further through an examination of its practice of awarding damages. This is pursued in the next chapter.

Chapter six: Damage and Compensation: The Board of Grievances and Redress for Delictual Liability of the State

6.1 Introduction

Compensation is at the heart of considerations of delictual liability in Islamic law as it is in Scots and English law.¹ This chapter examines assessment of damages and award of compensation by the Board of Grievances for delictual liability of the state in Saudi Arabia. The need for compensation when unjustified harm is established against a defender, as stated in chapter four, is the most basic principle derived by jurists from the well known Hadith which forms the foundation of delict in Islamic law: ‘there should be neither causing of harm nor reciprocation of harm.’ It is the centrality of this emphasis on compensation that informs the discussion in this chapter.

The discussion of selected cases in the previous chapter has suggested that the Board will determine the liability of public authorities using the same principles that apply to private individuals. One important point that has emerged in this study thus far is the broad scope of delictual liability of the state under Saudi Law. In this circumstance, the compensation regime- principles and practice- of the courts involved in determining such liability is a very important aspect of the work of the judicial body vested with jurisdiction on state liability for delict. This will involve an examination of the rules that the Board may apply as well considering how consistently such rules are applied. Consideration will also be given to how the Board has applied such rules in respect of differing forms of injury, including personal injury, damage to property, ‘economic loss’ and immaterial damage. The focus will also be on the Board’s approach to the assessment of the categories of harm and appropriate compensation for them.

The chapter proceeds in this way. The first part examines the nature and relevance of compensation under Saudi Law. While part two focuses on the types of damage regarded by the Board as harm for establishing a right to compensation, part three discusses assessment and award of damages. Some issues relating to assessment of damages are considered in this part and the final section concludes the chapter.

¹ D Fairgrieve *State Liability in Tort A Comparative Law Study* (Oxford University Press Oxford 2003) 189.

6.2 Compensation for Delictual Liability

Compensation practice is important not only as the final product of the process of litigation but also because of its wider implications for the rule of law within the legal system. The rule of law admittedly is a much contested concept² but what is of relevance here is the important role played by the courts as a refuge for the citizen in the determination of his/her rights against the state particularly in modern times. There is common agreement across various legal systems that the rule of law, particularly the role of the judiciary in securing justice and thereby fostering peace in society and at least discouraging resort to self-help, is a very important one.³

In civil claims where compensation is a very important type of relief granted by the courts, the practice of any court on it will have implications for court users and the case is no different in Saudi Arabia. The rule of law dimension is better appreciated in the light of the direct and indirect impact that compensation practice has on the litigants in the process. From the perspective of claimants for instance, there is the issue of confidence in the integrity of the judicial system as an arbiter between the state and the individual. From the perspective of the state, there are the fiscal implications; impact on the public treasury apart from policy concerns regarding the functioning and discharge of the duties of public authorities.

The determination of liability for delict is essentially with a view to ensure compensation in established cases of harm. In a system which recognises a relatively wide scope of liability, the compensation regime is of more than passing significance. As Fairgrieve has noted:

A system which conceives fault widely will be of reduced utility for the victims of wrongdoing if the categories of compensable loss are unduly restricted or the methods of measuring damages are unrealistic.⁴

² On some of the debates on the rule of law see for instance B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge 2004) , A Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2 (1) HJRL 48 and P Costa and D Zolo *The Rule of Law: History, Theory and Criticism* (Springer Dordrecht 2007).

³ Bedner note 2 supra at 67-68.

⁴ Fairgrieve note 1 supra at 190.

This observation with specific reference to French administrative law is important. It is argued that Saudi law, in view of the theory of Islamic law and practice of the Board of Grievances on damages, considered below is directed at avoiding these weaknesses.

6.2.1 Nature and Relevance of Compensation under Saudi Law

There are different basic principles guiding compensation for delict in Islamic law depending on the nature of the injury or loss involved. In property damage claims as well as economic loss, the basic principle in Islamic law of delict is that the claimant is entitled to restitution, whenever possible.⁵ It was narrated the Prophet has declared that ‘the hand is in debt for what it has taken until it is returned.’⁶ Hence, if a person who usurped money or property of another returns the money or property in full and in the same state as it was originally, the person is acquitted of responsibility. If money and property could not be returned due to destruction or damage of a nature that renders them useless, money or property similar to the original must be handed over.

There is a consensus among Islamic jurists that if things lend themselves to restitution in kind, compensation should be awarded ‘like for like.’ This is because a similar item will invariably resemble the lost or damaged item more closely than any monetary value, for being similar to the said item in looks, content and purpose.⁷ In other words, the money and property had a specific value and the same value must be restored or compensation paid in lieu. Scholars agree that if a damaged or destroyed item could be weighed or measured, it should be returned like for like. Resorting to compensation by value should only be allowed when no similar items are available. This is based on the Hadith ‘A container for a container, and food for food.’⁸ This is expressed as *mithlun bi mithli*, ‘like for like’. This principle, on the face of it, sounds simple and logical enough. However, as will be seen in the discussion below, in a developing system, this important classic principle can be challenging in application.

Moreover, when assessing damages, the value of the damaged or destroyed item before any said damage occurred should be considered. Such assessment should be confirmed by specialized trustworthy experts. In his book *Al-Mughni*, the renowned scholar Ibn Qudammah says, with regard to estimating the value of similar items: ‘Its evaluation

⁵ A Ibn Qudammah *Al-Mughni* Vol. 7 (Dar Al-Kutub Al-‘Imiah, Beirut) 361.

⁶ A bin Hanbal *Musnad Al-Imam Ahmad* Vol. 5 (Muasast Cordoba Cairo) 8.

⁷ Ibn Qudammah note 5 supra at 362.

⁸ S Abu Dawud *Sunan Abi Dawud* (Makatabah Ibn Hajir Beirut 2004) 721.

should be referred to competent experts'⁹ by looking at what physical damage actually happened. The use of experts will be discussed below. As for potential damage, only if it is certain to happen, it should be regarded as actual fact. By contrast, potential profit, that is any profit which has not yet been realised, is not recognised and thus not compensated for in the award of damages. This is because Islamic law regard such a determination as speculation. In other words, there is no certainty as to its occurrence or amount. The idea of compensation is to replace the value that has been lost, and potential profit that has not been realised or established.¹⁰

The general rule in matters of compensation is to redress the damage in kind, by repairing damaged items, as much as possible such as building up a damaged wall, or returning usurped property, as long as it remained intact. Failing that, compensation in value must be ordered.¹¹ In other words, the Islamic position on compensation is to have the victim restored to the position s/he would have been if the harm had not occurred, precisely the same as the notion of *restituto in integrum* in common law if this is at all possible.

There is a developed body of work on the scheme for assessment of liability, punishment and compensation for physical or personal injury claims in Islamic law.¹² This is based on the fact that the sources have prescribed the relevant regime for punishment and compensation in this aspect of Islamic law.¹³ It is now relevant to discuss the types of damage regarded by the Board in cases involving public authorities as harm for establishing a right to compensation.

6.3 Types of Damage that Count as Harm for the Purposes of Establishing a Right to Compensation for Injury

The dimensions of harm have been considered in a number of cases by the Board. It serves to examine some, though not all, of them for an understanding of the categories of harm specifically as they relate to the liability of public authorities. As mentioned in chapter four, the forms of harm under Islamic Law can be categorised into two categories, material and immaterial harm. Material harm includes personal injury, damage to property and

⁹ Ibn Qudammah note 5 supra Vol 8 at 28.

¹⁰ W Az-Zuhayli *Nazriyat Al-Damaan* (7th ed Dar Al-Fikr Damascus 2006) 96.

¹¹ Ibid. at 94.

¹² See for instance, Ibn Qudammah note 5 supra.

¹³ P Le Roy 'Liability and Compensation for Bodily Injury Under Islamic Law' available at: <http://www.genre.com/sharedfile/pdf/Topics13LeRoy-en.pdf> (Site visited 22 April 2010).

economic loss. Immaterial harm, as discussed in chapter four and later in this chapter, is somewhat problematic. This is because while there is basic agreement that Islamic law recognises immaterial harm, there is some divergence of opinion on the appropriate approach for addressing it. While some are of the view that it should be dealt with as a matter of criminal liability, others view it as one that is at least, also delictual. The reluctance to recognise immaterial damage as delictual in nature is located in the view that it is impossible to quantify the extent or nature of reputation for instance in order to determine or measure the harm done to it. However, as suggested in chapter four, the preferred view is that immaterial harm does constitute harm and ought to attract compensation once reasonably proved.

6.3.1 Material Harm and the Position of the Board

In line with the general rule, damages will be awarded for certain injuries. Such injuries include: personal injuries (including, *inter alia*, death and permanent impairment; pain and suffering, analogous to *solatium* in Scots law);¹⁴ damage to property, and economic loss (both pure and derivative). Decisions of the Board in respect of awarding damages under each of these categories will be discussed below.

6.3.1.1 Personal Injury Cases

Physical or personal injury claims are usually straightforward. Such cases may fall into one of three categories, death, permanent impairment and pain and suffering as a result of physical injury. In respect of cases involving death, *D v Al-Madinah Municipality*¹⁵, mentioned in the previous chapter, may be referred to. The claim for compensation for the death of the claimant's son due to the negligence of the defender in constructing a public fountain was upheld by the Board.

*S v Al-Madinah Municipality*¹⁶ represents a case concerned with permanent impairment. The son of the claimant was seriously injured leading to various permanent impairments as a result of falling into a waterfall constructed by the defender. The Board stated that the defender was obliged to observe necessary precautions in constructing the waterfall. The defender was in breach of its duty not to cause unjustified harm to people in its valid

¹⁴ J Thomson *Delictual Liability* (4th ed Tottel Publishing Ltd West Sussex 2009) 312-313.

¹⁵ (2006) Unreported Case No. 276/5/Q 1427.

¹⁶ (2004) Unreported Case No. 2432/1/Q 1424.

attempt to beautify the city. It is relevant to note, as mentioned in chapter four, that the law allows compensation to the relatives of persons killed by wrongful acts.

Similarly the Board has recognised pain and suffering as a result of physical injury, as a head of loss. In *C v Ministry of the Interior*,¹⁷ the court awarded the claimant compensation for suffering a physical and verbal attack from one of the defender's operatives at a security check-point. Amongst the reasons given by the court for its award of compensation was that the claimant suffered great harm and damage, not only physical - the beating - but also moral - public humiliation. The court stated that its decision was based on an incident in which the Prophet awarded compensation to a Jew who was frightened by Umar, one of his companions. The Prophet said: 'This is for the fright of Umar'. According to the Board, obviously, fright is moral damage turned physical as reflected on the Jew's face. The Board also noted that Ibn Hazm said: 'A barber cutting the hair of the Caliph Umar bin Al-Khattab was frightened by Umar for some reason. Seeing signs of the barber's fright, Umar said: 'I did not mean that. But I will compensate you for it', and gave him forty Dirhams which by the standards of the time, was a very handsome amount.¹⁸ The Board is therefore justifying its decision with reference to recognition of immaterial harm in the Islamic legal system even though the examples given did not result from physical injury. The award of damages in these cases will be discussed below.

6.3.1.2 Damage to Property

As highlighted above, the general rule of compensation where damage to property is concerned is to redress the damage as far as possible. In other words, the Islamic position on compensation is to have the victim restored to the position s/he would have been if the harm had not occurred, precisely the same as envisaged in the principle of *restituto in integrum* in common law. This approach has however been changed with regard to car accidents in the *Shari'ah* courts in Saudi Arabia.

The origin of the substitution of compensation by making restitution in kind for compensation in value by the *Shari'ah* courts can be traced to a circular issued by the Ministry of Justice in 1998. Some judges noted that the principle of *restituto in integrum* when interpreted as requiring restoring old cars (in accident cases) to their previous

¹⁷ (2007) Unreported Case No.3461 /1/Q/1428.

¹⁸ Ibid.

position (through repair) did not achieve justice. This is because the cost of repairing an old car may far exceed its value prior to the damage. These judges were of the opinion that such cars should be valued by a reliable committee and the depreciation in the value be given as compensation. A Committee from the Ministry of Justice and the Ministry of Interior (responsible for traffic control) established to look into the matter agreed with this approach. It had found that this approach was supported by the views expressed by a former Chief Judge of Saudi Arabia when a judge consulted him on the issue in 1967. The Ministry of Justice then circulated the opinion to courts adjudicating such cases with the caveat that it will be left to the discretion of the court to make a judgement in accordance with article 49 of the Basic Law.¹⁹ It will be recalled in this regard that this is the approach adopted by the General Courts in cases between private individuals. This is exemplified by the decision of the General Court in *N v B*²⁰ discussed in chapter four where the court ordered payment of the depreciated value of claimant's car in an accident caused by the defender's camels.

The decisions of the Board suggests the Board has completely moved away from the application of restitution in kind to compensation in value as a rule rather than the exception as envisaged by classic Islamic jurists and even the circular mentioned above. Thus, the Board has developed a practice of awarding damages based on depreciation virtually as a rule, ignoring the possibility of restitution (through repair for instance) without consideration that the cost of restitution may be different from compensation in value. Rather, it simply ascertains and awards the depreciation value as a measure of *restitutio in intergrum*, an approach which appears to have also been adopted by the *Shari'ah* courts in relation to car accident cases.

In *Q v Municipality of Riyadh*²¹ discussed in chapter five, the court accepted evidence on the depreciated value of the car and awarded damages for the accident accordingly. This case appears to be based on the opinion of the chief judge mentioned above and the practice of the *Shar'iah* court.

The Board has applied this approach in several cases involving car accidents as a result of

¹⁹ Circular No. 1128/T/13 of 10/11/1418 (1998) Ministry of Justice at 272-273. Article 49 of the Basic Law provides that 'subject to the provisions of Article 53 herein (regarding the Board of Grievances), the courts shall have jurisdiction to adjudicate all disputes and crimes'. However, it would appear that the Ministry is in fact referring to Article 46 which states that 'the judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic *Shari'ah*.'

²⁰ (2005) Case No 151/33 *Mudawanah Al-Ahkam Al-Qadhaiyyah* (1st ed Ministry of Justice 2007) 106.

²¹ (2008) Unreported Case No 1029/1/Q 1428.

the conduct of public bodies. For instance, in *I v Municipality of Al-Madinah*²² (discussed in chapter five), the Board held the defender liable in delict for failing to put up re-direction or warning signs to highlight the works area on the road and awarded compensation to the claimant on the facts. The Board also granted the claim for delict on similar facts in *T v Municipality of Al-Qaseem*.²³ In both cases, the Board awarded damages based on experts' assessed depreciation in the value of the cars.

It is important to note that the opinion highlighted above and circulated to courts applied specifically to cases where there has been damage to old cars only. It was developed to ensure that restitution; the 'like for like' rule is not undermined. In other words, the judges of the *Shari'ah* court were concerned that restitution in this line of cases lead to injustice against the defender. This is because in practice, when restitution is ordered which require repairing the damaged old car, the cost of restoration is usually over and above the value of the car prior to the accident. This, it was considered amounted to an injustice against the defender who will be required to pay more than the value of the car if it had not been damaged in an accident. This is because profit, as earlier stated is not an objective of Islamic law of delict.

An attempt to deviate from this approach of compensation in value for property claims was invalidated by the Appeal Chambers of the Board. In one case, *T v Municipality of Makkah*²⁴ the claimant filed a lawsuit against the Municipality demanding reconstruction of a fence that had been demolished by the defender. The first instance court upheld the claim. However, the Appeal Chamber, while upholding the finding of liability, struck down the reconstruction order. It stated the court has no authority to oblige the defender to act in a certain manner. What is required is for the defender to pay monetary compensation sufficient to cover the cost of restoring the damaged property to the extent that the court considered appropriate to achieve justice in the matter.

While the decision of the court of first instance appears to have complied with the general principle requiring restitution, the decision of the Appeal Court clearly preferred an award of monetary compensation over restitution. The decision of the Appeal Court in this case appears to be applying a different rule for public bodies contrary to the idea that the law is the same for all. There is not the underlying justification that there is in the road traffic

²² (2001) Unreported Case No 1535/1/Q 1421.

²³ (2008) Unreported Case No 271/7/Q 1429.

²⁴ (1997) Unreported Case No 1062/2/Q 1417.

cases. The basis for this position as stated by the court is the need to be wary of interfering with the functioning of administrative authorities; public bodies. In western legal terminology, this can be described as need to defer to the political branch; the separation of powers argument. In light of this, it is relevant to further comment on the practice of the Board in its compensation practice in this regard.

In adopting the approach of compensation for value in property cases generally, the Board has expressed justification in the need to respect the principle of separation of powers. Beyond this however, it is suggested that a wholesale adoption of this approach may work both positively or otherwise when considered from not just the administrative but also fiscal perspective. Importantly, while it is true that the cost of repairing an old car, as noted by some judges, may far exceed the value of the car prior to the damage, simultaneously an award of monetary compensation where restitution is possible may conflict with the no-profit principle (discussed further below). In *T v Municipality of Al-Qaseem*, for example, the claimant's car was evaluated by three accident repair garages. The first garage valued the car before the accident at SR85,000 and after at only SR42,500, the difference being SR42,500. The second garage valued the same car before the accident as worth SR88,000 and after at SR48,000, the difference being SR40,000. The third valuation before the accident was SR92,000 and after at SR60,000 with the difference being only SR32,000. The question then arises as to how much compensation the claimant would be entitled to.

According to the Board, the claimant deserves the depreciation in the value of his car but the difficulty is the fact that the valuations vary. Therefore, the Board takes the average of the three different valuations amounting to approximately SR38,167. In this case, as the claimant was held to be 50% liable for the accident following a Traffic Agency accident report, he was awarded only half of this amount. Given, then, that the claimant is awarded the average difference in price before and after the incident, it is possible, if the claimant subsequently sells the car for the highest valuation that s/he will have profited. Equally, if s/he is only able to sell the car for the lowest valuation, s/he will then have made a loss. Although the sale of the car is a future and contingent event, it remains relevant because it shows the difficulty in using an average valuation and how it is possible to go against the no-profit principle under the Islamic law of delict through the Board's approach. Further, the claimant may repair the car at the lowest possible expense but will have profited from the award of compensation.

With regard to compensation for the depreciation in value of property as a result of public

works undertaken by public bodies, such as construction of a road or a bridge, the Board is obliged to follow provisions of a statute on this issue. Royal Order No. 22037²⁵ defines the basis for compensation regarding affected properties as a result of public projects. It states that:

Compensation must be granted for damage caused to property as a result of public projects carried out; that can be achieved by estimating the value of the property before and after the damage, and the difference is considered the value of the damage, which should be paid to the property owner as reparation for the damage caused to his property.

This Royal Order applies to cases where public works have led to depreciation in the value of property. Compensation is awarded under the Royal Order precisely because restitution is not possible. The Royal Order, it is submitted, correctly applies the principles of compensation in lieu where restitution is not possible or, as in cases involving public authorities, not desirable in the general public interest.

In sum, in view of the varying possibilities which also may arise on a case by case basis, it would appear a better approach for the Board not to adopt a ‘one-size-fits-all’ approach, whereby the assessed depreciation in the value of an item is always calculated and awarded, as it does currently to damage to property claims. It is suggested rather that it may serve the public interest better, at least from a fiscal perspective, to decide on the specific facts based first on the fact that Islamic law is flexible enough to accommodate this. In some cases it may be that restitution, for example, serves as a better alternative to simply assessing damages. It is argued that the principle of *Al-Maslaha Al-Mursalah* is better carried forward in this manner.

6.3.1.3 Economic loss

From some of the decisions of the Board it is clear that economic loss is recognised as a type of harm. Economic loss can be divided into two categories; ‘pure economic loss’ and ‘derivative’ economic loss including, for example, economic loss deriving from physical injury (such as loss of earnings) or damage to property. It has been noted that with regard to public authorities, the English (and presumably, Scots law) courts are reluctant to award

²⁵ Issued on 9/22/1398AH (1978).

damages for ‘pure economic loss’ while their French counterparts are more disposed to this.²⁶ It is arguable that in theory, the position of Islamic law and the Board is the ‘generous approach’ of the French courts which will more readily accommodate claims for pure economic loss arising from the conduct of public authorities.²⁷ However, in practice, the Saudi experience suggests that cases of pure economic loss will remain few and far between.

Most of the cases for economic loss determined by the Board are for derivative economic loss. However the facts of *Z & 29 Ors v Municipality of Riyadh*²⁸ discussed in the previous chapter is an example of pure economic loss. In the case, the construction of a multiple-floor public car park by the municipality was held to have depreciated the surrounding properties of the claimants.

The Board awards compensation for loss of earnings arising from the conduct of public authorities which has resulted in unjustified harm. *Y v Al-Dammam Municipality*²⁹ provides a good reference point on the Board’s approach to general and specific claims of loss of earnings arising from the misconduct of public authorities. The claimant made a claim against the defender concerning the confiscation of a quantity of fish, two cars, tools, and his fishing licence and two fishing boats. The claimant demanded the return of the confiscated items as well as compensation for the loss of the cars for the two years. The claim also included a demand for compensation for the confiscation of the fish, boats and the fishing licence.

The defender argued that the vehicles, the tools and the fishing licence had been returned to the claimant (after filing the case) and the boats were not confiscated. As for the fish, it was confiscated in accordance with the municipal regulations and, therefore, the claim ought to be dismissed. The claimant confirmed that he had received his fishing licence and the two cars after filing the case.

The Board held that since the claimant had sold fish in a prohibited place he was subject to the prescribed fine in addition to the confiscation of his fish, and the possible suspension of his fishing licence. However, in confiscating the claimant’s vehicles, the defender had

²⁶ Fairgrieve note 1 *supra* at 192-193.

²⁷ *Ibid* at 196-197.

²⁸ (1985/86) Unreported Case No. 458/1/Q 1406. It is interesting to note that no reference was made in the case to the Royal Order No. 22037 and the claim as discussed in Chapter five was upheld on the equivalent of the *responsabilité sans faute* principle.

²⁹ (1997) Unreported Case No. 52/3/Q/1418.

exceeded its authority, as the prescribed penalties did not include such confiscation. This was regarded as a serious breach of the relevant regulations by the defender. The illegal seizure had caused economic loss to the claimant. The Board noted that this was particularly hard on the claimant, who was illiterate, and whose only actual and potential source of income was fishing.

The Board awarded compensation to the claimant for the verified period of confiscation of his vehicles. However, it dismissed the claim for damages for the fishing licence and the two boats. The Board found there was no evidence they had been confiscated, while the fishing licence had expired even before it was seized. Consistent with its positive finding on the wrongfully confiscated vehicles, it is to be assumed that the Board would have awarded compensation for loss of livelihood if the license had not expired since there was no provision in the relevant legislation for confiscation of fishing licences.

Furthermore, where a claimant has been unlawfully detained and thus prevented from pursuing a livelihood, the Board is disposed to granting compensation on proof of liability on the part of the detaining authority. There are now a number of cases where this issue has come up before the Board particularly in view of the rising numbers of detentions based on security concerns. In some unlawful detention cases such as *N v Ministry of the Interior*,³⁰ *I v Hael Police*³¹ and *F v Department of Immigration*,³² discussed in the previous chapter, the Board stated that the act of the public authorities was in violation of the law causing harm to the claimant by restricting his freedom and depriving him of running his business and caring for his family. The Board then awarded damages to the claimants for the whole period of their unlawful detention taking into account loss of earnings.

Similarly, in *N v Ministry of Finance*³³ the claimant claimed that the Customs Department used his truck in an operation to arrest a gang smuggling liquor from the United Arab Emirates (UAE) to Saudi Arabia without telling him or arranging for such use in advance with him or with security agencies. The Customs Department simply arranged with the driver without the knowledge of his employer. During the journey, the driver was arrested and the truck confiscated by the custom authorities of the UAE. The driver was then turned over to the competent authorities in Saudi Arabia where he was jailed for two years until

³⁰ (2005) Unreported Case No. 2589/1/Q/1426.

³¹ (2006) Unreported Case No. 747/1/Q/1427.

³² (2001) Unreported Case No. 97/3/Q/1422.

³³ (2006) Unreported Case No. 960/3/Q/1426.

the truth emerged. The driver was released, and compensation for damage caused to him was paid to the value of 200,000 Riyals by a Royal Order. The truck remained impounded in the UAE for over five years.

The claimant requested compensation for the impounding of the car for the aforementioned period at a daily rate of (five hundred Saudi Riyals) travel costs he incurred over a period of five years to secure the release of the truck, a reimbursing of the fine he paid to the UAE arising from the impounding of the truck. One million Saudi Riyals for psychological damage and defamation of his brand name and his own reputation due to the false charges of alcohol smuggling. The defender responded by stating that this matter was the subject of the afore-mentioned Royal Order and thus there is no objective merit to the claim made by the claimant.

The Board held that the defender's actions resulted in damage to the claimant must be removed. This could only be achieved by payment of compensation for truck rental for the period during which the claimant's truck was impounded. This is in compliance with the Prophet's saying '*There should be neither causing of harm nor reciprocation of harm.*' The Board awarded damages for loss of use of the truck and the fine paid for recovery of it by the claimant. As for the claimant's demand for compensation for transport expenses for employees to pursue the matter of getting the truck back, the Board rejected this claim as unproven. With reference to the claimant's demands for compensation for moral damage, the court considered the issuance of the afore-mentioned Royal Order (awarding the driver the sum of 200,000 Riyals) and the statement of facts and the verdict in his favour in this matter as well as the compensation for physical damage as sufficient to redress the alleged moral damage. This aspect of the case is further discussed in the section on immaterial damage to reputation.

A key principle that is emphasised in the assessment and award of damages for economic loss by the Board is the 'no-profit' principle. This is to the effect that a claimant is only entitled to the actual loss and is not allowed to make a profit from the award. This approach is grounded in the general principles of compensation under Islamic law as stated earlier. This principle, when adhered to by the court would appear to have taken on renewed significance from a policy perspective in relation to the award of damages against public authorities.

Indeed, in *N v Municipality of Riyadh*³⁴ the concern of the Board was expressed that the court should be mindful of the fact that the awards are paid from the public treasury. In that case, the claimant stated that his establishment had been operating in the business of general car-hire for several years. It moved to a new building that had a space for car-parking and a small workshop and a building for the administration. At this location, the business had no ill-effects on the neighbours. The municipality then notified them that they had to obtain a licence to practice the business activity there. It then cut off their water supply for two months. The municipality also took two cars belonging to the claimant's establishment and kept them in the municipality's car pound. The claimant demanded compensation for the municipality's disconnection of the water supply from his buildings. He also demanded the car-hire value of said two cars which were still in the municipality's car pound. The judge inspected the car pound personally and found the claimant's cars there. The municipality argued that they impounded the cars to force the claimant to vacate the site, since all other attempts to eject him had failed.

The trial court found that there was no basis for the confiscation of the cars. It ordered the defender to pay the claimant the value of car-hire of similar vehicles for impounding his cars, that is: the amount of twenty-five thousand and two hundred riyals. The claim for cost of water incurred because of the Municipality's disconnection of his building's water-supply was rejected for lack of evidence. On appeal, the Board's Appeal Chamber queried the award for being excessive. The Appeal Chamber stated that it agreed with the Court on the eligibility of the claimant to compensation as a matter of principle but disagreed with the calculation of compensation. It noted that there was a need for a holistic view of the real economic loss that arises from a case in deciding the amount of damages that should be awarded. In this case, it noted that an allowance should have been made for the expenses the claimant would have incurred in running and maintaining the vehicles if they had not been impounded. These ought to be reduced from the award. It emphasised that such compensation should be sufficient just to cover damage suffered by the claimant without any excess, and urged the trial court to bear in mind that compensation would have to come out from the public purse.

In compliance with this order, the trial court adjusted the award accordingly. It is interesting to note however that the trial court commented on the reference to the need for caution in making awards against public authorities since such are drawn from the treasury.

³⁴ (1995) Unreported Case No 774/1/Q 1415.

According to the court, the need for caution was a general one. Caution ought to be exercised in all cases, whether the decision involved the public treasury or a private person or body. This statement *prima facie* is an affirmation of the need for even-handed justice to all parties in litigation irrespective of their status. It also can be interpreted as confirmation of the view canvassed throughout a substantial part of this study that the same principles of delictual liability apply to both private persons and public authorities under Islamic law.

6.3.2 Immaterial Harm

From the cases to be discussed below it may be observed that immaterial harm is of three forms: the pain and suffering of an injured person (including psychological pain); damage to reputation (defamation) and for loss of liberty (independently of any loss of earnings). Developments under each of these categories will be discussed further. However, it is appropriate to start by considering the recognition of immaterial harm in the jurisprudence of the court.

6.3.2.1 The Question of Recognition of Immaterial Harm

In light of the previous discussion in chapter four regarding the controversy on immaterial harm among the Muslims scholars, it is not surprising that there is some difficulty in identifying the firm position of the Board on the issue of immaterial harm. While the cases show that sometimes the Board appears to have taken the liberal view that immaterial harm ought to be compensated, it has not done so in a decisive manner. A good starting point may be to refer to the view expressed by a senior judge of the Board on immaterial harm. According to him, generally, ‘no compensation is paid for intangible personal damage such as psychological pain and anguish.’³⁵

In support of this view, he cited one of the early decisions of the Board where it held that ‘compensation should include all definite actual damage that is both clear and direct according to convincing evidence with relevant documents.’³⁶ This clearly suggests the Board will not grant claims for immaterial harm. This position may not be unconnected with the dominant jurisprudential approach of the Hanbali School of Islamic jurisprudence with its heavy reliance on textual sources in rulings and adjudication. While this approach may have been the position of the Board in the past, a number of its decisions delivered

³⁵ M Shaybat-al-Hamd *Al-Wilayah al-Qadaiyyah li Diwaan al-Madhalim fil al-Mamlakah al-A'arabiah al-Sa'udiyah* Vol. 1 (Mataba'h As-Sallah Jeddah 2006) 402-403.

³⁶ Appeal Decision No. 18/T 1399, Case No.790/2/Q 1397, cited in Shaybat-al-Hamd *supra* at 403.

after its reconstitution as an independent body, shows it is gradually moving towards a more progressive view on compensation for immaterial harm as the following cases show.³⁷ The researcher found through informal discussions with some judges of the *Shari'ah* court that the *Shar'iah* courts have consistently refused to recognise immaterial harm as a head of claim and to award any compensation for such claims. This also includes pain and suffering that may have arisen through physical injury. This approach is in line with the restrictive view mentioned in chapter four.³⁸

6.3.2.2 Pain and Suffering

As stated above, pain and suffering does form a category of material harm but it may also fall under the category of immaterial harm in the form of mental anguish, for example. As will be discussed presently, the Board has recognised this distinction and awarded compensation for immaterial harm of this nature. The decisions of the the Board suggests that in a few cases as in *C v Ministry of the Interior*, the Board treats pain and suffering as material harm. The Board sometimes also treats pain and suffering as immaterial harm but some confusion remains as to what the status of immaterial harm is.

One example of when the Board has recently preferred to award compensation on such a basis can be found in *M and N v Ministry of Health*³⁹. This was a case which involved a claim for trauma arising from the defender's alleged delict for the kidnap of the claimants' baby from a public hospital shortly after delivery. In holding the hospital liable for the loss of the baby, the Board awarded compensation to the claimants 'to console the parents for the loss of their son and to compensate them for the *material and immaterial harm* that has resulted from the defender's delict.'⁴⁰ The immaterial harm in this case was the psychological trauma suffered by the parents as a result of the loss of their child while the actual loss constituted the material harm.

However, despite this decision and the decision of *C v Ministry of the Interior* mentioned above recognising the material and immaterial harm of pain and suffering, the Board clearly remains reluctant in awarding damages for such heads of claim. Indeed in *K v*

³⁷ The decision in question was delivered 3 years before the reconstitution of the Board in 1982.

³⁸ A Al-Salamah 'Al-Ta'wedh 'an Al-Darar Al-Ma'anawiy' (2010) 48 *Majalah Al-'Adl* 192, 192-200. Ministry of Justice.

³⁹ (2008) Unreported Case No.777/1/Q/1426.

⁴⁰ Ibid at 6. Emphasis mine.

*Ministry of the Interior*⁴¹ an employee of the defender brought an action for judicial review to quash his transfer to another city. He was successful in his claim but the judgement was not implemented by the defender. The claimant then returned to the trial court with a claim for compensation based on the psychological pain and anxiety he suffered as a result of the non-implementation of the judgement. The trial court then awarded him the sum of three hundred thousand riyals. The defender appealed this latter decision. The Appeal Chamber of the Board overturned the trial court's award of damages. This was because according to the Appeal Chambers, there are no guidelines governing the issue of immaterial harm, and 'it involves conjecture and speculation, especially since there are no valid criteria for assessing the extent and value of immaterial harm.'⁴² The Appeal Chambers has followed the first opinion explained in chapter four.

There remains an inconsistency and a lack of certainty in the decisions of the Board with respect to awarding compensation for immaterial pain and suffering. This is evident through the fact that both *K v Ministry of the Interior* and *M and N v Ministry of Health* were in 2008 but the final judgement in each is, remarkably, diametrically opposed. It would appear that there exists a tendency among some judges towards the liberal view to compensate for immaterial harm, which is suggested within the spirit of justice in *Shar'iah*.

6.3.2.3 Damage to Reputation

Damage to reputation is another form of immaterial harm which has been considered by the Board. In *X v Ministry of Information and Culture*⁴³ the claimant claimed that the defender's act of withdrawing his book on judges and the judiciary in Saudi Arabia from sale to the public caused him harm and loss for which the defender ought to compensate him. He had obtained clearance of the defender as the appropriate body for granting permission for all publications in the country. He sought a number of reliefs from the court. One of them was for compensation for immaterial harm. This included loss of reputation leading to the stoppage of his contribution to knowledge as since the withdrawal of the book by the defender, his newspaper columns had been stopped by the publishers. In addition, his health was negatively affected. He demanded four hundred thousand Saudi Riyals for this heading of loss. On this specific claim, the Board held:

⁴¹ (2008) Unreported Case No. 851/1/Q/1428.

⁴² Ibid.

⁴³ (2000) case No 902/2/Q 1420 (Majmu'ah al-Ahkam wal-Mabadi al-Idariyah, The Board of Grievances 2008) 1911.

... it must be noted that compensation must be for actual, certain and clearly ascertainable harm. The claimant has failed to provide what can be relied on for this (claim) other than mere allegation. Therefore, the Board considers that the compensation he was awarded (under other headings) is sufficient to repair any other harm that he (the claimant) is claiming.⁴⁴

Thus, the Board summarily dismissed the claim for loss of reputation. It can be argued that at least in theory, if the claimant had provided what could have been relied upon in proof of his claim, the Board would have granted it. As will be argued further below, the approach in this case amounts to a fictional recognition of immaterial harm since it suggests in one and the same breath that the award made for material harm suffices for it. It is reasonable to expect that if unproven, there should be no basis for any award being made particularly since the tenor of the judgments which adopted this approach suggests a reluctance to compensate for it based on aversion to compensate for a harm whose value cannot be determined.

The reluctance of the Board to go beyond recognition to actually making an award for moral or immaterial loss arising from damage to reputation is also demonstrated in *N v Ministry of Finance*⁴⁵ (which has been discussed above and included claims for damage to reputation). The court considered the issuance of the afore-mentioned Royal Order (which awarded the driver of the truck the sum of SR 200,000), the positive finding on the innocence of the claimant as well as the compensation for material damage, sufficient to redress the alleged moral damage.

This aspect of the decision ought to be criticised on two scores; first is the fact that the Royal Order was confined to the driver only. More important, however, is the point that the claim for damage to the reputation of the claimant was a very grave issue in light of the fact that Saudi Arabia is well known as an Islamic State which takes a strong view against the consumption of and trade in alcohol. There is good reason to believe that any imputation of engagement in this line of business will considerably hurt the business and reputation of an individual in the circumstances of the claimant. Thus, the decision of the Board to the effect that the positive finding on the innocence of the claimant and the compensation for material harm was sufficient to cover the immaterial harm in this case fell well short of delivering justice on the facts.

⁴⁴ Ibid at 1924-1925.

⁴⁵ (2006) Unreported Case No 960/3/Q/1426.

However, an example of where the Board did recognise compensation for pure immaterial harm for damage to reputation is *T v Ministry of Information and Culture*.⁴⁶ The claimant appealed the decision of the Commission for Review of Violations of Printing and Publishing Law (the Commission) when it failed to award him adequate compensation for the damage to his reputation caused by the newspaper subject of the complaint. In upholding the appeal, the Board noted the prohibition of publishing false information or news about anyone by virtue of Article 9 of the Printing and Publishing Law.⁴⁷ According to the Board, the newspaper had breached the law. It published incorrect news that damaged the claimant's dignity and reputation and disclosed facts pertaining to an investigation without the permission of the competent authority, as required by the law. The Board further referred to Article 35 of the same law which provides that:

A newspaper that incorrectly attributes a statement to any person or publishes inaccurate news must make amends by publishing a correction free of charge, at the request of the person concerned, in the first issue after the request for correction is made. This is to appear in the same place of the newspaper where the erroneous news or statement was published or in a prominent place in the same newspaper. *Those who suffer any damage have the right to claim compensation.*⁴⁸

The Board stated that the newspaper report contained innuendos that the claimant was a criminal, a murderer who killed his son. These completely untrue stories and news, the Board held, had a grievous impact on the claimant, since he was depicted as a criminal and murderer; and his sanity and morals were questioned. This is why the award made by the Commission was inadequate. It stated further that a central objective of Islamic law is the protection a personal's mental well-being and personal honour. The claimant's sanity and honour were questioned, his privacy was violated, his trade name, and financial and commercial transactions were also damaged. This damage should be covered by monetary compensation that matches and redresses its effects. The compensation specified by the Commission is less than the damage suffered in what Islam protects from harm and transgression and lists this amongst its five cardinal objectives. It thus quashed the award and remitted the application back to the Commission.

⁴⁶ (2008) Unreported Case No. 4115/1/Q/1428.

⁴⁷ Issued by Royal Decree No. 32/M (2000).

⁴⁸ Emphasis mine.

It has been suggested in *X v Ministry of Information and Culture*⁴⁹ that compensation is awarded for material harm suffered would have been adequate compensation for any immaterial harm suffered in the form of a damaged reputation, provided, of course, it has been proven. In *T v Ministry of Information and Culture*⁵⁰, however, compensation for a damaged reputation has been recognised independently of material harm. This is a progressive judgement moving away from the restrictive approach.

6.3.2.4 Loss of Liberty

Loss of liberty (independently of any loss of earnings) arising from unlawful detention has been demonstrated in several cases to amount to an intentional delict, as discussed in chapter five. It will be seen from the cases below that the Board has consistently accepted that loss of liberty through unlawful detention will give rise to a claim for immaterial harm. Compensation awarded in cases of this nature to cover pain and suffering as well as damage to reputation but the loss of liberty itself has been considered independently because there appears to be consistency in the decisions of the Board in respect of such cases.

In *D v Ministry of the Interior*,⁵¹ for instance, the Board held that the wrongful detention of the claimant had led to the deprivation of his liberty as well as negatively affecting his dignity and reputation. The detention has also caused him mental anguish deriving in part from his separation from his family. Such damage, although immaterial, must be assessed by the Court for sufficient compensation fit to redress and remove its impact on him. The proper cause, it further held was to repair the situation with certain gratification brought about by an award of financial compensation.

Likewise, in *S v Ministry of the Interior*⁵² the Board, in addition to claims for loss of earnings due to unlawful detention, granted the claim for the harm of depriving him of his freedom, and preventing him from caring for his family and the accompanying mental anguish and the sense of humiliation and contempt he suffered. It is clear from these decisions that moral damage was estimated separately and independently from the material

⁴⁹ *X v Ministry of Information and Culture* note 43 supra.

⁵⁰ *T v Ministry of Information and Culture* note 46 supra.

⁵¹ (1994) Unreported Case No 29/4/Q 1414.

⁵² (2003) Unreported Case No.2739 /1/Q/1424.

damage of economic loss. There remain, nonetheless, elements of both material and immaterial harm.

In a recent decision concerning unlawful detention, the Board held that ‘it is an established jurisprudential as well as judicial principle that when the *Khata* of the administration causes harm to any individual, the victim deserves compensation to repair the *material* and *immaterial* harm suffered.’⁵³ The victim in this case suffered from a restriction to his liberty through unlawful detention. As such, immaterial harm was clearly established. The mere fact of unlawful detention was sufficient to establish immaterial harm in this case, there was no consideration of any psychological harm for example.

It is clear that the Board has adopted a consistent approach in awarding compensation for immaterial harm in cases involving loss of liberty through unlawful detention. This is perhaps due to the severity of the unlawful restriction of liberty together with the far reaching implications in violation of the basic principle in Islamic law in respect of liberty as indicated in chapter five.

6.3.2.5 Compensation for Immaterial Harm- From Fiction to Reality?

It can be deduced from this line of cases that the Board does grant claims for immaterial harm despite a good number of instances where it disclaims the propriety of recognising it as a separate head of claim. However, some of the cases suggest this may be limited to instances of ‘mixed’ as opposed to ‘pure’ cases of immaterial harm. ‘Mixed’ cases of immaterial harm here refer to those cases where the claimant claims not only for immaterial harm like psychological harm or emotional pain but also material loss. ‘Pure’ cases of immaterial harm refer to those cases where the claim may only be for immaterial harm in any form.

The Board’s approach in the mixed cases is significant to the extent that it shows the fiction in the Board’s rejection in some cases of the validity of immaterial harm as an independent head of claim. That fiction, implied in the discussion of some of the foregoing cases, plainly stated is that it is not logical for it to disclaim the validity of claims for immaterial harm in the same breath that it declared them covered in compensation awarded

⁵³ See *I v Hael Police* note 31 supra.

for material harm as it did in some of the cases examined above. In other words, these ‘mixed’ cases (claims for material and immaterial harm) provided an important opportunity for the Board to be categorical as to the non-recognition of immaterial harm. It did not disclaim the validity of immaterial harm claims but (in most cases) preferred rather to subsume them under material harm awards.

In the progressive movement towards the more liberal approach, it would appear that it has been almost an essential factor that before the Board will entertain a claim for immaterial harm of any nature, that there must also have been material harm. Even in such cases the Board has suggested that compensation for the material harm is adequate to also compensate for the immaterial harm. However, it is envisaged that there will come a time in the near future when the Board could conceivably award compensation for immaterial harm independently of material harm. This is likely to come through the new generation of judges who appears to be in favour of the ‘liberal approach’.

There are hardly any claims of pure immaterial harm in the decisions of the Board and the position of the Board on such cases remain ambivalent. However, the Board did recognise compensation for pure immaterial harm in *T v Ministry of Information and Culture*⁵⁴ as indicated above. Note the attention of the Board to various ways a person can, and in this case, had been affected by immaterial harm. Interestingly, the Board did not request specific proof of the harm suffered by the claimant. This may be due to the nature of the case as one for judicial review where the application had already been determined as being meritorious by the relevant administrative body.

It is also worthy of note that the Board in this case was determining a case which has a statutory basis as the cause of action. It is not clear whether the results would have been different if this was the equivalent of a ‘common law’ action- where the claimant relied on the general principles of Islamic law- rather than a statute. It is suggested that the result ought not to be different in view of the relevant legislation subject of this claim. This is because, the Board, like all other courts in Saudi Arabia is required to only uphold laws in conformity with the *Shari’ah* as stipulated by Article 48 of the Basic Law. Thus, the Board implicitly upheld the proceedings under the relevant law as one which it recognised as being in conformity with the *Shari’ah*.

⁵⁴ *T v Ministry of Information and Culture* note 46 supra.

This decision raises a number of issues worthy of some comment. First is the affirmation of the position that immaterial harm is recognised as a head of claim under Islamic law of delict as discussed earlier. Second is the emphasis of the Board in this case on the importance of moving beyond the fictional recognition of claims for immaterial harm and the need to actually make a definitive award for it. To secure the needs of justice as recognised under Islamic law. This it is suggested is a move to reality.

It does appear that a new generation of judges who at present can be found mainly at the first instance (trial) level of the Board may be more disposed to recognising immaterial harm. Incidentally, this does not seem to be the case with the *Shari'ah* courts as stated above. The main challenge has been how to overcome the requirement of valid criteria to determine the existence or occurrence of immaterial harm. This concern is grounded in the general aversion of Islamic law to speculation; the courts require evidence to substantiate the claim of immaterial harm virtually in the same way they do material harm. This approach may be easily questionable from the perspective of a legal system which has taken for granted that immaterial harm can be inferred from or follows certain sets of facts or conduct. However, it does appear that a more rigorous threshold either exists in or has been required in practice under Islamic law.

It is suggested that the lingering reluctance of the courts, both the Board and the General Courts in this regard can to a large extent be reduced, if not removed through the introduction of empirical evidence in such proceedings. This can be done through litigants introducing reliable reports of psychologists and related experts who can provide an assessment of the psychological health of the claimant. As it has been noted earlier (and further discussed below) the Board does rely heavily on expert evidence in traffic cases for instance. The relevance of expert witnesses in decision-making in Muslim society and legal determinations in particular is one with considerable pedigree. A recent study has analysed the important role that expert witnesses have played in the *Qadis* (Muslim judges) court from historical times till date. They have helped through the provision of their expertise, to make the *Qadi* and his court relevant to society in a changing world of science and technology.⁵⁵ It is suggested that the use of expert evidence in the considerations of immaterial harm claims by the Board will further advance the legitimacy of Board in the same way.

⁵⁵ R Shaham *The Expert Witness in Islamic Courts: Medicine and Crafts in The Service of Law* (The University of Chicago Press Chicago 2010).

In sum, it seems that with regard to the award of compensation for immaterial harm the Board is still waiting for someone to ‘ring the bell.’ The Board has on few occasions taken some tentative steps towards the tower as demonstrated in a number of cases discussed in this section. However, about the boldest step yet is that taken in *T v Ministry of Information and Culture*. As discussed in chapter four, the reluctance to award damages for immaterial harm is mostly due to the view taken by some scholars that it is impossible to determine the extent of the harm for the purpose of awarding compensation. Moreover, there is a criminal punishment to deter the wrongdoer. However, in view of the strong argument that immaterial harm is an integral part of the Islamic law of delict, one can only hope that the Board will abandon its ambivalence on this important aspect of compensation. The progressive, albeit slow, movement towards the second opinion, which allows compensation for immaterial harm as discussed in chapter four, may be attributed to the appointment of a new generation of judges who seem to be more liberal in their thinking than perhaps their predecessors. This may be due in part to the educational benefits of globalisation. There is certainly an increased contact with other disciplines in the social-sciences and other branches of knowledge that have a bearing on law among the younger generation in Saudi Arabia. It is relevant at this point to turn to the issue of assessment of damages, calculation and award of damages with specific reference to personal injury cases and immaterial harm.

6.4 Assessment and Award of Damages

The discussion here on assessment, calculation and award of damages does not focus on economic loss and damage to property, as these issues have been considered in the general consideration of the two above. As stated above, the practice of the Board in cases involving damage to property is to award the depreciation in the value of the property following the occurrence of harm to the property. In addition, there is a codification of the rules for assessment and award of damages for depreciation to the value of the property, as a result of public works, which operates on the principle that the depreciation in value of the property must be made good. Royal Order No. 22037 which is the operative legal instrument on the matter is quite clear on the point. The Board, as mentioned earlier, has followed the provisions of the legislation since it is in accordance with the position in Islamic law. Suffice it to say that the key principle in economic loss is the no-profit principle. In awarding compensation, the Board considers the relevant costs that would have been incurred by the claimant if the delict had not been committed. Further, the Board will award damages only based on determinable, actual, rather than possible loss as

established by the evidence. Issues around assessment and award of damages on personal injury and immaterial harm will now be further considered below.

6.4.1 Personal Injury

In Islamic criminal law, determination of liability for causing personal injury or death takes account of intent in the determination of culpability and punishment. In contrast however, as a western modern author rightly states:

for tortious liability it is only required that someone has caused the damage (i.e. the victim's death or wounds), not that he was at fault, for example by acting intentionally or negligently. As a consequence, children and insane persons can be held financially liable for any harm caused by them.⁵⁶

As discussed earlier in chapter four, the rationale for this is two-fold. First, the lack of capacity one way or the other does not count as legal justification for harm to others. Secondly is to achieve the ends of justice in a manner that is fair to all and protect even the defender from possible acts of vengeance despite his lack of capacity which may be a real possibility. In other words, Islamic law posits that ensuring compensation for unjustified harm is the sure-footed route to ensuring *al-Taharuz* and *As-Salamah*, social harmony in society.

It has been stated above that compensation for physical injury claims are typically straightforward as far as the practice of the Board, and indeed, the General Courts are concerned. This, as stated above, is due to the fact that the sources of Islamic law have prescribed the applicable scheme for punishment and compensation in this aspect of Islamic law. The Board, as it has been indicated, is expected to apply Islamic law following the sources and it is not at all surprising that it avails itself of the prescriptions in the classic literature in this regard.

Islamic jurisprudence has fixed the amount of compensation for the loss of souls and limbs and did not leave it to the judge's discretion except in what can be regarded as minor cases of personal or physical injury. The general principles for the assessment of damages under classical Islamic law stipulate specific remedies based on the nature or extent of the injury.

⁵⁶ R Peters *Crime and Punishment in Islamic Law- Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press Cambridge 2005) 19.

Depending on the three factors, the applicable remedy could be *Diyah*, *Irsh* or *Hukumat-al-'adl*. The applicability of any of these three forms of remedy is guided by incidental rules—the assessment of the impact or nature of the injury. Compensation is guided by incidental rules of whether the injury has led to a loss of life or functional impairment of a body part or organ, or the disruption of natural beauty of the limbs or part of the body.

Diyah is fixed compensation for the loss of life, complete loss of a faculty or limb. Full *Diyah* is awarded for loss of life. Where the limb or faculty lost or permanently damaged so as to be functionally useless consists of only one such limb or faculty, then full *Diyah* is awarded. An example is the loss of sense of taste or smell or sight in the two eyes or hearing in the two ears. However, where the limb consists of two independent parts like the eyes (where only one is lost or sight in one is lost), or the loss of a hand or leg, then half *Diyah* is awarded. Where the limbs consists of parts, for example, the ten fingers of the hands, the amount of *Diyah* payable will depend on the per centum lost.⁵⁷

Irsh is the fixed compensation awarded for the impairment of a faculty or limb. Like *Diyah*, the application is according to the level of the impairment if it is possible to determine or recognise the amount of the loss in issue. Where it is not possible to determine the level of diminished functionality of the limb or faculty the judge's discretionary power *Hukumat-al-'adl* comes into play. The judge's discretion also applies in the award of damages for other types of injury like those which affect the natural beauty of a limb.⁵⁸

The application of the aforementioned principles has been demonstrated in a number of cases. In *S v Al-Madinah Municipality*⁵⁹ mentioned above the Board stated that it is established in *Shari'ah* that 'there is for (the loss of) every sense a *Diyah*.' The medical report on the incident stated that the child's mental capacity, speech, sight, hands, feet, ability to discharge (urine and faeces) had been affected. The Board held that the claimant was entitled to complete *Diyah* for loss of each of these faculties. The clinical report further stated that there is a ninety-five percent loss of the child's ability of perception and recognition. The Board awarded compensation, *Irsh*, for this loss which was ninety-five percent of the applicable *Diyah*. Therefore, the Board awarded the claimant a sum of 695,000 Riyals reaching the level of compensation for the loss of senses and abilities as

⁵⁷ M Bosaq *Al-Ta'awidh 'in al-Darar fee al-Fiqh al-Islami* (Dar Ishbilyah lil Nashir wa Al Taozi' Riyadh 1999) 309- 343.

⁵⁸ Ibid. at 344 - 363.

⁵⁹ *S v Al-Madinah Municipality* note 16 supra.

stated.⁶⁰ In this case, no medical costs were claimed or awarded because the injured boy was treated in a public hospital where all medical treatment is free. It is logical to expect that the Board would award claims for medical expenses in deserving cases where this is incurred.

*D v Al-Madinah Municipality*⁶¹ discussed earlier, involved a claim for loss of life. The Board held that the defender, like an individual, or any other body, is liable for the consequences of its delictual conduct. It ordered the defender to pay the *Diyah* for manslaughter; the sum of SR100, 000 for the death of the child.

6.4.2 Immaterial Harm

In those cases where the Board does award compensation for immaterial harm, it takes a number of factors, including social status and income, into consideration in assessments and calculation of the appropriate award. In *W v Ministry of the Interior*,⁶² the Board awarded the claimant compensation for unlawful detention. The Board compensated him for his suffering resulting from the deprivation of liberty and unlawful separation from his family. The Board stated in the judgement that :

Damage caused to people by imprisonment and detention varies, depending on their circumstances and social status, as well as their income. Hence, the amount of compensation sufficient to redress and cover such damage varies, depending on the circumstances of each case. Therefore, the court endeavours to estimate the compensation to award the claimant for both his material and moral damage, taking into account the claimant's employment status.

In fact this statement of the Board is in compliance with Royal Order No. M/1407.⁶³ This Royal Order provides for the right of people unlawfully detained to address their claims to the Board. It provides in part that:

⁶⁰ It should be noted that there was a set amount of *Diyah* under Saudi Law for manslaughter to the sum of SR100, 000 which has recently been amended by Royal Order No.43108 on 31/8/2011 to the sum of SR 300,000.

⁶¹ *D v Al-Madinah Municipality* note 15 supra.

⁶² (2007) Unreported Case No. 747/1/Q/1427.

⁶³ Issued in 2000.

the Board of Grievances shall examine lawsuits of that kind and decide the suitable decision and compensation to repair the harm in order to achieve justice. This is because the harm that affects those individuals, as a result of unlawful detention, varies according to their status, situations and the circumstances. Therefore, the compensation for this damage will vary accordingly.

There is no definition of what constitutes status in the Royal Order, but it can be assumed that status here would include social standing like educational attainments and professional standing, among others just as the Board alluded to in *W v Ministry of the Interior*.

In its judgement in this case, the Board found that the claimant earns a monthly salary of ten-thousand, eight-hundred and fifty riyals, for regular 7-hour duty, which he was unable to perform due to imprisonment but since he was paid, the Board excluded his working hours from its calculation. The court calculated for the claimant the seventeen hours left in his day, using his hourly rate. Thus, the amount of compensation for 239 days of imprisonment was calculated at two-hundred and thirteen-thousand, five-hundred and fifty-two Saudi Riyals.

In exercising its discretion, the Board has, in this case, applied the same method for calculating compensation for the remaining period of unlawful detention as it did for loss of earnings. The loss of earning approach has been adopted in an area which does not concern loss of earnings. This means that a person having a higher social standing and a higher income would be awarded more compensation for the same period of unlawful detention as a person of a lower social standing and income. However, in doing so, the Board has given consideration to wider circumstances as it is required to do under Royal Order No. M/1407 though perhaps focussed heavily on income, to the detriment of family life, for example.

A striking feature of these cases where the claims for immaterial harm were granted was the use of wide discretionary powers by the courts in determining the appropriate amount of compensation. None of the cases provide an insight on how the award was made. Thus further to the Royal Order No.1407, there remains a lack of guidance on the calculation method that is to be adopted in making such awards, raising the possibility of inconsistency

in this area of the Board's compensation practice. Indeed in *D v Ministry of the Interior*,⁶⁴ concerning unlawful detention, the Board held that in estimating immaterial harm, the court endeavours to use its discretion, without limiting itself to elements of certain physical evidence, as would happen in the case of compensation for material harm. This is because, according to the Board:

estimating sufficient compensation is neither easy nor straight-forward. But that must not hinder the court, since difficulty is no excuse for depriving the claimant of his right to compensation to redress his material harm and reinstate his social status, and to compensate him for the cost he put forth while following up this case.

The Board further stated that the estimation of damages in such cases is done in the manner it deems 'sufficient to achieve justice and redress injury or damage.' This decision is to be welcomed for its progressive views on the proper approach to assessment and award of compensation for immaterial harm. It certainly conflicts with the approach in other cases of immaterial harm discussed above including *K v Ministry of the Interior*. It is argued that such a liberal approach gives the judges the needed liberty to award damages for immaterial harm taking variable but relevant circumstances of the claimant and the nature of the harm among others into consideration. It is such an approach that can provide the Board with the much-needed flexibility to address claims of immaterial damage that are likely to increase both in volume and complexity with the growing awareness of people of their rights and liberalisation of governance in the country. The Board should utilise this freedom with more regularity in order to best achieve justice for the victims of immaterial harm.

6.4.3 Use of Experts and Expert Evidence

A marked feature of the approach of the Board to determining liability of public authorities is the recourse to expert evidence. This is commonly done in cases involving technical matters like traffic accidents and construction issues. But the use of experts, as the discussion above shows, also extends to the determination of technical issues in any type of case. This practice of the Board is not unique to it. Indeed, following the Islamic legal system, the Board, like all other courts in Saudi Arabia, relies where it considers appropriate on expert evidence. As stated above the classic Jurist Ibn Qudamah says, with

⁶⁴ (1994) Unreported Case No 29/4/Q 1414.

regard to estimating the value of similar items: 'Its evaluation should be referred to competent experts.'⁶⁵

As it has been noted in chapter four, the General Courts similarly rely heavily on experts in their adjudication. Thus, the Board sometimes relies on the Council of Experts of the *Shari'ah* Court for advice in matters which it considers requires technical assessment. Whether expert evidence is to be used is a matter for decision by the Board and the incidences around the attendance and costs of the experts are borne by the Board. This goes back to the mention earlier made of the hybrid nature, partly inquisitorial and partly adversarial, of the power of the judges and the conduct of proceedings in the Board (and indeed other courts in the country).

The use of expert evidence is also a codified matter with regard to the Board. Article 24 of the 'Rules of Procedure and Proceedings before the Board' provides that the Board, where it requires it, can appoint an expert with a clear mandate on the scope of work/evidence required from the expert. The panel may call the expert to give his evidence *viva voce* which will then be entered into the case record.

The significance of the use of experts is two-fold. First the Board uses expert evidence in the calculation and award of damages generally. Second, expert evidence not only assists judges in particularly complex cases to determine the appropriate award of damages, but also the contributory nature of any loss suffered. This is most notably so in road traffic accident cases. Such information is then used to determine any reduction that may be required in an award of compensation.

6.4.4 Conduct of the Claimant which may Affect the Award of Damages

As stated in chapter four, the conduct of the victim may negate liability. However, there are instances also where the conduct of the victim, although it does not negate liability, may reduce the award of compensation. The latter instance is equivalent to the concept of contributory negligence in Scots and English Law. More importantly, the practice of the Board on contributory negligence is similar to the general approach of the General Courts as highlighted in the case *G v Saudi Telecommunication Company*⁶⁶ discussed in the previous chapter.

⁶⁵ Ibn Qudammah note 5 supra Vol. 8 at 28 and Az-Zuhayli note 10 supra at 95.

⁶⁶ (2007) Unreported Case No. 117/2 1427.

There are a number of cases that have been decided by the Board where the conduct of the victim affected the award of damages. In *I v Municipality of Al-Madinah*⁶⁷ mentioned earlier, the Board found from the report of the Traffic Agency investigation into the accident that 75% of the responsibility for the said accident fell on the person who left the asphalt piles on the road and the remaining 25% was a result of speeding of the claimant. Thus, the defender must bear 75% of the cost of the damages sustained by the claimant's car in the accident. *T v municipality of Qaseem*⁶⁸ presents similar facts. It was proved from the accident report by the Traffic Agency that the defender was in *Khata* in its construction of humps implicated in the road accident. However, the fact of speeding by the claimant was also established to have contributed 50% of the cause of the accident. The Board accordingly awarded the claimant half of the loss he suffered from the accident.

Further, in *D v Ministry of the Interior*⁶⁹ the Court noted that the claimant demanded a compensation of ten thousand riyals for every day he spent in jail, that is a total of five-hundred thousand riyals for the entire period of his unlawful detention. The Board also considered evidence of the claimant's partial responsibility for the long period of incarceration.

6.5 Conclusion

Compensation, to paraphrase the language of the introduction of this chapter, is the *raison d'être* of adjudicating delictual liability. This, it has been argued is the same across legal systems, the Saudi legal system inclusive. It is not likely there will be a fundamental change in this area of the law. Interestingly, Saudi law shares with Scots and English law, the principle of *restitutio in integrum*.

This chapter has evaluated the Board's practice regarding compensation for public authority liability in delict. An examination of various cases of the Board demonstrates that Saudi law lays emphasis on the need for compensation for unjustified harm done by public authorities for material and immaterial harm. An important feature of the compensation practice of the Board of Grievances is the need to ensure that compensation follows unjustified harm but without profit. This aspect of the Board's jurisprudence is an important one given the implications for delictual liability claims against public authorities. This issue will be further addressed as part of the conclusion of this study.

⁶⁷ (2001) Unreported Case No 1535/1/Q 1421.

⁶⁸ (2008) Unreported Case No.271/7/Q 1429

⁶⁹ (1994) Unreported Case No 29/4/Q 1414 discussed in the section on immaterial harm above.

As discussed above, the Board, in accordance with the general principles of delictual liability in Islamic law does recognise material and immaterial harm. Assessment and award of damages for material damage are fairly straightforward. However, the dominant jurisprudential approach of the Hanbali School of Islamic jurisprudence which relies heavily on textual sources in rulings and adjudication has impacted on the recognition of immaterial harm in regard to the Board's method of assessing the damage resulting from it. Consequently, the recognition of immaterial harm has largely proceeded in a fictional manner with regard to the award of damage for it unlike other heads of damage.

This approach has proceeded through the requirement of the Board that the claimant proves immaterial harm basically in the same manner as material harm. The fictional approach, in the opinion of this researcher, is wrong and as the latter category of cases discussed above demonstrates, the Board should adjust its approach to a more liberal and consistent view that is arguably more in tune with the spirit, if not letter of Islamic law of delict. In this regard, the decision in *D v Ministry of the Interior*, it is argued is the appropriate way to proceed. Surely, as the Board stated in this case, any perceived or real difficulty in determining the extent or worth of the immaterial harm should never operate as a bar to the award of damages. At best, such difficulty should be viewed as a challenge and many more that will come the way of the Board. It must rise to the occasion, otherwise its important role in its classic origins and relevance in contemporary times risk obliteration or will become undermined at least. The Board may do so by extending its use of expert evidence to cases of immaterial harm as such assessments may result in more consistency in the decisions of the Board. However, even with the use of experts, the difficulty remains that there is a lack of guidance on the assessment of damages for immaterial harm.

As a procedural matter, the foregoing examination also discloses that the Board relies heavily on expert opinion in cases where technical issues are involved in determining the liability or otherwise of any of the parties. The use of experts for determining technical matters can be considered 'pragmatic.' While this follows classic Islamic law principles, it is suggested that the use of experts and expert evidence needs to be properly monitored and controlled to ensure the integrity of their evidence and ultimately that of the court. Experts are also human from whatever perspective one looks at and it may be relevant to consider introducing some forms of check like the ability to cross examine them.

Chapter Seven: Conclusion

The Saudi state, like any modern state, has the necessity to contend with the challenges that arise from governmental activity and interaction of public authorities with the citizens and residents within its borders (and even sometimes beyond).¹ The role of courts in checking the power of the (political) organs of the state has become a common and important theme in constitutional legal theory. The comparative literature in this regard has continued to grow. While this work is not exactly on that theme, the work of courts in checking power is of at least tangential relevance and interest to this study. Specifically, this study has brought attention to the significance of the judicial institution, in this case, the Board of Grievances, to the exercise of state power.

The separation of the grievance jurisdiction from the general courts (*Shari'ah*) in Saudi Arabia can be traced to the historical founding of the former jurisdiction. The issue had never really been the distinction in the law applied to state officials as much as the need to emphasise the superior status of the court (and its judges). The grievance jurisdiction has always been recognised as a special one requiring the direct or implicit power (and sometimes personality) of the head of the Muslim state for addressing claims of harm caused by (officials of) the state who may be quite powerful themselves and may even be reluctant to obey the general court. Thus we find as discussed that the position of the *Sahib al-Madhalim* was held by the highest judicial authority, was even regarded as a higher office than the Grand *Qadi* (Chief Justice) office and sittings were held in the court of the ruler and sometimes with his attendance and on specific day (s) of the week.

This approach to the adjudication of state liability can be traced to the fact that under Islamic social system, the head of state (who in practice was almost invariably the head of government too) was considered as being directly responsible for the welfare of the citizens and, from the religious point of view, was personally accountable to God for the conduct of state affairs by his officials. Hence the interest in ensuring that delictual and other claims against the state were accorded the highest level of attention and adjudication since this relate to the functions of officials who represent him. This separation would appear to be then due essentially to the need to secure the highest level of respect for and

¹ A conceivable instance of this will be the delictual liability arising from the conduct of its embassy staff in foreign countries for example. Another example by analogy can be drawn from the cases against the United Kingdom by some former detainees in Guantanamo Bay, the most famous of whom is Moazeem Beg, a British citizen who brought a legal challenge against the government of the UK in a British court for its culpability in his unjustified detention and torture there.

compliance with the decisions of the Board by (sometime powerful) state officials. Despite the foregoing, it is also important to acknowledge that the opportunity to secure not only definitive and swift enforcement of and compliance with the decisions of *Diwan al-Madhalim* promoted this separation, but also, in a limited number of cases, the need for more flexibility in dealing with the distinct nature of the state liability for delict seems to have played at least a minor part. Given this background, it is not exactly clear whether the jurisdiction would have developed differently if it had been merged with that of the general courts.

A gap currently exists in determining the liability of public authorities for delict through the decisions of the Board. It is important that the Board develops a formal theoretical and analytical framework similar to that which exists in western legal systems to make for consistency in decision-making by the judges. A correlation of this is the need for the adequate training in the *Shar'iah* colleges and law schools and continuing education programmes introduced along such theoretical and analytic framework. This is in order to ensure that they are able to consistently apply general principles of Islamic law to current, and in particular, future (and presumably), more complex cases of delictual liability.

A focal point of this study is the focus on a system of law which claims universal applicability, even more, a law for all times. For Muslims, the *Shar'iah* is a code that covers all aspects of life and is applicable to all situations. It governs individual and social relations and as such is claimed to be applied, to various degrees, all across the Muslim world and beyond where Muslims live even as minorities. However, a persistent concern, with advocates and sceptics of the system, remains the viability of a legal system steeped in a specific historical and even contextual setting, in societies and climes across the world. This study has sought to engage an aspect of that issue; namely the applicability of *Shar'iah* principles to state liability for delictual conduct through an interrogation of the experience in Saudi Arabia, commonly perceived to be a conservative society. The exploration in this study hopefully provides useful insight on the veracity or otherwise of the adaptability of Islamic law to all aspects of life and in the contemporary period. The position argued in this study is that *Shari'ah* does contain mechanisms that make its application viable even in complex areas of law like the delictual liability of the state.

State liability for delict in modern legal systems is a complex area of law. This research has attempted to present a critical perspective on whether the application of the current principles of delictual liability in Saudi Arabia is useful and sufficient for effectively

tackling the (slowly) growing number of claims for delictual liability of the state. The analysis of Saudi Law with referential comparison to Scots and English law shows that legal systems are not just a set of rules, but made up of, and influenced by, a number of factors in their design. Prominent in this regard are religion, customs and cultural practices, social, ethnic and even tribal standards. This calls to mind the view expressed by Zweigert and Kotz that ‘the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.’² It is true that the differences in the experiences of two societies that have shaped their legal systems could produce different results. However, the point remains that there are opportunities for learning in examining the process utilised in addressing shared challenges. Thus, the value of even a referential comparative approach adopted in this study which has required further reference to French law specifically in the area of *responsabilité sans faute*.

A salient issue that has been highlighted in this research is the confusion around the concept of *Khata* and *Ta’ady* in considerations of delictual liability of the state. It has been argued that *Ta’ady*, rather than *Khata* is the appropriate basic requirement of delictual liability in Islamic law. This is so, despite the prevalence of the use and adoption of the latter term in the courts across the civil jurisdictions in Arab Muslim countries in the contemporary period. The confusion has been traced to historical factors surrounding the establishment of the judicial institutions in the various countries in the post-colonial period and the initial influence of the French and then (by some of transmutation), the Egyptian sources. The scholarship and literature on the issue have not been spared the confusion as the review of the literature on the issue as shown.

It is important to note that *al-Majalah*, considered by not a few, as the most notable attempt at codifying Islamic law in the last century, has played a key role in the spreading of this confusion. It is important that jurists, legal practitioners as well as the general public in the relevant countries take a close and critical look at the issue since the confusion suggests a different, arguably narrower basis for delict in Islamic law. This is important because of the obvious implication of the element on claims for delictual liability against individuals and the state. A related, and perhaps more fundamental, even if less obvious, issue is the appropriateness of retaining it within a system which claims to be based on Islamic law. At the least, there is a need for clarification that it is at variance with the

² K Zweigert and H Kotz *An Introduction to Comparative Law* (3rd ed Oxford University Press, Oxford 1998)
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Shari'ah particularly for those jurisdictions, like Saudi Arabia that declare its law on delict is based on the Islamic legal system.

Some may question the engagement with the critique of the use of terms like *Khata* and 'risk-based liability' by the Board and view it as unnecessary, if not downright unproductive. However, deeper reflection suggests the relevance of the critique in this study. There are a number of reasons, some already advanced (but which bears repeating) for the attention paid to these terms in the jurisprudence of the Board. One is the context of the research; investigating what is the state of the law of public authority liability for delict through an examination of the decisions of a specific judicial institution and national jurisdiction; the Board of Grievances and Saudi Arabia respectively. The jurisdiction, its institutions and laws are commonly referred to both positively and negatively but hardly studied outside in the comparative literature. More telling still, there are relatively few analyses, given its relevance in the middle-east and beyond, even in Arabic. There are fewer still critical and detailed socio-legal studies on Saudi Arabia and its legal system in the English language. This immediate context highlights the need for every effort to ensure thoroughness of analysis and clarity on terminology in any attempt to identify the *jurisprudence in action* in the specific limited confines of the research focus.

This leads to the second point which is the focus of the research; delictual liability of public authorities, an area which by all accounts is complex even in the western developed legal systems like the United Kingdom and France. This much is attested to by the academic literature on the topic, some of which have been highlighted in this study. This is germane in the context of a developing country with a comparatively different system which aspires for fidelity to its values and legal heritage. It is of academic interest to identify extraneous influences (deriving mainly from historical factors) from other legal systems. Such identification logically leads to investigation and analysis of their compatibility or otherwise with the subject system, in this case, Islamic law. Put another way, it is relevant to interrogate what *is* as against what *ought* or, in some cases *perceived* to be the *law*.

Thirdly, in a globalising world with the inevitable growing interest in comparative studies across the social sciences, including law, it is particularly important to make an attempt at least, at clarifying what is the correct statement of the law of any jurisdiction. This is a foremost requirement before such legal system can be validly 'compared' with any other. Otherwise, any attempt at comparison stands suspect at best. If attention is not paid to the

issue, there is a serious danger of furthering misconceptions of law through the uncritical adoption and use of terms strange to the subject system. This, it has been argued, is the case for example with the use of a term like *Khata* in delict. Analysis shows it has a different jurisprudential connotation in other aspects of Islamic law e.g. application of criminal law.

Finally on the point of the need for terminological clarity, one of the likely consequences of terminological confusion is the prospect of horizontal and parallel misapplication of the concept (s) involved. Horizontal here will refer to the possibility of importation of extraneous meanings or conceptualisation of the term from foreign sources as is the case with *Khata* not so much in the jurisprudential application of the Board (at least in practice), but in some other Arab Muslim jurisdictions. Parallel misapplication here refers to the possibility of misapplication deriving from internal (like other areas of Islamic law) sources. The result of either is the same; confusion in the *law*. In the case of the Saudi jurisdiction, struggling with the challenges of modernisation, such a jurisprudential situation will, to say the least, be quite problematic. That will be even more so in an area that is developing in the jurisdiction and promises to become more complex to adjudicate. Consider that even in better developed legal systems of the United Kingdom and France, delictual liability of the state is notoriously complex. Surely, a system that is developing will require all the clarity it can muster to meet the challenges ahead.

The distinction between *Shari'ah* and *Fiqh* is very important for the application and development of Islamic law in general and relevantly here, delict in countries whose legal systems are based on that system of law like Saudi Arabia. *Fiqh*, the methods of Islamic Law, is subject to change depending on circumstances. *Fiqh* allows for the evaluation of foreign law, practices and experiences with a view to their adoption and application where they are compatible with the *Shari'ah*. This process is possible through a number of jurisprudential mechanisms one of which is *al-Maslaha al-Mursalah*.

The jurisprudential concept of *al-Maslaha al-Mursalah*, protection or preservation of the public interest, is central to law making and governance in the Islamic socio-legal system. In order to validly act on or determine what is in the public interest however, recourse must be had to the objectives or aims of Islamic Law, *Maqaasid al-Shari'ah*. Its potentials and capacity for adapting Islamic law to social-change are profound given that it is an inbuilt mechanism for preserving the fundamentals of the faith-based law to evolving human needs and temporal circumstances.

A liberal construction of *al-Maslaha al-Mursalah*, it is argued provides a viable basis for the development of appropriate principles in the challenging and ever-expanding area of delictual liability of public authorities. Through the principle of *al-Maslaha al-Mursalah* the (UK) sources may be drawn on as appropriate in enriching the law and jurisprudence of Saudi law in the area of delictual liability of public authorities and indeed, any other area of Islamic law. The operative condition or proviso for such adoption remains that such principles must not be contrary to the *Shari'ah*, the source of Islamic law. This is much like the 'Repugnancy Test' laid down by the UK for the reception of local or customary law in its colonial territories.³

The issue of recognition of and compensation for immaterial harm in cases of delict arguably presents an important point of dissonance between doctrine and practice in Islamic law, at least, as practised in Saudi Arabia. While in principle, *all* unjustified harm must be removed, in practice, there is recognition (at least in some cases) of immaterial harm for which distinct compensation is not normally made; hence the dissonance between doctrine and judicial practice. That dissonance, it has been suggested, ought to be removed. A way out, it is proposed, is the use of relevant expert witnesses. The use of witnesses, it has been noted, is an established practice in the Islamic legal system with an enduring history and significance. And so it is in Saudi courts in many cases. Somehow, it has not been deemed necessary or appropriate to take recourse to experts to secure evidence (or the lack of it) on a rather contentious issue which lends itself, at least in these times, to specialised testimony. That simply should not continue.

The case for the use of expert evidence on claims for immaterial harm may be considered by not a few judges of the Board (and especially the *Shari'ah* courts) as one for undesirable change. Incidentally, change, while a constant phenomenon in human life is rarely welcome, at least not usually at the beginning. It is logical then to expect that there may be an initial resistance to the use of expert witnesses to establish immaterial harm. Notwithstanding, the case for it, and the prospects for its acceptability it is suggested, can be quite viable. The use of expert witness' evidence to establish immaterial harm, as the Board requested in the case of *H v Saudi Airlines*, is likely to secure recognition with an increased social-acceptability of immaterial harm as a form of damage which requires compensation. The matter of societal recognition and acceptability, it is suggested, holds an important key to positive resolution of the contentious issue.

³ See generally B Ibhawoh *Imperialism and Human Rights-Colonial Discourses of Rights and Liberties in African History* (Suny Press New York 2006) 58-60.

A number of cases on immaterial harm discussed in this study clearly speak to the fact that claimants regard immaterial harm as a distinct form of harm requiring reparation. It is logical to assume that this approach on the part of claimants is likely to increase to the extent that it will be regarded as part of the custom, *Urf* of Saudi society. As stated earlier, the judges are required to consider custom in their adjudication. The judges will then have little choice on the matter. This view is premised on the fact that judges in all legal systems, the Islamic one like that in Saudi Arabia being no exception, will seek to remain relevant in the socio-political scheme of society. No doubt, a contrary approach by the courts (were the matter to become recognised as custom), will risk a loss of relevance.

In the United Kingdom, an important issue that has exercised the minds of judges, academics, the political branches of government and presumably the general public regarding delictual liability of the state is the development of a ‘compensation culture.’⁴ Compensation culture is an ‘unhealthy’ culture ‘which says that someone must be liable to pay every injury.’⁵ It is condemned because it stultifies ‘*reasonable risk-taking*.’⁶ The major concern raised about it from a governmental perspective is how it may tend to undermine implementation of policy.⁷ However, it is interesting to note that a recent study points out quite importantly, that the concerns in the light of empirical surveys, are ‘somewhat inflated.’⁸ Indeed, a number of empirical surveys have demonstrated a fall in personal injury claims in the past decade in the United Kingdom for instance.⁹

The reason for the inflated view on the dangers of a ‘compensation culture’ may have more to do with the fact as observed by one author, that it is not a legal, but rather a political term.¹⁰ The media has been identified as a major promoter of this state of affairs.¹¹ Given this construct, discussions of the issue may easily lend itself to the vagaries of (political) manipulation by politicians and even government bureaucrats seeking a convenient shield against public accountability. This is precisely a situation the precursor of the Saudi Board of Grievances, *Diwan al Madhalim* was developed to combat; the state is to be protected

⁴ See for instance S Halliday, J Ilan and C Scot ‘The Public Management of Liability Risks’ (2011) 31 (3) Oxford Journal of Legal Studies Advanced Access 1-24.

⁵ J Steele *Tort Law- Text, Cases and Materials* (Oxford University Press Oxford 2007) 559-560.

⁶ Ibid at 560 (emphasis in original).

⁷ Halliday *et al* note 4 *supra* at 2 and W Haltom and M McCann, *Distorting the Law: Politics, Media and the Litigation Crisis* (University of Chicago Press 2004); K Williams, ‘State of Fear: Britain’s “Compensation Culture” Reviewed’ (2005) 25 Legal Studies 499; A Morris, ‘Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury’ (2007) 70 MLR 349.

⁸ Halliday *et al* note 4 *supra*.

⁹ Steele note 5 *supra* at 560.

¹⁰ Ibid. at 559.

¹¹ Ibid at 560.

only to the extent required for the performance of its legitimate duty under the law. That same law requires the duties of the state to be fulfilled with the utmost regard to the individual and general well-being of its citizens.

It is logical to argue that the fear of the ‘compensation culture’ as well as the flood-gate argument emanates essentially from the opposition to profit that appears available to be made given the nature of the assessment of damages practice. In other words, a critical factor in the concern on development of a ‘compensation culture’ is the amount of awards made in individual cases by the courts. Taking the argument to the Saudi context, it could be argued that the practice of delict by the Board would lead to the rise of a ‘compensation culture.’ With the development of such a culture, the state would be over cautious in initiating any development, because the presence of even a slight reasonable risk could raise the possibility of a claim against the state.

The current practice of the Board based on the precepts of Islamic law however negates and reduces this possibility. In Islamic law, a claimant would only be restored to the state previous to the harm occurring, and no profit would be gained. This would balance against any the development of a ‘compensation culture.’ In essence, where the courts in the UK limits liability to prevent the rise of a ‘compensation culture’ from which claimants may seek to profit, Islamic law limits ‘the profit’ by only allowing restoration to the ascertainable pre-harm state, thereby balancing against the rise of a compensation culture and ensuring equality for all before the law. This is exemplified by the reluctance of the Board to award for immaterial damage as discussed earlier, that reluctance extends from its aversion to not ensuring justice in award of damages. It is not so much that it does not recognise immaterial harm as the fact that it wants to ensure there is no profiting from that head of claim. Despite that fact however, it is important to recognise it as it has been emphasised in this study.

In some cases, the awards for delictual liability of the state have been quite sizeable. The large size of compensation awards against the state clearly has the tendency to, and indeed seems to have fostered an interest in pursuing claims for delictual liability of the state under various guises. This has formed part of the concern by observers. Similarly, the current practice of the Board based on fidelity to Islamic law principles of ‘no profit’ from delictual liability claims irrespective of the deep pocket of the defender is relevant. This feature of the equality principle in Islamic law should work against what in some cases, may be considered as inappropriate compensation awards for delictual liability of the state.

Moreover, the fixed system of award for personal injury further shows the emphasis in Islamic law on ‘no profit’ from delictual claims against either the individual or the state. This is argued as the balanced approach, where the injured individual is not left without compensation and the public purse is not unduly burdened by indiscriminate awards of damages which can be viewed as being detrimental to the public interest.

Even if a ‘compensation culture’ as commonly assumed has developed in the context of the United Kingdom, Ireland or even France, it is doubtful that it would, or should, be an issue of major concern in the context of the Islamic system. It is argued that a court like the Board of Grievances in Saudi Arabia, charged with the dispensation of justice in Islamic law is obliged to maintain a *just* balance always between the individual and social interest. This is in line with one of the cardinal objectives of the state in Islamic law which is to maintain social harmony. No doubt, there may be a tension in practice on the matter but Islamic *fiqh* with its various interpretive mechanisms like *al-Maslaha al-Mursalah* comes to play to ensure a balancing act that takes cognisance of the social context and specific situation of claimants to achieve justice.

An instance, even if not entirely free of possible criticism, is substituting the foundational rule of *mithlun bi mithli*, ‘like for like’ rule for compensation in lieu option in deserving cases of road accidents. At one at the same time, such a compensation regime works fairly in the interest of the individual and the state. It protects the interest of claimants who are not barred from receiving compensation through the introduction of complex rules (of a legal and policy nature) and it serves the interest of the state which does not have to pay considerable sums in compensation at a level that hampers the discharge of its overall obligations of public welfare. It is hoped that the Board will continue on this footing that seeks to achieve the spirit of the law rather than a fixation on literalist interpretation or application of black letter law. Such an approach is required in the face of changing social circumstances and is important for achieving a required balance in the conduct of affairs in Muslim societies.

An issue connected to the concern on the ‘compensation culture’ is the ‘flood-gate’ argument. Here the point is that awarding compensation against the state may lead to so much litigation which will hamper government initiatives, delivery of welfare services and socio-economic development. However, virtually the same arguments relevant to the concern on the promotion of a ‘compensation culture’ apply here too. The Islamic position, where adhered to, as is arguably the case with the Board, provides a ‘check and balance’

platform to mediate possible tension: (reasonable) compensation is awarded to a deserving claimant and the state is allowed to carry out its functions as reasonably as possible.

From the perspective of Islamic law, the whole existence of delictual liability is to ensure that the injured is compensated and it would be unjust, particularly given the power of the state, to proceed with an institutional approach which diminishes the relevance of compensation. It is arguably in the best interest of the state and the public that the concerns of both parties are even-handedly dealt with by the justice system to ensure the desired peace, justice and development in society. As mentioned earlier, the Islamic system is based on social harmony and peace. Each of the structures of the state as an aspect of Islamic law is directed at achieving that purpose. Recognition and satisfaction of the victims of state delict is an important mechanism for achieving and sustaining that purpose.

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