



## The Comparative Study on Insurance Contract with Liability of Perpetrator's Relative in Relevant Laws

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### ABSTRACT

Islam has been assumed as one of the major harbingers of principle of individualization of punishment by aiming at negation of oppression and justice administration from the beginning of its advent. Certainly, the Islamic illuminative injunctions have been enacted with consideration of time and place requirements and inevitably those injunctions, which entirely depend on these conditions, are changed following to changes in social conditions; however, this issue has not been unfortunately addressed in the created development in Iranian criminal law after Islamic Revolution and some of the criminal laws, including the law concerning to liability of perpetrator's relative have not been considered for law enforcement due to some of required social conditions. The present article is based on this assumption that essentially any judgment will be concerned with its specific subject and conditions per se. Hence, the liability of perpetrator's relative also follows the suit and the related conditions. Whereas its issue is subjected to tribal and nomadic life and there is no generally such a condition at this time (non-compliance of the liability of perpetrator's relative with the custom and norm of present time) thus the subject of liability of perpetrator's relative will be rejected as well. Some other issues are mentioned regarding liability of perpetrator's relative including ambiguity about criminal and or compensatory essence of liability of perpetrator's relative, doubt in type of liability in terms of obligator and or positive nature, the subject of defense from the relative of perpetrator and its contradiction with the principle of individualization of punishment, irrationality of liability of perpetrator's relative, and the relationship among liability of perpetrator's relative with the insurance etc. Thus, due to proximity of liability of perpetrator's relative to insurance in today communities we intend to examine these two subjects at the same time from one point of view.

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### INTRODUCTION

The system of Liability of Perpetrator's Relative has been compared with liability insurance in *Islamic Jurisprudent Weekly* (فقه الاسلامی، Damascus: 1950) and it has been commented about the legality of types of insurance including liability insurance at end accordingly this contract is in favor of members of community and it has not been opposed by the Islamic legislator (Sharia) explicitly.

Also, Articles 305-314 of Islamic Punishment Law have been devoted to subject of *liability of perpetrator's relative* (ضمان عاقله). The subject of liability of perpetrator's relative is defined as the responsibility of blood money for mere manslaughter by the perpetrator's relative in the cases when the given relative shall be obliged. This point that why the perpetrator's relative (عاقله) is responsible for payment of such blood money is the question that was raised after ratification of Islamic Punishment Law. It is natural that there are two different attitudes about this subject among the authors like other legal jurisprudential issues.

Compliance of insurance contract with jurisprudential disciplines is also considered as a serious problem in which there is no other alternative except discussion and Islamic discerning analysis about it. No track of insurance may be also found in Holy Quran and Sunna regarding insurance in its modern concept. It is true that after emerging of Islam, some contracts like guarantee and system of liability of perpetrator's relative that may embody a similar type of life and liability insurances in the mind, were confirmed and signed by the holy Sharia,

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but the aforesaid institutions have been mainly based on cooperation and contribution. In any case, in its current concept and the related rules and regulations, insurance is one of the western phenomena, which entered initially by marine transport to Islamic countries and due to their urgent need to the insurance they have tried to take the fatwa from the great jurists at the given time. Whereas proposing of these issues by the Islamic religion is based on moderation and away from any hostility thus jurists have tried with respect to wide range of insurance types to confirm its authenticity by the insurance with one of the jurisprudential contracts where one of these contract is liability of perpetrator's relative that has been prevalent among Muslim and verified by Islam at early Islamic period.

The importance of this phenomenon and severe requirement of Muslims from Islamic nations to the insurance has caused the Islamic jurists to analyze the insurance and make it compliant with Islamic regulations as well and this led to opening the subject of Islamic interpretative reasoning (اجتهاد) about insurance.

The marine insurance is one of the primary types of maritime-related insurances while no sign of insurance regulations might be seen in these books until 19<sup>th</sup> century. The subject of insurance has been mentioned in form of question and answer and without deduction in Islamic injunction books by the Islamic qualified authorities. Therefore, the subject of compliance of insurance with jurisprudential principles and analysis the differences and similarities of liability of perpetrator's relative in payment of insurance has been considered as one of the social problems and requirements by the aid of the beneficent and dynamic Islamic jurisprudence (فقه) and given that the perpetrator's relative is responsible for payment of blood money in mere manslaughter so it has been called as familial insurance and this question may be raised that if there is any difference among that insurance, which is prevalent at community level today from the type of insurance that has been called under title of *liability of perpetrator's relative* (ضمان عاقله) or not.

#### *Definitions of perpetrator's relative (عاقله):*

There is a rule regarding Islamic criminal law based on which whenever a crime is committed by fault the perpetrator's relative will be liable for payment of blood money under certain conditions. It was a judgment before Islamic period that had existed according to social requirements and interests for enforcement of this regulation at that time and it has been affected by holy Sharia as well. The responsibility of the perpetrator's relative, which is called under title of *liability of perpetrator's relative* (ضمان عاقله), has been reflected according to the order of the well-known jurists as well as in Islamic Punishment Law and implied in that law.

#### *a) Lexical meaning:*

Arabic term 'عاقله' is a feminine singular noun and it has been derived from original word 'عقل' with the meaning of fortification and fence and 'عقول' is plural form of this word while some other experts have defined term of 'عاقله' as obstruction and confinement and others expressed it as the 'الرباط والعقال' i.e. bindings and pledges. Hence, the most known implication is that term 'عاقله' is used as meaning of rejection and obstruction since the perpetrator's relative is characterized as the agent who acts for avoidance from loss and damage and injury and he always look out for other relatives and kinsmen in order to prevent them from perpetration of actions leading to murder, injury, and also defects in body organs. Of course, other group of lawyers has implied that term of 'عاقله' is used for fastening the camel with rope as well as for blood money.

#### *b) Terminological meaning:*

With respect to position of perpetrator's relative historically, the subject of liability of perpetrator's relative is assumed as a type of familial insurance where if someone committed a crime by fault, his/ her relatives would be pledged to pay compensation for the perpetrator with respect to their obligation and or if an underage and or lunatic person committed a crime, his/her near relatives ought to incur the blood money for the sake of him/ her.

#### *c) From jurists' viewpoint:*

With respect to historic position of 'عاقله', the liability of perpetrator's relative is a subject to which Islam has paid special attention and explanation of this subject includes certain philosophy but due lack of governance of Islamic religion over the history, this issue has been discussed only in theory while if these legal institution is revived in the community it may prevent from destruction of many members of families.

Imam Khomeini (RAH) argues that the perpetrator's relative includes the agnate, freed slave, undertaker by inheritance, and Imam. The liable person among agnates is someone, who is relative to the perpetrator by his parents.

#### *d) From lawyers' viewpoint:*

Term 'عاقله' is one of the Islamic positive laws and lawyers have expressed about 'عاقله' that he is someone, who incurs payment for the mere manslaughter that has been committed by another one. In the book of 'Private Criminal Law' Dr. Hooshang Shambayati says: Term 'عاقله' is derived the word 'عقل' that means fastening and consolidation and this term is used for this reason because upon payment of blood

money to the avengers of crime in the past time, a few camels were given as the compensation for blood of the murdered person to his/ her avengers beside the doorway of their house and they fastened the legs of the camels and for this reason it was called 'عاقله'. Similarly, in the book of 'Private Criminal Law', Dr. Seyed Jalal Madani implies: Term 'عاقله' has been defined as prevention and fastening and it has been used for this purpose because this measure can prevent the perpetrator from mere murder by fault.

#### *Definition of insurance:*

The insurance is the coverage of a contract whereby one party will be pledged to pay or guarantee for payment of loss of other person against the incurred loss and damage to the given property due to possible accident or certain risk.

#### *Lexical meaning:*

The terminologists do not unanimously agree on the origin of lexical root for term 'insurance' (بيمه). Some of them consider term 'بيمه' as derivative from Indian language and they define it as guarantee specified to life and property that has been prevalent in modern civilization. In some other group including Mohammad Moein in the book of 'Persian Thesaurus', he introduced term 'بيمه' as a Persian word that means the risk and this meaning is also seen in derivation of term 'بيمه'; for example, Persian word 'بيمگاه' i.e. place of risk and fear for life. Thus, 'بيمه' is a Persian noun and it means the security against the possible pending risk. The Arabs have selected term 'تامين' (security) for this concept and call the insurance contract as 'عقد التامين'. This word is derived from word 'امن' and it means confidence and calmness, which reminds of this concept that the insured party acquires confidence by insuring his/ her life or properties. In Latin, the term 'cecoras' has been also used for the work 'insurance', that means confidence.

#### *History of 'عاقله' and 'insurance':*

In Islamic law, payment of blood money by the male relatives of perpetrator of murder is so important that this term may embody a type of mandatory insurance in minds; in addition, it causes removing the hostility and establishing the peace among both parties and tribes where the scientists have called it as 'Third Party Insurance' that can contribute to the humans under critical conditions.

#### *a) History of 'عاقله':*

The tribal custom had governed in the community in rules at pre-Islamic era and Age of Ignorance among Arab people; in other words, each of tribes and clans possessed their own chief and a series of specific traditions and rites according which they acted. In this tribal structure, if someone killed a member of his/ her own tribe, s/he was not supported by the tribe and s/he might flee and or was excluded from tribe's support and or he was banished by the tribe thus s/he was called as 'خلع' (expelled). If the murdered person was from another tribe, the tradition of avenge was executed and accordingly each members of the murderer's tribe might be subjected to this risk of killing by them versus the given killed person.

In some cases, they asked for blood money and their dispute was resolved by payment of blood money and compensation for murder. Nothing was worst than this state for members of Arabic tribes to be banished from their own tribe during Age of Ignorance. At the beginning, tribal attribution was required by birth among tribe. But everyone could share in food with the tribe. In an environment full of poverty, the life of one human was equal to one hundred camels and the blood money was paid to avenger of blood of the killed person from the given tribe mainly in order to prevent from revenge of that tribe and whereas payment of such amount of blood money was arduous and heavy for many persons thus their tribe submitted it to the avenger tribe. Since this former custom and tradition governed in Hejaz region and in some of Arabic areas upon emerging of Islam therefore The Islamic clear religion accepted this rule and for this reason, liability of perpetrator's relative is also considered as a type of confirmatory institution in Islam.

In any case, regarding accepting and resolving of liability of perpetrator's relative system in pure murders by fault governing over the relations among members and Arab tribes it was required for the members of tribe to assist each other collectively against violence from the aliens and to support from their members. As a result, continuance and establishment of this type of cooperation and subject of familial indemnity and liability against individual's crimes and offences by fault was posited as an explicit treaty and unwritten law.

This collective and binding familial obligation was followed by two positive and generally accepted outcomes at that time:

- a) With participation in quick payment of blood money the grounds were prepared for recovery of grief of the family of the lost tribe as well as avoidance from the hostility and creating peace and reconciliation among tribes of both parties.
- b) The assistance and cooperation by others in payment of heavy amount of blood money that was mainly assumed as very difficult for the given person alone was considered as acceptance of a type of required insurance. It was at the time that there was no social institution and organizations like current insurances.

Therefore, the historical origin of the injunction regarding liability of perpetrator's relative 'ضمان عاقله' returns to pre-Islamic period.

#### *B) History of insurance:*

Although it seems that the age of insurance industry is more than several hundred years but no one knows exactly that the first insurance policy was attributed to what nation. Some researchers consider the Phoenician mariners as innovators of insurance. It was in such a way that the mariners received loan from merchants and whenever the debtor mariner finished his trip successfully he should pay the original and interest of the received loan to the creditor merchants within the stipulated time.

Mariner's commodities were mortgaged by the merchant and if he could not receive his claim he could sell them in auction. But if the mariner's ship was inflicted by sea accidents and or attacked by pirates and commodities were plundered then the loaner had not any claim and right regarding the original value and interest of the given loan. Therefore, merchant assumed the risk i.e. returning of the loan original and interest versus delivery of the commodities to the destination intact and healthy. These types of loans have been called as marine loans in history of emerging of insurance.

Nonetheless, according to opinion of many researchers, in its real concept, insurance was created since 14<sup>th</sup> century since the church had already opposed to insurance as marine loans because they assumed the interest as prohibited according to religious rules. Thus, merchants changed its form and the borrower paid award instead of interest that was the same amount of interest but its form was in such a way that the church could not oppose it.

The first insurance contract that was found is the transportation insurance that is referred to 1347AD and it was concluded in Genoa city, Italy. Thus, one may attribute the start point of insurance activity in modern form to fourteenth century.

Arising of insurance in 14<sup>th</sup> century and or probably before this time does not mean that the human had not already tended to find an instrument to campaign against the consequences of accidents.

The first examples of insurance can be found in Ancient Iran. According to the archeological researches and the acquired reliefs and documents, regardless of all of its amazing effects, Takht-E-Jamshid (Throne of Jamshid) also possesses a human aspect compared to the other monuments at its period. All of persons, who worked in Takht-E-Jamshid and received salaries, were also insured at that time, based on the found written adobes in Takht-E-Jamshid.

In its traditional form namely the existing type of social cooperation and synergy for proration of individual and few individuals among all groups or society, insurance has long history in Iran and the people of this land have been active and pioneer for contribution to compensate the unwanted losses that might occur for their compatriots and even people from other nations with inspiring from their Islamic and cultural teachings. Despite of this fact, the insurance has been proposed in its professional and modern form for the first time in our country in 1891.

In 1931, along with approval the companies' registration law in Iran, the British, German, Austrian, and Swiss insurance companies etc like Osterreich Allianz, Eagle Star, Yorkshire, Royal, Victoria, Swiss National, Phoenix, Ettehad Al- Vatani (Homeland Alliance) etc have established insurance branches and agencies and acted in insurance field.

Expansion of activities of foreign insurance companies caused the national authorities to notice that necessity of an Iranian insurance company that was established and started activity on early November of that year in Iran. The establishment of Iran Insurance Company may be assumed as a turning point in history of activity of (SHAGOOR) insurance since with appropriate executive organization that was at their disposal after the government, it could control the market and monitor the activity of foreign insurance institutes.

After the victory of Islamic Revolution and coincided with starting political- social developments, the insurance was not an exception to this rule and it was subjected to important reforms and changes. The foreign insurance companies were closed down while despite of receiving a lot of funds and exiting them as foreign currency from the country, they proposed the limited insurance coverage. All of the allowed insurance and credit institutes were announced by the National Council of Islamic Revolution and thereby it terminated the lifetime of twelve private insurance companies in this country.

#### *Difference aspects of 'عاقله' from insurance:*

The In Islamic law, the civil liability is assumed for murder by fault namely if someone commits the murder or crime, s/he should pay blood money to the remainder relatives of the killed person based on the fund that its amount is determined in Islamic jurisprudence in this regard that is called *system of liability of perpetrator's relative* 'نظام عاقله' in Islamic jurisprudence and it is highly similar to modern insurance so that the study on types of insurance one can compare the 'نظام عاقله' with liability insurance since both of them are responsive to crimes by fault not the deliberative crimes namely the perpetrator's relative is responsive to manslaughter while liability insurance also consists of errors and urgencies.

Now, we examine eight types of differences among liability of perpetrator's relative versus insurance:

1) In system of liability of perpetrator's relative, the perpetrator's relative is only responsible against liability and guarantee of the crime by fault and the responsibility of murder and deliberative crime or by default is on the onus of the perpetrator of crime even though the perpetrator reconciled with avengers of blood or someone on whom the crime has been committed and the judgment of execution of murderer is converted into the payment of blood money, the perpetrator will be also responsible for payment of blood money while the perpetrator's relative has no any obligation against the deliberative crimes and on the other hand, we can also find this point with looking at insurance system that only unintentional risks and losses and what is done by fault can be insured and the insurer will not compensate for the damage that has been deliberately committed by the insured party. The reason for such a decision both in liability of perpetrator's relative system and in the insurance is clear in insurance system since if the insurer party assumes the responsibility for the intentional crime and fault of the insured party therefore the disorder and perpetration of crimes will become prevalent in the community and at the same time the perpetrator may feel that s/he will not be responsible for his/ her crimes. Therefore, principally the condition of lack of liability will be effective concerning to unintentional crimes, but it will not be liable for their crime. But no contract can waive the responsibility of someone, who caused loss for other one; therefore insurance of general losses will be annulled because of its conflict with the public order.

But this point is noticeable that in the third party compulsory insurance law the damages caused by deliberation and lack of driver's license are payable. As Article 6 of this law implies: Regarding the intentional effort made by the driver to create accident or if the driver has no license for driving, the insurance company may refer to the perpetrator of damage to return the repaid funds after payment of damages.

Compensation for the losses caused by intentional perpetration is one of the properties of third party compulsory insurance law but it should be noticed that acceptance of this article is not proper since the subject of insurance is concerned with the possibility of realization of that condition that does not depend on will and desire of insurance contract parties, especially the insured party. In fact, the insurers insure the possible and uncertain accidents, which occur suddenly due to external factors without their will and intention by the insured party according to Article 7 of the given act.

2) The liability and commercial insurance is concluded by mutual agreement and contract and the liability contract is an agreement whereby the insurer is pledged to compensate for the inflicted losses to other parties by the insured party. The subject of insurance is attributed to the damages, which have been exerted to others due to perpetration of unintentional crimes; namely, the intention, consent, and mutual agreement of contract parties (insurer and insured party) are necessary for conclusion of insurance contract and at the same time the proper and authenticated nature of contract will be also requisite for insurance contract as well and the subject of insurance should be also clear and it should be legal and legitimate. Namely, the insurance contract is concluded by an offer from the insurer (*offer*) and agreement by the insured party (*acceptance*). Thus, insurance contract is concluded following to acquiring mutual agreement by both parties and this agreement is typically fulfilled pursuant to trend of some phases while regarding liability of perpetrator's relative, payment of compensation is binding and compulsory and no mutual agreement has been concluded among both parties.

3) The liability of perpetrator's relative is based on cooperation, benevolence, and synergy while the profitable aspect is mainly considered in types of insurance including liability insurance.

4) According to Islamic narratives, if the murderer escapes or in the case of lack of access to the perpetrator and or if the murderer dies, the blood money is paid from his/ her property and if s/he is not alive or has no property, it is collected from the nearest relative of him/ her and if s/he has no relative the blood money will be paid by Muslim Treasury. But it is not the same case in insurance so the compensation of loss will be paid by insurance company in whatsoever.

5) The liability of perpetrator's relative is only assumed as an obligation and it is specified to well-to-do and wealthy people while the wealth and poverty has no effect in payment of premium in insurance contract. Anyway, the insurance company will be responsible for payment.

6) The blood money is voluntarily paid by the perpetrator's relative but the insurance is considered as exchangeable contracts (not voluntary contract) in such a way that with payment of some fund the insured party will be sure to acquire the obligation of the opposite party for compensation of the possible risk while not implying this obligation in contract causes lack of concluding insurance contract. Thus, insurance contract includes two parties where one is property and the other is obligation but the ground may not be prepared to fulfillment of this obligation and as a result the sense of security will be certainly acquired as a mental phenomenon. Hence, the insured party acquires the mental element with payment of some fund versus it.

7) The liability of perpetrator's relative is a general order and related to all of people while insurance is attributed to someone, who pays premium.

8) The liability of perpetrator's relative will be required to pay blood money after occurrence of accident but the insured party shall pay premium before occurrence of accident.

It has been implied in Article 328 of Civil Code: 'Anyone, who wastes the properties of third party, shall be liable whether this loss caused deliberately and or by fault and error.' This issue regarding wastage (loss) is

typically related to insurance and it has been referred to two types of this issue in Islamic jurisprudence (فقه) as well where it is mentioned that any person who causes loss of property of third party will be liable. In such liability, omission (perpetration by fault) is not assumed as condition. Therefore, wasting of property of third party will be assumed as liability albeit it is committed unintentionally and or by ignorance and error since the wastage (loss) is deemed as positive rules and we know that unlike obligatory laws, the knowledge, intention, power, and sanity are not effective in positive rules. But regarding the liability for payment of blood money, the presence of error (fault) element is deemed as the necessary condition for crime only for creating a responsibility against the committed action and also in crime by accomplice the existing error element is not required for creating liability and only causal relationship is adequate among action of perpetrator and damage for this liability.

*Difference aspects of liability insurance and liability of undertaker by inheritance:*

Although, there are some similarities among *liability of undertaker by inheritance* (ضمان جريره) and liability insurance, one could find the following points with comparison of these two terms:

1) The liability of undertaker by inheritance is one of the cases of liability of perpetrator's relative that is more similar to insurance than other cases and whereas in the case of liability of undertaker by inheritance, perpetrator is supported arbitrarily and based on contract and agreement, unlike the liability of *agnate* (عصبه), this supporting is natural and it is deemed legally as mandatory order. In other words, in liability of perpetrator's relative (عصبه: by agnate), the positive and negative advantages are both determined compulsorily and directly by the legislator while in the case liability of undertaker by inheritance (ضامن جريره), this type of advantage is based on contract and agreement following to the treaty among both parties. Thus we can see that in friendship contract or liability of undertaker by inheritance, a type of legal relationship is created due to will and power of both parties and the liability of undertaker by inheritance is integrated and continued according to their obligation. By considering this explanation when someone is pledged to pay the financial compensation relating to crime by fault committed by third party, he will be inherited from the other contract party versus the obligated person (guarantor) and versus liability of undertaker by this inheritance.

It is clarified by comparison among liability of undertaker by inheritance and insurance that the contract of liability of undertaker by inheritance is one of the forms of insurance under title of liability insurance, which is prevalent today since the friendship contract (موالات) includes all cornerstones of the liability insurance contract. Like any other contract, insurance contract consists of offer and acceptance among contract parties (insurer and the insured party), subject (person, property, and the like), consideration and return of consideration (insurance amount and installment). The liability (guarantee) contract is also a contract composed of offer and acceptance. In the case of liability of undertaker by inheritance (ضامن جريره), the guarantor is assumed similar to insurer since the insurer is pledged to pay compensation in the case of any possible crime. The other party, who plays roles of principal debtor (مضمون عنه) and guarantee creditor (مضمون له) in liability of undertaker by inheritance, is deemed as the insured party. The insurance premium is considered as the compensation that guarantor will pay in the case of occurrence of crime by fault. The insurance installment is the same as his inheritance that has been created according to mutual agreement of the contract of liability of undertaker by inheritance for him. The given risk in insurance is considered the same as that crime and the possible and probable offence, which may be committed by principal debtor.

2) Insurance and liability of undertaker by inheritance are highly different from each other in terms of subject and status since liability of undertaker by inheritance is a contract that has been assigned for whatsoever case – lack of any heir than Imam- and it is effective while if there is any other heir, this contract will be ineffective and null and void and this is unlike insurance contract that is a civil free and absolute contract and it is effective like rights of creditors and shareholder prior to heir.

3) The liability of undertaker by inheritance contract is concluded among two natural persons while insurance contract is concluded among a natural person (insured party) and a legal entity i.e. insurance company.

4) It should be noted that liability of undertaker by inheritance assumes the responsibility of the crimes for which the blood money are required versus contract party provided that he is inherited from the given party. Someone who is assumed as liability undertaker by inheritance shall not be legal heir of principal debtor provided that he is not relative heir for the guarantee creditor at any levels otherwise this can annul this contract even after occurrence of contract while this is not the case in insurance.

According to Provision of Article 307 from Islamic Punishment Law, the liability of undertaker by inheritance is also introduced as one of the perpetrator's relatives for liability without any definition and implying its qualifications. But with reference to jurisprudential books, if the perpetrator has no agnate and has the liability undertaker by inheritance then the undertaker by inheritance is assumed as his/ her liable relative. Namely, the undertaker by inheritance is not considered as the perpetrator's liable relative at first place and at the same time assuming him as undertaker by inheritance is not subjected to being agnate for the perpetrator. Similarly, unknown family relationship is the condition for assuming the given person as liable undertaker by

inheritance. Therefore, if there is a relative of the criminal person, the contract of liability of undertaker by inheritance will be cancelled.

5) *Commonalities of the liability of perpetrator's relative with insurance:*

In this section, we explain about similarities of insurance contract and the liability of perpetrator's relative and their compliance with Islamic jurisprudence is described. The type of insurance, which is proposed in Islamic jurisprudence, is the same as liability insurance today. Some of the Islamic jurists have compared the liability insurance with system of liability of perpetrator's relative and commented about its legitimacy as well. To interpret this issue, they write that a class of human's heirs is considered like an insurance system in some cases. Under such circumstances, the liability of perpetrator's relative should pay for the losses, which someone exerted not intentionally but by error and this damage should be compensated on behalf of the perpetrator and this is similar to insurance. Therefore, the similarity among liability insurance and liability of perpetrator's relative system is in that a class of dead person's heirs may act like the insurance; namely, they may compensate the damages, which the given person has exerted to others during his/ her life time. In contrast, if the intentional murderer dies, these persons will be inherited from him/ her and in fact payment of blood money is similar to premium installments. These advantages are only devoted to jurisprudence (Feqh) of Sunnite. But in Shiite jurisprudence, the male agnates enjoy this advantage as well.

The male heirs are inherited twice the female heirs and these regulations are typically assumed as examples of the well-known jurist rule: 'من له الغنم فعليه الغرم' (*One who is more solvent shall pay further*). This is natural rule and it has been also employed in jurisprudence about mortgage and as it was stipulated for the liability of perpetrator's relative to pay blood money in the cases of unintentional crimes at the same time regarding inheritance some advantages has been anticipated for the given person and this is in fact a type of insurance and it differs from insurance in that in the case of liability of perpetrator's relative both positive and negative advantages are mandatory and stipulated by legislator while about insurance the subject is the contract that is example of modern insurance in both cases. Under some conditions, system of liability of perpetrator's relative applies to the non- Muslims citizens residing in Islamic countries as well and if the given person has committed an offence or crime while s/he has no property then Imam will be responsible for payment of blood money for this perpetrator since Imam receives Non- Muslim Tax (جزية) and relatives of non- Muslim citizens will pay blood money for him/ her and this is typically similar to liability insurance and also the similarity and congruity among the liability of perpetrator's relative with insurance contract may revive this assumption that the liability of perpetrator's relative is a type of insurance; of course, this paradigm can be further reinforced by historical background that is liability of perpetrator's relative.

The credibility and prevalence of insurance in community is aimed at providing security for persons against huge losses and damages, which may occur during period of life. The aforesaid goal can be distinguished as well in liability of perpetrator's relative in this case since at first place the perpetrator shall be initially responsible for payment of blood money and the assigned obligation to the perpetrator's relative is intended to exchange and contribute to the culprit to compensate for the damages, which have been wrongly created. This institution is based on the goal of providing security for the person against possible risks and compensation for their incurred losses and or sharing in them.

Thus, system of liability of perpetrator's relative is in fact a type of insurance but not in the form of today insurances, which are established according to contract and agreement but this type of insurance possesses specific property per se where in this institution the premium is not necessarily means payment of fund, but it includes obligation to participation in compensation of the exerted damages and losses to other members. In this type of insurance, the members are both the insured parties and the insurers. In fact it is a type of social institution that is intended to reduce the financial and life liability of person and by proration and division of this burden among the members of group, the culprit will become more exonerated. The essence of insurance that had been prevalent among Arab tribes was mutual or bilateral insurance and it was in fact a union, which was established by the insured parties and the members were obliged to compensate the incurred losses for one of member in their group.

Today, the Islamic injunctions may be implemented better while the time requirements have not led to commit something against the Sharia but it is legitimate contract. There is insurance for blood money today but it should be reinforced in such a way that to include cost of treatment as well so that to require legal approval. Therefore, we should adjust the blood money with requirements at our time and the case of liability of perpetrator's relative should be converted into the insurance and it should be liability insurance.

At the time when Treasury of Muslim, which contributed to the expedencies for the Muslims, was accumulated in a certain place, but at present, Treasury of Muslim has been divided and insurance bureau is one part of it so what it may more critical and higher than this expediency that the Muslim's blood not to be wasted. Therefore, liability of perpetrator's relative should be turned into the insurance since the case of liability of perpetrator's relative is negated in today community and it is specified only to the period when he has been

pledged to pay blood money and at the same time the subject of insurance should be also exploited in payment of blood money and compensations for injuries.

Some of Islamic jurisprudents including Ayatollah Seyed Mohammad Hassan Marashi, have mentioned the liability of perpetrator's relative as a familial insurance (in book of new attitudes in Islamic criminal law) and implied that today subject of insurance is assumed as totally rational and legal issue and it is based on this philosophy that to prevent from destroying the individuals or small and big- size institutes or enterprises upon occurrence of accidents since if the damages are exerted on individual or group a certain person or persons may incur it and this often leads to their elimination but if it is divided among these members and all of them undergo it will be more tolerable.

Thus, the subject of liability of perpetrator's relative is in fact a kind of insurance. The familial insurance is required by holy Sharia of Islam since commitment of mere manslaughter is unprecedented and it is expected for any human and whereas blood money for murder is very expensive and any human could not easily afford for it therefore Islamic Holy Sharia has invited the relative and kinsmen of culprit to contribute to this compensation and it has made this issue as compulsory for relatives of perpetrator of crime to pay blood money for the mere manslaughter.

However at present time the need to establishing such an institution (family insurance) has been reduced everyday by creating several insurances and with respect to nuclear families and weakening of familial dependency strings presence of this case will be also problematic under current conditions. Therefore, at least some classes of liability of perpetrator's relative should be excluded from these cases including relatives and only some cases like Treasury of Muslim is considered as liability of perpetrator's relative.

#### 6) *Similarity of liability insurance with liability of undertaker by inheritance:*

The case of undertaker by inheritance can be compared and adjusted only with a type of insurance namely 'Liability Insurance'. The liability of undertaker by inheritance is considered as liability insurance because it possesses the insurance cornerstones like offer and acceptance of both insurer and the insured party, premium, and subject of insurance since the insurance subject is similar to liability, (the insured party versus guarantee creditor), (insurer versus guarantor), and (premium insurance versus blood money) and the insured risk is the same as the crime that may possibly occur.

The liability for undertaker by inheritance is a type of insurance and contract that has been signed and approved by Islam and it determined an obligation for him. This is an obligation that has been directly stipulated by the legislator for heir versus the bequest that he will achieve for free. In fact, Islam has assumed the inheritance that is inevitably left from a person for the heirs as type of premium and this is a premium, which they have not concluded contract for it but Islam has necessarily considered this assumption and this is a type of compulsory insurance. Hence, the similar aspect of insurance and liability of undertaker by inheritance is in that liability of undertaker by inheritance is a type of insurance at smaller scale in which either of parties is responsible for compensation of crimes of each other under some conditions and they are inherited from each other against this obligation under certain circumstances. As it implied in Article 307 from Islamic Punishment Law, rather than agnate, the undertaker by inheritance has been also accepted in liability of perpetrator's relative since transferring the liability from culprit to the perpetrator relative is not problematic based on agreements and laws. The liability of undertaker by inheritance is also one form of these private agreements. In other words, if someone has no inheritance relationship with other one he may agree with the given person by contract to be guarantor to compensate for his/ her crimes provided that the given person is allowed to inherit from the dead person after the guarantee creditor. Such a contract as a private agreement has been accepted by Islamic Holy Sharia as the examples of liability insurance as well.

Thus it can be concluded that the liable perpetrator's relatives had been considered as members of a certain tribe who were living based on their own certain system before the emerging of Islam but after arising of Islam in addition to confirmation on principle of blood money under title of criminal compensations (ديات), the holy Sharia built them based on certain system; namely, the arbitrary system of payment of blood money has been selected in the case of intentional murder and injury but the compulsory system of blood money has been accepted for mere manslaughter and injury under certain conditions. This is the same as 'liability insurance' today that has been called 'liability of undertaker by inheritance' (ضمان جريره) in Islamic jurisprudence.

#### *Conclusion:*

Given that the liability of perpetrator's relative is the reminiscence from time of tribal period and its history refers to pre-Islamic era and Age of Ignorance and such a liability is assumed as Islamic confirmatory laws so the smallest tribal unit (of house: بيت) started to be composed of wife, husband, and children in the tribal system of residing Arabs in Arabic Peninsula. Although, a tent (خيمه) was the agent of a family and a campus including a few tents was called 'clan' (حي) while the people called this clan as 'ethnicity' (قوم) and group of ethnicities that were assumed as their relatives included the tribe. This tribe was deemed as an independent government that absolutely governed over all of internal and external positions and aspect of tribe.

The cornerstone of social and political life inside the tribe was based on principle of indemnity of individuals and their full equality in rights. The duty of maintenance of security and the subject of dispute and hostility among members was assigned to chief of tribe and the head of tribe had highly position and all members obeyed him. If one member of a tribe killed someone from the opposite tribe, the murderer was not only responsible but this liability was transferred to all of his/ her relatives and the poverty and war governed over their life among the ignorant Arabs where one hundred camels were stipulated as blood money of a human and whereas this fund was very expensive for a person so the murderer could not afford it alone. Thus, the members of his/ her tribe should pay the blood money for the victim to the other tribe in order to prevent the opposite tribe from taking revenge of the killed person and outbreak of war. Such an order has been implicitly accepted by members of all of tribes and it was well-known as 'نظام عاقله' (System of liability of perpetrator's relative to pay blood money) and each of them was obliged to each other. Thus, the Islamic jurists have assumed it as a type of mutual insurance. This is a kind of insurance that can be prevalent among the tribe in which its members are so interrelated together that they may lose their own individual personality and mentality and to the extent it is related to intergroup members this sentence is their slogan (*All for one and one for all*) and in fact all members are transmuted in the group and the group is responsible for actions of members and user of their rights alone. But after the victory of Islamic Republic of Iran, the related subjects to case of 'liability of perpetrator's relative' was also mentioned in Islamic Punishment Law that was a new paradigm in our legal community.

Although, this subject was not problematic at period of Holy Prophet (PBUH), it is not feasible to be enforced in our community and no one has ever seen or heard that a person or persons were sentenced to payment of blood money as the perpetrator's relative. The reason can be considered as non-compliance of time and place conditions in attitude toward Islamic injunctions while in most of Islamic injunctions, the time and place conditions play determinant and decisive role; however, the related injunctions regarding liability of the perpetrator's relative (نظام عاقله) could never be adjusted to today criteria. Under such conditions, it is better for us to tend to establish a fundamental principle under title of 'insurance' and so that to provide the ground for Implementation of Islamic Sharia statement i.e. '*The Muslim's blood should not be wasted*' with establishing this new institution. The insurance may divide the costs of accidents among the members through participation of a lot of members in a group and as a result it hinders from the misery and losing life of the culprit of damage. Thus, there is no problem to solve all of these problems by insurance however currently the subject of liability of the perpetrator's relative is negated and weakening of dependence strings should omit at least some classes from group of liability of the perpetrator's relative such as his/ her kinsmen and only some cases like Treasury of Muslim may be included in this rule. Rationally, someone who has caused loss of property of other person should be assumed as liable and for this reason s/he has not compelled any members of the family or relatives to incur his/ her own responsibility among these relatives while the subject of liability of the perpetrator's relative does not exist according to its legal concept in today world and this issue is subjected negation and therefore the blood money does not apply to the liability of the perpetrator's relative. Hence, it is suggested to substitute the system of liability of the perpetrator's relative with one of the following systems, which are justified according to Islamic jurisprudence and today are applied as well.

#### *Suggestions:*

- 1) The blood money was paid by perpetrator's relative in the past time and it was because of this fact that they (relatives) have personally been pledged for this purpose. This is the same as modern insurance, but today there is no such an obligation; therefore, the insurance law should be ratified instead of system of liability of the perpetrator's relative since the insurance law, particularly liability insurance, is an appropriate solution for most of problems in community in relation to the blood money caused by driving traffic crimes however this measure is not adequate as well and there are many people, who are in prison due to insolvency to pay the blood money. Thus, by means of the governing spirit over the order of liability of the perpetrator's relative and with taking attitude toward the historical background of this command that is type of mutual and bilateral insurance, we should create a standard for all members of the nation in order to be secured from the unintentional crimes so that we no longer witness that some persons are remained in prisons without perpetration of any blamable crime and exclusively without deserving for confinement and at the same time the avengers of the blood (victim) can achieve their rights otherwise the Muslim's blood may be wasted as well. The strategy that seems to be appropriate is to create and improve fund of blood money with participation of all members of people through taking certain amounts of money in legal way and reimbursement of this money into the needed fund thereby one could create suitable alternative for system of liability of the perpetrator's relative and this the same as mutual insurance under its aegis all persons, who have unintentionally committed manslaughter or injury, can be secured.
- 2) Transfer of liability of the perpetrator's relative to the government: As in tribal communities, this system has been assumed as a type of government that was independent in terms of internal and external affairs, but today in our community and most of Islamic nations, developing urbanism and elimination of tribal life have

been accompanied with centralization of power and formation of government so it can be implied that since the tribe has been replaced by the government and it receives tax from the citizens instead of chief of tribe thus this liability should be conveyed to the government while the government may also freely discern about determination of suitable mechanism to compensate for this type of loss and it can directly compensate for it through the given public budget. The government can support the individuals against the accidents with the framework of social security system in order to implement certain projects to compensate for the losses and with respect to Article 29 of the Constitution.

3) Assuming individual civil liability: In the case of cancelation of liability of the perpetrator's relative system and determination of individual liability, since the individuals know that they should personally incur the adverse consequences of their crimes in the case of wrongdoing, they will be more cautious in their measures for doing the arbitrary tasks, which may lead to accident; meanwhile, the individual possesses further ethical value than 'liability of the perpetrator's relative' since imposing the liability to the culprit may further reassure the victim and according to public attitude such a liability also includes religious dimensions and moral value as well.

4) Concluding legal liability insurance contract and insurance for blood money by the insurer companies may be deemed as another solution for some of problems of community regarding blood money caused by driving traffic crimes.

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