

## ISLAMIC LAW PERSPECTIVE ON PROTECTION OF AIR PASSENGERS' RIGHTS

By:  
Aliyu MUSTAPHA\*

### ABSTRACT

Although both the international and National laws of states provide for some air passengers' rights, airlines are sometimes violating these rights. Damages resulting from delays, cancellation of scheduled flights and loss or damage to passengers' baggage are some common challenges air passengers face. This paper via doctrinal methodology traced, explored and showcased the Islamic Law perspective and its encompassing provisions on the protection of Air Passengers' Rights. The paper, using the principles of Daman and Taqsir, explored how Islamic Law perspective on the rights of air passengers can best be established and protected against airlines. It is found that Islamic law has comprehensively provided for adequate protection of the rights of air passengers. The article also showcases how some Islamic legal maxims could be relied upon as basis for these rights and some exceptions where liability could not lie on air carriers. The paper revealed that Islamic law provisions are comprehensive in protecting the rights of victims generally and air passengers' rights in particular. International legal regime and Nigerian laws can benefit by adopting the provisions of Islamic law in adequately protecting air passengers' rights.

### 1.0 Introduction

Air passengers' rights and protection *ab initio* is not treated as a distinct topic or subject under Islamic law. However, from the position of

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\* Dr. Aliyu Mustapha is Senior Lecturer in the Department of Islamic Law, Faculty of Law, Bayero University, Kano – Nigeria. Mobile No: +234 803 252 9091, [aliyumustaphagembu@gmail.com](mailto:aliyumustaphagembu@gmail.com).

*Shariah*<sup>1</sup> in both primary<sup>2</sup> and secondary<sup>3</sup> sources some Islamic Legal maxims (*Qawa'id*) and the analysis of jurist/authors relating to rights and obligation, a better understanding of the rights of air passengers from the Islamic viewpoint can be drawn. Islamic law by nature is comprehensive and timeless in its relevance and application. Its universality can be seen from its objectivity and fairness in upholding justice at all times and in all circumstances. In the words of Kamali, “*Shariah* aims at striking a balance between continuity and change. The basic objectives of *Shari'ah* are permanent and relevant in all times and circumstance.”<sup>4</sup>

This article examines the position of Islamic law on rights and obligation and apply these principles to air passengers' rights. The article starts by looking at the concept of Right and Obligation under Islamic Law and the basis and foundation of air passengers' rights under Islamic Law. This is followed by looking at some air passengers' rights provisions under the Nigerian Civil Aviation Regulations, 2015. This article then focused on establishing rights of air passengers through the principles of *Daman* and *Taqsir*. This was closely followed by highlighting air passengers' rights; delay, cancellation of scheduled flight, baggage loss or damage from the Nigerian law position and showcases how Islamic Law principles and maxims can be used in protecting these rights. The paper ends with a conclusion and recommendation for the Common and Nigerian law to adopt Islamic legal rules in providing for a better protection of air passengers' rights.

## **2.0 Concept of Right and Obligation under Islamic Law**

The concept of right under the *shariah* did not benefit unanimity of definition. Nevertheless, the simple definition of ‘right’ adopts the word ‘*haqq*’ to convey a plain meaning. The Qur'an in a number of

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<sup>1</sup> The phrase “*Shari'ah*” in this context is the translation and meaning of the word “*Islamic Law*” and the two will be used interchangeably in this research work.

<sup>2</sup> Qur'an and Sunnah constitutes the primary sources of Islamic law. It is therefore binding on the Jurist to first make reference to the primary sources for solution to problems in each case. See Nyazee, I.A.K., *Islamic Jurisprudence (Usul al Fiqh)* Islamabad International Institute of Islamic Thought. (2000), 155-163.

<sup>3</sup> Secondary sources include techniques of legal reasoning which a *mujtahid* (Islamic scholar) employs during *ijtihad* using the Quran and the traditions of the holy Prophet (*Sallallahu Alaihi wa Sallam*) to arrive at a legal reasoning. See Nyazee, I.A.K., 213.

<sup>4</sup> Kamali, M.H, *Shari'ah Law: An Introduction*, Oxford: One world Publications, (2008), 49.

verses convey a number of meanings to “right” which include justice, legal claim, an obligation, etc.<sup>5</sup> The Quran categorically enjoin human being to fulfil their obligations.<sup>6</sup> Therefore the onus of fulfilling contractual responsibilities between one another is not only a duty but a right of the contracting parties. According to Shaikh Mustapha Al-Zarqaa, the word right means the power by which the *shariah* establishes an authority or enforces an obligation<sup>7</sup> or the authority recognized by the *shariah* to control the action of man....<sup>8</sup> Thus, a holder of a contractual right may claim or waive same, even without any consideration.<sup>9</sup> It is entirely a matter of choice to either enforce or relinquish such rights, because it is exclusively for the individual concerned.

The theory of *haq al ibaad* (rights of men) in Islam will conveniently be applied in appreciating air passengers’ rights. In Islamic philosophy, *haq al abd* (human rights) are designed to protect the honour and dignity of man against exploitation, oppression and injustice.<sup>10</sup> Contrary to other human philosophies, human rights in Islam is twofold; protection of human beings (*ibad*) and protection of the rights of Allah; the Creator of human beings. These rights are originated from divine revelation; it is comprehensive and aimed at protecting not only the physical body of man but the soul (*ruh*) and intellect of man.<sup>11</sup> In essence, there are three basic categories of rights in Islamic law: the right of Allah, the right of the individual and collective right or the right of the state.<sup>12</sup> It is important to state that the rights of Allah (*haqq Allah*) and that of the state is separate from the

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<sup>5</sup> See Qur’an (*Al-Nisa’i: 58, 135*), (*An’am: 152*), (*Al-Nahl: 90*), (*Al-Baqara: 282*), (*Al-Ma’ida:1*).

<sup>6</sup> Qur’an 5 v. 1.

<sup>7</sup> Al-Alee A.A., “*Liability of Air Carriers for Delaying Carriage of Passengers: A Comparative Study*”, *Al Adl Journal* No. 45. (2012), 182.

<sup>8</sup> Qadri, A.A., *Islamic Jurisprudence in The Mordern World*(Taj Publishers, India, 1999) 242.

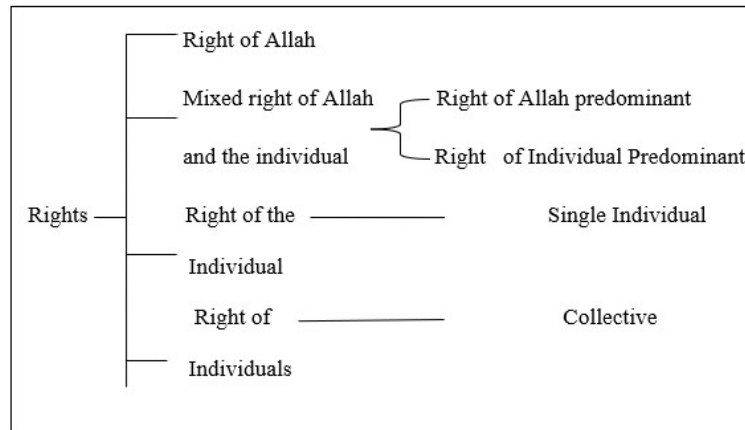
<sup>9</sup> Kamali, M.H, 303.

<sup>10</sup> Shamrahayu A. Aziz, “Islamic Concept of Human Rights” in: *Human Rights Law: International, Malaysian and Islamic Law Perspectives*, edited by: Abdul Ghafur Hamid (Sweet and Maxwell, Malaysia, 2012), 324.

<sup>11</sup> Shamrahayu A. Aziz, 328. In order to achieve the objectives of human rights, the basic values of human creation is to be preserved: i.e. protection of faith and religion; self; mind or intellect; honor, family or lineage; and wealth. See Q: 4:29, Q: 24:17, Q: 5:90-91, Q: 39:9, Q: 17:32, Q: 24:4, Q: 5:38.

<sup>12</sup> See Nyazee, I.A.K., 92.

rights of the individual (*haqq al abd*).<sup>13</sup> For a clearer understanding of classes of rights in Islam, a graphic representation showcasing the classification is provided below.



Classification of Rights under Islamic Law

Source<sup>14</sup>

From the table above, it can be seen that rights are categorised. This categorization is aimed at presenting a better understanding of the operation of Islamic law on each of the class of right and more specifically the right of the individual. Individual rights (single or collective) as depicted under the third and fourth category will conveniently accommodate air passengers' rights. Under Islam, man is not permitted to unlawfully harm any creation, even himself. This is a duty for all men and the basis for the existence of rights in *shari'ah*. The structure of Islamic law is built in such a way that the concept of duties and obligations revolves around recognised set of rights. But it should be appreciated that rights are better understood alongside the concept of obligation. What then is obligation?

<sup>13</sup> *Haqq Allah* refers to public rights or rights that belong to the community as a whole whereas *Haqq al Abd* refers mainly to private rights. Broadly the laws of *Shari'ah* in the sphere of *mu'amalat* which seek to regulate relations among individuals, constitute the primary concern of government authorities and the judiciary. The rules pertaining to devotional matters, especially those which consist purely or principally of the Right of God, such as ritual prayers and fasting, etc., constitute religious obligations. Failure to fulfil these calls for moral reprimand in this world and punishment in the next, but they are basically not justiciable in the courts. See also Kamali, M.H, 17.

<sup>14</sup> Nyazee, I.A.K., 93.

Obligation on the other hand is a duty to do something. For the purpose of this paper, the concept of obligation is better viewed from the angle of performance as opposed to declaration or imposition.<sup>15</sup> It is said that where there is a right there is a corresponding duty.<sup>16</sup> Thus, where there is a breach of duty of performance, the law comes in to protect a right. This leads to the question of enforcement. Enforcement as a tool for the protection of right is recognized by Islamic law.<sup>17</sup> Enforcement through the judicial mechanism or otherwise becomes a tool for not only safeguarding but protecting individuals' rights including air passengers' rights. The section below will focus on some selected air passengers' rights which emanates from contracts and some arising from torts.

### **3.0 Air Passengers' Rights; Delay, Cancellation of Scheduled Flight and Baggage Loss or Damage**

The selected rights of air passengers covered by this article are delay, cancellation of scheduled flight and loss or damage of passenger's baggage as some of the common challenges of air passengers. The paper will first provide the Nigerian law position on these selected rights before looking at them from the Islamic law viewpoint.

The common law position on delays of flight is provided by article 19 of the Montreal Convention which is domesticated in most states including Nigeria. The Montreal Convention, 1999.<sup>18</sup> The

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<sup>15</sup> Ibid, 106.

<sup>16</sup> This is a universal principle aptly captured in the latin maxim *ibi jus ibi remedium* and adumbrated in the case of *Saleh V. Mongunu* ((2006) 15 NWLR, (Pt. 1001) P.26 at 37-38. See also in this regard the case of *STITCH V. A.G FEDERATION* (1986) 5 NWLR (Pt.42) 1007 Pp.60-61, Para D-B) where the Supreme Court of Nigeria held: the maxim is not only an English common law principle. It is a principle of universal validity couched in Latin and available to all legal system involved in the impartial administration of justice. It enjoins the court to provide a remedy whenever the plaintiff has established a right. It is therefore established in the substantive rule of law, matters such as the rights and duties of carriers, consignors, consignees, passengers etc. and the limits of liability provided by the law. See for instance, Article 17,18,19,20,22,23 and 24 of the Warsaw Convention, 1929.

<sup>17</sup> Ibid., 104. The author added that as long as there is someone to enforce the performance of duty, then right exist. The function of legal system is the adjudication of rights, and this makes make it possible for a victim to claim such rights.

<sup>18</sup> Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Montreal on 28 May, 1999. It entered into force on 4/11/2003. 171 parties are signatories to the convention as at April, 2017. Nigeria ratified the convention on 10/05/2002 and it became in force on 4/11/2003. <http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllIte>

Nigerian Civil Aviation Regulations, 2015<sup>19</sup> pursuant to the Nigerian Civil Aviation Act, 2006<sup>20</sup> provides for air passengers' rights and airlines' obligations to passengers was enacted. The regulations prescribe for minimum rights and obligations of passengers and air carriers and provide for compensation for overbooking and denied boarding, delay and cancellations of flights.

### **3.1 Delay of Scheduled Flight**

The Nigerian Civil Aviation Regulations, (CARs) 2015 provides for compensation for delay of both domestic and international flights.<sup>21</sup> By the provision of section 19 of the Nig. CARs 2015, when a carrier expects delay for domestic flight beyond its scheduled time, it is mandated within 30 minutes after the scheduled time of departure to provide passengers with information and reason for such delay.<sup>22</sup> If delay continued for two hours, carriers shall give refreshment, E-mails and phone calls to passengers. It is provided that passengers should be reimbursed if delay continuous beyond three hours. For international flight, the carriers' liability for delay between two and four hours and more than four hours and above, passengers are entitled to 25% of passenger price ticket and meal, refreshment and hotel accommodation respectively.<sup>23</sup> Likewise, a passenger is entitled to assistance and accommodation if such a delay is between the hours of 10pm to 4am.<sup>24</sup>

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[ms.aspx](#) ([accessed](#) 05 February, 2022). See [www.icao.int/secretariat/legal/Chronological Record/NEW...](http://www.icao.int/secretariat/legal/ChronologicalRecord/NEW...) ([accessed](#) 05 February, 2022). Nigeria formally domesticated the convention in 2006 under Schedule ii of the Nigerian Civil Aviation Act, 2006.

<sup>19</sup> The Nigerian Civil Aviation Regulations 2015, was first promulgated in 2006 to provide national requirements in line with the provisions of the Civil Aviation Act, 2006 and for standardized operational procedures, equipment and infrastructure including safety management and training system in conformity with Standard and Recommended Practices (SARPs) contained in the Annexes to the Chicago Convention, 1944.

<sup>20</sup> The Act has 15 Parts with 79 Sections. Under section 77 (1) (a-d), the Act repealed the Carriage by Air (Colonies, Territories and Protectorates) Colonial Order 1953, Civil Aviation Act, Cap 51 of the laws of the federation of Nigeria (LFN) 1990, Civil Aviation (Amendment) Act, 1999 and the Nigerian Civil Aviation Authority (Establishment) Act, No. 49 1999.

<sup>21</sup> Civil Aviation Regulations 2015, Section 19.6.

<sup>22</sup> Civil Aviation Regulations 2015, Section 19.6.1.1.

<sup>23</sup> Civil Aviation Regulations 2015, Section 19.6.2.1 (i) (ii). These compensation is in addition to normal telephone calls, E-mails and SMS by the carrier to each passenger.

<sup>24</sup> Civil Aviation Regulations 2015, Section 19.9.1 (iii).

These remedies are termed as “assistance” under section 19 of the regulations. It is the argument of this paper that the use of the term “assistance” to define a right is inappropriate. Literally, assistance means a kind of help. A right on the other hand is a legal entitlement. Thus, the use of the term assistance seems to be too liberal and may undermine the rights of an air passengers. It is submitted that airlines should feel obliged to compensate passengers as a matter of right and as such it is better to use the term “right” instead of “assistance”.

### **3.2 Cancellation of Scheduled Flight**

On flight cancellation, by airlines section 19.2.1 of the Nig. CARs 2015 provides that flight cancellation is the non-operation of flight which was previously planned and on which at least one seat was reserved.<sup>25</sup> In practice, airlines may cancel flight but provide air passengers with alternative flight. However, passengers are entitled to notification of such cancellation and notification of the alternative flight in advance. Section 19.7 of the Nig. CARs 2015 provide the remedy for cancellation of flight. For both local and international flights, carriers must inform passengers of cancellation and give reason.<sup>26</sup> It is provided that a period of 24 hours and 7 days’ notice should be given to passengers for cancellation of local and international flights respectively.<sup>27</sup> For local flights, passengers must be immediately reimbursed in cash and for international flights; refund must be made within 14 days.<sup>28</sup> Where a flight is cancelled, there is no provision for immediate refund of fares to passengers. The practice is that air passengers do not receive refunds immediately after cancellation.<sup>29</sup> Sometimes it takes a long time for a passenger to get back the fare paid. This leaves passengers stranded after a flight is abruptly cancelled especially if they do not have extra money to buy another ticket. It is

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<sup>25</sup> Civil Aviation Regulations 2015, section 19.2.1 (8).

<sup>26</sup> Civil Aviation Regulations 2015, section 19.7.

<sup>27</sup> Civil Aviation Regulations 2015, section 19.7.1 (iv) a and b.

<sup>28</sup> Civil Aviation Regulations 2015, section 19.9. It should be noted that for international flights, reimbursement may be made by cash, electronic transfer, cheques, bank orders etc. See Civil Aviation Regulations 2015, section 19.8.3.

<sup>29</sup> The regulations provides for some civil violations, which will render airlines liable to pay penalty. See Nigerian Civil Aviation Regulations 2015, B 888, Item 7, Table 2 on Recommended Sanctions. The violations provided are for denied boarding and its procedures, assistance of passengers with reduced mobility, non-display of air passengers’ rights in airports and failure to investigate passengers’ complaints. However, flight cancellation is not included and the penalty to be paid by air carriers.

provided that where carriers did not comply with the onus of giving notice, passengers shall be provided with assistance. Right to assistance and care simply mean the provision of light refreshment, meal, access to telephone message, E-mails and where applicable hotel accommodation and transportation to and fro.<sup>30</sup> It is the argument of this paper that the use of the term assistance will not positively be interpreted as obligation on airlines.

### **3.3 Loss or Damage of Air Passenger's Baggage**

Negligence in handling passengers' baggage resulting in delay, damage or loss of baggage is also common in recent times. It was also revealed that more than 70 percent of air passengers experienced problems with their luggage either being "searched or rummaged through" at some Nigerian airports<sup>31</sup> and some airlines arriving at airports without passengers' luggage. Delay or loss of baggage can be a setback to a journey. The case of *Kabo Air Ltd v Oladipo*,<sup>32</sup> reveals how loss or delay of luggage can defeat the purpose of a trip. In this case the respondent boarded the appellant's flight to Lagos from Kaduna on 30/12/1994 to celebrate the New Year with his family and attain a wedding ceremony. On arrival at Lagos, his checked luggage was not carried along by the appellant. He therefore lodged a complaint and was asked to wait for the next flight from Kaduna. To his amazement, the next flight also arrived without his luggage. The respondent was disappointed and had to return to Kaduna without celebrating the New Year with his family or attending the wedding. Also, the case of *Godric Nwauzor Ltd v Egypt Air*,<sup>33</sup> show how airlines negligently loss passengers' baggage. The plaintiff in May, 2010 send 5 bags of personal effects via the defendant's aircraft from Egypt to Kano-Nigeria. The defendant arrived Kano with only 4 bags. One bag was missing and the missing bag contains effects valued at N890, 000 (Eight Hundred and Ninety Thousand Naira). After several efforts, expenses and letters to the defendant, the plaintiff filed an action before the Kano Federal High Court. The defendant, in their written address argued that the plaintiff failed to tender the duplicate baggage tag as

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<sup>30</sup> Civil Aviation Regulations 2015, section 10.

<sup>31</sup> Agabi C., Passengers rate Nigerian Airports experience low-survey. Daily Trust Online newspaper of 09/03/2016. Available at <http://www.dailytrust.com.ng/news/business/passengers-rate-nigeria-s-airports-experience-low-survey/137160.html>. (accessed 20 March, 2022).

<sup>32</sup> [1999] 10 NWLR 517 CA.

<sup>33</sup> FHC/KN/CS/70/2011 (Unreported).



provided by the Warsaw convention which govern the entire contract. Till date the case is still pending before the court. The Nig. CARs 2015 provides that air passengers should be compensated for lost, damaged and delayed baggage.<sup>34</sup> However, there is little or no enforcement of this provision

As a matter of right (except on safety and other valid considerations) air passengers are to be carried in the same flight with their luggage. Where a passenger could not be carried along with his or her baggage, he or she must be informed in advance.<sup>35</sup> Passengers whose luggage are delayed are entitled to compensation of N5, 000 for domestic flights and \$150 USD for international flights by the carrier for inconveniences caused to such passenger.

From the above provisions on delays, cancellation and loss or damage to air passengers' baggage, the provisions are inadequate both in substance and procedure of compensation, especially on practical enforcement and real quantum or alternative mode of compensation. The following part dwells on the Islamic law perspective on the basis for establishment of liability by air passengers against air carriers.

#### **4.0 Establishing Rights of Air Passengers and Liability of Air Carriers through Daman and Taqsir**

Generally, the relationship between air carrier and an air passenger is contractual. The contract often defines rights and obligations in the relationship. Both the air carrier and an air passenger are bound to fulfil their part of the contract. The *Qur'an* provides, O you who believe, fulfil your obligations....<sup>36</sup> This verse is a basis for the protection of air passengers' contractual rights against airlines. In Islamic law, human beings generally and air travelers in particular have certain rights such as right to their honor, dignity, privacy and the right of protection of their property from all forms of destruction or damage. By the contractual relationship of air passengers and air carriers, liability could arise in instances as delay, cancellation of scheduled flight or lost or damage to passengers' property or baggage. Liability could also emanate from tort which can be appreciated under the principle of *Taqsir* (negligence). Thus, rights of air passengers and liability of air carriers can be established under *Daman* or *Taqsir*.

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<sup>34</sup> Nigerian Civil Aviation Regulations 2015, section 17.

<sup>35</sup> Nigerian Civil Aviation Regulations 2015, section 17.1 and 2.

<sup>36</sup> Qur'an (*Al-Ma'ida: 1*).

The term *Daman* is widely used in several cases of claim and liability. Generally, *damān* referred to civil liability. In its widest meaning, *daman* is civil liability arising from the non-performance of contractual obligation, violation of trust, misrepresentation and unlawful enrichment.<sup>37</sup> It also means “Debt resulting from damages.”<sup>38</sup> The term extends to compensation of money or property arising from contract since it covers compensation arising from destruction or damage. In the legal context, the word *daman* has been defined as “the duty to compensate damage either by replacing the damaged property or paying its value” or “repaying the value or equivalent of the damaged property.”<sup>39</sup> The Prophet (*Sallallahu Alaihi wa Sallam*) was reported saying: “the hand is liable for what it takes unrightfully until it returns it to the rightful owner.”<sup>40</sup> Under the principles of Islamic law of torts (*fiqh al-daman*)<sup>41</sup> the term *daman* also connotes liability, obligation, commitment, fine and compensation.<sup>42</sup> Muslim jurists also use the term *daman* to indicate liability or duty to compensate for the damage caused to someone's reputation, person or property. In this case any damage caused to an air passenger or to his property or reputation (either arising from contract or torts) or the destruction or damage of property, there is liability for compensation.

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<sup>37</sup> Zainudeen J., *The Concept and Application of Daman in Islamic Commercial Law*, University of Edunburgh, 1994. Available at <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.652923>. accessed 25<sup>th</sup> January, 2023. *Daman* has been classified by Muslim jurists into *daman al-aqd*, *daman-al-fa'il* and *daman-al-ghasb*. Modern jurists define *daman al-fa'il* as the civil liability or duty that obliges or requires a person to compensate others for damage that results from his own act. Therefore, *daman-al-fa'il* can accurately be translated as tortuous liability.

<sup>38</sup> Zuhaili Muhammad Musthafa, *Al-Qawaid al-Fiqhiyyah wa Tatbiqatuha fi al-Mazahib al-Arba'a* (Vol 1. Dar al-Fikr, Damascus, 2006) 547.

<sup>39</sup> Ibid, 547.

<sup>40</sup> Musnad Ahmad, Tradition no. 20086, vol.33, p.277. This has become an established legal maxim in *fiqh*.

<sup>41</sup> These are the rules of *Sharia* contained in various books of Jurisprudence in which principles of Islamic law of torts are evaluated. *Daman* simply means an obligation to pay compensation as a result of injury or destruction caused. See Muhammad Ali El-Gari, 'Credit Risk in Islamic Banking and Finance' in: *Islamic Economic Studies* (Islamic Research and Training Institute, Islamic Development Bank, Jiddah, vol. 10, 2003), 13.

<sup>42</sup> Nicholas H D Foster, 'The Islamic Law of Guarantees' (2001) Vol. 16 No. 2, *Arab Law Quarterly*, 133, 139.

On the other hand, *Taqseer* is an arabic word derived from the root word "*qassara*" which also has different meaning amongst which include; failure, omission, shorten, carelessness, negligence<sup>43</sup> etc. In this context, *taqsir* connotes the act of being careless of one's duty or lack of proper care and attention.<sup>44</sup> Technically it means negligence. Negligence includes forgetfulness, Ignorance, inattention or error.<sup>45</sup> The word has been mentioned in the Holy *Qur'an* in many verses cautioning mankind. For instance, the *Qur'an* provides that something is present in man but he does not pay attention to it and forgets it. The Holy Qur'an says: "And do not be one of those who are heedless."<sup>46</sup> In another verse, the *Qur'an* provides: "And many people are heedless of Our revelations."<sup>47</sup> The objectives of tortious liability is not directed towards punishing the tort-feasor (in this case the air carrier) but aims at redressing the victim in the form of compensation and to serve as deterrent.

Allah has created human being and gave him intellectual ability to think and take decisions. Man is therefore responsible for his actions following his will, inclinations, and choice.<sup>48</sup> The verse below provides for the characteristics/attributes of the negligence: "...They have hearts (minds) with which they do not understand, and eyes with which they do not see and ears with which they do not hear, they are like four ends, but more misguided! "They are the negligent."<sup>49</sup> Man is under a duty to take heed of whatever he does and of the rights of others. On this Al Qarafi writes: "If you hold a rope for a man in a well to hold on to and the rope breaks, then you are not liable because it is not your (negligent act). You are liable if the rope slips from your hand." Islamic law also holds a person responsible for wrongful advice and to fulfill obligations imposed on him either by contract or based on duty of care in relation to his dealings with others.

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<sup>43</sup> Almaany Dictionary, available at <<https://www.almaany.com/en/dict/ar-en/تقصير/>> accessed 30th January, 2023.

<sup>44</sup> Ibid.

<sup>45</sup> Shahrzad Mozafari Ghazafi and Sajjad Ranjbar Dafchachi, 'The concept of neglect from an Islamic Perspective' (2021) 11, International Journal of Engineering and Science, 40.

<sup>46</sup> Qur'an 7:205.

<sup>47</sup> Qur'an 10:92.

<sup>48</sup> Muhammad Akbar Khan, 'The Islamic Law of Torts and Product Liability (An analysis)' (2018) vol. 19 Issue 1, Pakistani Journal of Islamic Research, 19.

<sup>49</sup> Qur'an 7:179.

It is clear from the above discussion that Islamic law stressed on the rights and fulfilment of duty. In Islamic law of tort the violation of such a duty is termed as *ta'addi*<sup>50</sup>. This is because the life, property and honor of human being are sacred and no one is allowed to take away or cause any harm to a fellow human being, taking into cognizance one of the objectives of legislation under the *shariah* is the protection of property or *Maal*.<sup>51</sup> The Prophet (*Sallallahu Alaihi wa Sallam*) is emphatic on avoiding harm where he said: "*There should be neither harming nor reciprocating harm.*"<sup>52</sup> Therefore, any injury to a person or chattel without any legal justification is *ta'addi*. The *taadi* or act of transgression without justification must cause *Darar* (injury, wrong or harm suffered) to the air passenger in his life, body or property. In fiqh, *darar* denotes damage caused to someone's reputation, person or property.<sup>53</sup> The victim of the tort must prove that an injury has resulted from the tort-feasor's act. Injury could be to the air passenger in person or to his property (which could be total or partial and it could be permanent or temporary). Apart from *taadi* which results in *darar*, there must be a link, that is *Alaqa Bainahuma*; referring to the causational link between the *taddi* and *darar* known as *al-rabita* (the link).<sup>54</sup> For a tortuous action to succeed, the claimant must also prove the nexus, link or relationship between the *ta'adi* and the *darar*. Where this link is missing, the claim will fail. These three elements must be conjunctively proved before any tortuous claim can succeed.

In Islamic law, the air carrier and other officials in the airport are under an obligation to ensure the safety of air passengers and should not commit *ta'addi* in whatever form. It is a duty on the air carriers to take good care of their passengers and their property by ensuring that their safety and security from all forms of injury, destruction, loss or devaluation. This premise is based on the provisions of the *Shari'ah* on the sanctity of life and property. Therefore, negligence resulting to

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<sup>50</sup> Ta'addi literally means trespass or to exceed limit. It is an injury to a person or chattel without right or legal permission.

<sup>51</sup> Khallaf, A., *Ilm Usul Al Fiqh.*, Dar Al-Ghad Al-Gadeed, 2011, 23.

<sup>52</sup> Imam Al Nawawi, *Arba'unan Nawawi*, Hadith No. 32; Al-Bayhaqi, *al-Sunan al-kubra*, tradition no.11384, vol.6, p.114; Ahmad, *Musnad*, tradition No. 2865, vol. 5 p. 55, Ibn Majah, *Sunan*, Tradition No. 2340, vol. 2, 784; AD daru Qutni, *Sunan*, Tradition No. 4539, vol. 5 p. 407.

<sup>53</sup> Al-Zuhaili, *Nazariyyat al-daman fil fiqh al-Islami-Theory of Responsibility in Islamic Law*(Damascus, 1970) 23.

<sup>54</sup> *Ibid.*, p. 26.

damage to an air passenger leaves an air carrier with the liability to pay compensation. Under Islamic law, an incompetent physician, for instance, is to be prevented from offering medical services or advice due to the harm that his incompetence will cause,<sup>55</sup> an incompetent pilot or any staff in the aviation sector should not be allowed to participate in the chain of air carriage to avoid breach or passengers' rights among others. Similarly, if there is damage to baggage or damage resulting from delay or cancellation of scheduled flight, a carrier should compensate a passenger. It is argued that whenever liability will lie on a person if he causes loss of the usefulness of a thing, *itlaf*; causing something to lose its usefulness or function for which it was originally made). For example, damage to a travelling bag that is torn to such an extent that it cannot contain the clothing and personal effects of a traveller or a wheel chair that is broken down. Under this, the passenger should be compensated proportionate to the loss or damage incurred.

From the foregoing analysis on the principles of *daman* and *taqsir*, air passengers travelling can conveniently establish liability against air carriers. Below is a discussion on some selected air passengers' rights via a vis Islamic law perspective.

#### **5.0. Islamic Law Perspective on Delay, Cancellation of Scheduled Flight and Baggage Loss or Damage of Air Passengers**

From the Islamic viewpoint, the term delay<sup>56</sup> is technically defined by jurist to mean failure to execute something on time. Therefore, if an operating airline delays a flight beyond its scheduled time of departure or cancels a flight, it is a breach of contract which often results to damage. Since air passengers travel without anticipating delays or cancellation of scheduled flight and it so occurs, passengers face series of challenges; economic and social such as missing of important appointments, payments made for hotel reservations, moral harm like discomfort or pain of staying at the airport for long hours - especially if a passenger is accompanied by children, women, sick or old people. At times passengers are left stranded with little or no explanation from the air carriers. It is the position of Islamic law that if delay of a flight results to damage, it entitles a passenger to compensation. The reason behind making a carrier liable is that he is under an obligation to fulfil

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<sup>55</sup> Ibn Nujaym, *al-Ashbah wa al-naza'ir*, 75.

<sup>56</sup> Al-Alee A.A, "*Liability of Air Carriers for Delaying Carriage of Passengers: A Comparative Study*", *Al Adl Journal* No. 45. (2012), 45.

his promise at the time provided by the contract. The Quranic provides: “Fulfil promises for promises are accountable.” A carrier is generally liable for delay or cancellation of flight or for baggage loss/damage. The paper made reference to some principles elicited from selected *qawa'id* (Islamic legal maxims) in understanding the Islamic viewpoint and showcasing the its inclusiveness in the protection of air passengers' rights.

### **5.1 Selected *Qawa'id* (Islamic Legal Maxims) Applicable to Air Passengers' Rights**

*Qawa'id* or the maxims of *fiqh* are legal principles representing a consistent pattern of legal rulings. *Qawa'id* is the plural form of the word *qa'idah*, being the feminine active participle of the verb *qa'ada*.<sup>57</sup> The word has different meanings in Arabic which include base, foundation, stability or firmness.<sup>58</sup> Mustapha al-Zarqa defined *qawa'id* as: “general *fiqh* principles which are presented in a simple format, consisting of general legal rulings of the particulars related to it.”<sup>59</sup> Legal maxims (*qawa'id al-kulliyah al-fiqhiyyah*) are theoretical abstractions, usually in the form of short epithetical statements, that are expressive, often in a few words, portraying the goals and objectives of the *Shari'ah*.<sup>60</sup> The legal maxims of *fiqh* are statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes. Some jurists are of the view that maxims should not be used as a basis for legal rulings.<sup>61</sup> They argued that, maxims are descriptive, not prescriptive. The jurist view maxims as titles for a set of rulings that are bound by a common thread and just as aid to students, jurist or judges to organize and classify legal rulings. The following maxims can be used as basis for the making a better case for air passengers' rights and exceptions under Islamic law.

One of the most suitable maxim for the protection of air passengers' rights is *La Darara Wala Dirar* (there is no harm nor

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<sup>57</sup> Ibn Manzur, *Lisan al-Arab* (Beirut: Dar as sadir, 1968).

<sup>58</sup> Al-Qurtubi, *Al-Jami' li-Ahkam al-Qur'an* (Cairo: Dar al-Kitab al-Arabi, 1967), 12, 309.

<sup>59</sup> Mustapha al-Zarqa al-Madkhal, The translation of the definition was taken from: Mohamad Laldin, *A Mini Guide To Sai'ah and Legal Maxims*, Second edition, (Kuala Lumpur, 2009), 94.

<sup>60</sup> Muhammad Hashim Kamali, *Qawa'id al fiqh: The legal Maxims of Islamic Law* (Association of Muslim Lawyers).

<sup>61</sup> Al-Nadwi, *Al-qawa'id Al Fiqhiyya*, 329-31.

reciprocating harm).<sup>62</sup> No one should cause harm nor reciprocate harm. This is a comprehensive principle applicable to many instances for the prevention of harm and promoting peaceful coexistence amongst human being. It is the version of one of the five universal *qawa'id*, i.e. *al-dararu yuzal* (harm must be eliminated).<sup>63</sup> This maxim is a fundamental principle that establishes that the law is concerned with preventing, eliminating, and minimizing harm. This maxim aids jurists in determining rulings for scenarios that involve conduct that is not explicitly addressed in the *Qur'an* or *Sunnah*. The *qa'idah* is also based on provisions which clearly prohibit causing harm where Allah instructs men not to hurt or cause harm to the divorced women if they want take them back after they finish their prescribed periods: "And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable bases or set them free on reasonable bases. But do not take them back to hurt them, and whoever does that, then he has wronged himself..."<sup>64</sup> This *qa'idah* is an essential principle which aims at preventing *darar*<sup>65</sup> regardless of its nature, origin or cause.<sup>66</sup>

The maxim *Al Adlu Wajibun Fi Kulli Shay'in* (Justice is compulsory on everything) is also relevant and can be employed as one of the bases for the protection of passengers' rights. This maxim entails that justice must be done on all creations either human or animal. In the legal sense, the *Shariah* prescribed how Muslims should conduct themselves regarding their relationships with others and also basis for punishments of certain crimes. Justice must therefore be dispensed for

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<sup>62</sup> On the authority of Abu Sa'eed al-Khudree (may Allah be pleased with him), that the Messenger of Allah (peace and blessings of Allah be upon him) said: There should be neither harming (*darar*) nor reciprocating harm (*dirar*). A hasan hadeeth related by Ibn Majah, ad-Daraqutnee and others. See Al sadlan, *Al Qawa'id al-Fiqhiyya Al kubra* (Riyad, Dar Al Balansiyya, 1417 A. H) 493.

<sup>63</sup> Salih al Sadlan, *'Al Qawa'id al Fiqhiyya Al kubra* (Riyad, Dar Al Balansiyya, 1417 A. H) 493.

<sup>64</sup> *Qur'an* 2:231.

<sup>65</sup> Ibrahim Al Hariri, *Al Qawa'id al Fiqhiyya Al Kulliyyah* (First edition, Amman, Dar Amman, 1998) 89.

<sup>66</sup> Kamala, 'Shari'ah Perspectives on Aids' (1995) 5, IIUM Law Journal. *Darar* is of various types according to different considerations. It either affects one or more of *al daruriyyat al-khams* the five essential values specified in *ilm maqasid al-shariyyah*, namely: faith, life, intellect, property and lineage or affects a value with lesser important. *Darar* can either direct or indirect, material or moral. The performer of direct *darar* is liable while that indirect *darar* is only liable if it was intentional.

others, regardless of the cost or other considerations. The *Qur'an* provides: "And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.)."<sup>67</sup> Consequently, delay or cancellation of flight due to action of the air carriers for purely commercial reason, for instance, where the number of passengers is considered to be insufficient to embark on a trip or due to the air carrier's negligence respecting periodic maintenance, the airlines should be liable to compensate the passenger.

Another relevant maxim that could be used for the protection of passengers' rights where delay, cancellation or loss of baggage occasion is *Al Mashaqqatu Tajlibul Taysir* (Hardship calls for ease). This maxim is firmly rooted in the text of the *Qur'an* and the *Sunnah* of the Prophet (*Sallallahu Alaihi wa Sallam*) as follows: "God intends ease for you and does not intend hardship"<sup>68</sup> and, "He has not placed upon you in religion any hardship".<sup>69</sup> The essence of this maxim is the balancing of benefits and harms. Ease is offered whenever hardship is involved in performing a religious command which is disproportionate to the command. For example, the risk to one's health is enough to offer an ill person an exemption from the *Ramadan* fast. It is, at the end of the day, a weighing of harms and benefits such that accommodation is offered to the extent that the harm exceeds the benefit. Significantly, the undue hardship that attracts ease must be a valid one.

However, a carrier is not liable if a delay or cancellation occur out of the control of the carrier due to safety reason, strong wind and other serious weather conditions, such delay or cancellation of flight could be justifiable. In such cases, the harm/injury suffered by the air passenger is lesser than the harm or damage potentially averted. This is because eliminating harm is portrayed as one of the major principles of *Shari'ah*.<sup>70</sup> The principle that, "Private harm is borne in order to prevent public harm" is apt here. Thus, where an individual's rights conflicts with public safety or interest, the public is given priority. Other relevant maxim on this are, *Al-dararu al-ashaddu yuzalu bi-l-darari al-akhaff* (a lesser harm is to be tolerated in order to eliminate a greater one) and *Yutahammalu al-dararu al-khas li-daf'i al-darari al-am* (a private injury is tolerated in order to prevent a public injury).

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<sup>67</sup> Qur'an 2:188.

<sup>68</sup> Qur'an 2:185

<sup>69</sup> Qur'an 22:78

<sup>70</sup> Fawzy Shaban Elegariani 247.



These *qawa'id* principle can serve as exception to liability if delay or cancellation of flight is done for safety or security reason. It is worthy of note here that compensation under Islamic law does not only aim to replace pecuniary damages but also emotional losses. In Islamic law, the liability in tort can be avoided in case of *force majeure* or act of God.<sup>71</sup> But where the right of a passenger is breached without any legal justification, the carrier is liable.

On compensation for loss or damage to passenger's baggage, actual compensation with the type of loss is aptly captured by the maxim *Tudammin Al Mithliyyatu Bi Mithliha Wal Mutaqawwimatu Biqimatiha* (Compensation for mithli property is provided with mithli and qimi with qimi) This maxim provides for compensation of al mal(property) in the case of damage, destruction or loss. To determine how damage is measured, weighed and counted, it is by recognizing the reality of the Mal (the property) as Mithli (similar or fungible) and Qimi (dissimilar or non-fungible) property. *Al-Mal al-Mithli* is property that its similar can be found in the market with its descriptions without a significant difference such as wheat. While *Al-Mal Qimi* is property that does not have its exact resemblance in the market.<sup>72</sup> Example, a special handmade bag for an emir is a *qimi* property because its exact equivalent cannot be found in the market. Thus, if an air carrier lost or damaged a passenger's baggage, he is liable to pay according to the category of the damage in question.

On loss, destruction or damage to passenger's baggage, the Muslim Jurists unanimously agreed that whoever consumes, destroys or damages any property will be liable to make good the loss or damage to the owner. The Jurists supported their position with the report of Aisha (May Allah be Pleased with her), who said: "*Safiyya prepared food for the Prophet (Sallallahu Alaihi wa Sallam) and sent it to him. I was taken by jealousy so I broke the container/bowl. I then asked the Prophet the atonement of what I did, the Prophet said, "container for container (bow for bowl) and food for food."*<sup>73</sup> This is also applicable in cases where the air passengers' luggage or property is lost, destroyed or damaged. A reasonable compensation should be accepted in case the

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<sup>71</sup> Monzer Khaf, 'Economics of Liabilities: An Islamic View' (2000) 8 (2) Journal of Economics and Management, 92.

<sup>72</sup> Imam Nawawi, Rawdah at Talibeen (Dar Al kutub Al ilmiyyah) 18 and 19.

<sup>73</sup> Sunan Al-tirmidhi, Tradition no. 1359, vol.3, 33. Sayyid Sabiq, Fiqhus Sunnah vol. II p. 361

original property could not be secured. The Jurists differed when the thing destroyed/damaged cannot be measured or weighted. *Hanafi* and *Shafi'i* is of the view that compensation of same is to be accepted except where the thing destroyed or damaged could not be found. On the other hand, *Maliki* is of the view that compensation can be accepted but not its equal.<sup>74</sup> Thus, an air passenger can claim any in accordance with the applicable school of thought in their jurisdiction. Similar principle on liability for destruction of baggage is *Man Atlafa Shay'an Liyantafi'a Bihi Daminahu* (Whoever destroys something for his benefit is liable for Compensation). This maxim entails that where a tort-feasor destroys or damages a property just to benefit from that act, he will be liable to compensate the damaged property. But where the destruction was done to remove an injury or harm, there will be no compensation. This maxim is relevant for claim of compensation against negligent air carriers for baggage loss, destruction or even pilferage. The same thing will apply to render air carriers liable if destruction of passenger's baggage or any property is made by the staff of air carriers for their benefit.

#### 6.0 CONCLUSION

Transportation by air and air passengers' rights in particular is currently and largely regulated by the Montreal Convention, 1999 and State legislation of individual nations like Nigeria. Although air passengers' rights are provided under the Nigerian Civil Aviation Regulations, 2015 for the selected challenges; delay, cancellation of scheduled flight and loss or damage of baggage. The Nigerian legal regime on these rights is not adequate and leaves gap in defining the nature of damages and compensation of an air passengers. Islamic law provisions are found to be more comprehensive on the nature of the rights, damages and all-encompassing compensation provisions protecting these rights and that Common law and the Nigerian regime can derive lessons from the principles of *Shari'ah* in addressing air passengers' rights to achieve a better protection.

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<sup>74</sup> Sayyid Sabiq, *Fiqhus Sunnah* (vol. II) 361-362.