DAMĀN AL-MITHL IN THE CONTRACT OF AL-IJĀRAH AND AL-RAHN: A COMPARATIVE JURISPRUDENTIAL STUDY

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Abstract

Al-damān (guarantee) is one of the legitimate means used to protect ownership and other financial rights. It is one of the means of security upon which people have been dependent for a long time. As people use it, it develops with the development of their economic and commercial dealings. Al-damān has, as such become an important means which plays a vital and basic role in the development of modern economies. Its role is so vital that it is not an exaggeration to say that al-damān has become the basic pillar of the modern economies and all commercial dealings for banks, companies and individuals.

People are in dire need of guarantee in protection of their civil rights and property. Compensation may be made in return for harm inflicted. Al-damān may result from either contracts or harm afflicted as a result of negligence. It takes a number of forms in modern Islamic law. Among its forms are surety, mortgage and compensating what perishes. Among its forms are also all forms of insurance and negligence responsibilities pertaining to public and private workmen. The Shari‘ah protects all those rights in legal maxims like al-ghurm bi al-ghumm (he who endures the pain enjoys the gain). All forms of modern guarantees and insurance are means of social cooperation designed to repel harm and to promote economic and commercial boom. When risks are removed or lessened, the movement of people, ships, cars and other means of transport are possible.

These questions and some other critical issues were treated by Islamic law. The focus in Islamic law to explain the nature of al-damān, its causes and some other fundamental issues that proved to be the major characteristics of this concept.

Thus this research is devoted to an essential concept in modern economic theory that is the concept of guarantee which inculcates the sense of confidence and safe in many commercial transactions. Indeed this concept is far more developed in Islamic law compared with any other legal systems as it was put in practice for many years.
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1.2.2.1 Definition Of Taṣāruf ......................................................... 42
1.2.2.2 A Unilateral Itlizām (Undertaking) ........................................ 45
1.2.2.3 Comparison Of Taṣāruf With 'Aqd In Its General Sense .............. 46
1.2.2.4 The Results of these Comparisons ......................................... 48
1.2.3  Damān In The Contract ('Aqd) .................................................. 51
1.2.3.1 Nature Of Damān In Islamic Law ........................................... 53
1.2.3.2 Mode Of Damān In Islamic Law ............................................. 54
1.2.4 Damān Al-Yad (Liability On Account Of Possession) ...................... 56
1.2.4.1 There Are Three Types Of Yad According To The Hānāfīs ..........  57
1.2.4.2 Types Of Yad According To The Shāfi‘īs .................................. 58
1.2.4.3 Four Causes of Liability on Account of Possession .................. 59
1.2.4.4 Consequences Of Yad Al-Amānah And Yad Al-Damān ................. 61
1.2.5 Damān al-Itlāf (Liability For Destruction) ................................... 61
1.2.5.1 Difference Between Damān Al-Itlāf And Other Liabilities .......... 62
1.2.5.2 Conditions For Damān Al-Itlāf (Compensation For Destruction) ... 63
1.2.5.3 Definition Of The Harmful Act And Its Types ......................... 63
1.2.5.3.1 False Testimony ............................................................ 63
1.2.5.3.2 Compulsion ................................................................... 64
1.2.5.3.3 Taghrīr (Deception) ......................................................... 65
1.2.5.4 An Act Committed With The Permission Of The Proprietor Or The Ruler 66
1.2.5.5 Mode Of Compensation For Destruction .................................... 66
1.2.5.6 Inevitable Accident .............................................................. 68
1.2.5.7 Participatory Negligence ....................................................... 68

1.3 SECTION THREE: CONDITIONS WHICH RENDER Damān OBLIGATORY ................................................. 70
1.3.1 Conditions (Shurūf) In The Lexicography And The Usage Of The Jurists ...................................................................................... 70
1.3.1.1 Condition According To Lexicographers ................................ 70
1.3.1.2 Condition In The Usage Of The Jurists .................................... 71
1.3.1.3 The Difference Between Pillar and Condition ......................... 73
1.3.2 Pillars Of Damān .................................................................. 74
1.3.3 Conditions Of Damān ............................................................ 74
1.3.3.1 First: Conditions Of Guarantor (Surety) ................................. 75
1.3.3.2 Second: Conditions Of Madīn 'Anh (Makfūl 'Anh) .................. 75
1.3.3.3 Third: Conditions Of Madīn Lah (Makfūl Lah, Al-Dā‘in) .......... 77
1.3.3.4 Fourth: Conditions Of Madīn Bih (The Guaranteed Debt) ......... 78

1.4 SECTION FOUR: OBJECT OF Damān ......................................... 80
1.4.1 Damān Of Property .................................................................. 80
1.4.1.1 Definition Of Property According To The Lexicographers ........ 80
1.4.1.2 Definition Of Property According To The Jurists .................... 81
1.4.1.2.1 First: Definition of Property According to the Hānāfīs ....... 81
1.4.1.2.2 Second: Definition Of Property According To The Mālikīs .......... 81
1.4.1.2.3 Third: Definition Of Property According To The Shāfi‘īs .... 82
1.4.1.2.4 Fourth: Definition Of Property According To The Hānbalīs .......... 83
2.3 SECTION THREE: WHAT IS RELATED TO THE NULLIFICATION OF
AL-IJARAH ................................................................. 149
  2.3.1 Definition Of Invalidity And Voidness And The Differences Between
  Them .......................................................................... 149
    2.3.1.1 Invalidity ...................................................... 150
    2.3.1.2 Nullity ....................................................... 151
  2.3.2 The Emergence Of The Difference Between The Ḥanafi And The
  Majority Of The Jurists ............................................. 151
  2.3.3 What Is Related To The Invalidity Of Al-Ijārah .................. 153
  2.3.4 The Effects Of The Void Contract ............................. 154
  2.3.5 The Demerits Of The Reward In The Contract Of Hiring Of Persons .. 155
    2.3.5.1 First School: The Mālikī, Shāfi‘īs And The Opinion Of
    Imam Ahmad ....................................................... 156
    2.3.5.2 The Second School ....................................... 156
    2.3.5.3 There Is A Difference In Two Aspects .............. 157
  2.3.6 The Evidence Of The Majority Of The Jurists ................. 157
  2.3.7 Evidence Of Abu Ḥanīfah And The Two Disciples ........... 159

2.4 SECTION FOUR: THE EMPLOYEE .......................................... 161
  2.4.1 Definition Of The Employee And The Associate Employee
  According To The Jurists ........................................... 161
    2.4.1.1 The Difference Between The Employee And The
    Associate Employee ............................................. 162
      2.4.1.1.1 Definition Of The Associate Employee .......... 162
  2.4.2 The Insurance Of The Employee Whose Works Can Be Blamed .... 166
    2.4.2.1 First, The Opinion Of The Majority ............... 166
    2.4.2.2 Second, The Opinion Of The Shāfi‘ī Jurists ....... 167
  2.4.3 The Damān Of A Manufacturer Whose Boss Blames Him ...... 169
    2.4.3.1 The Reasoning Of Abū Ḥanīfah ...................... 169
  2.4.4 Implementation And Issues .................................... 170

2.5 SECTION FIVE: SHARED LABORER AND ITS RULES .................. 178
  2.5.1 Compensation For What Is Lost In The Hands Of A Shared
  Workman .................................................................... 178
    2.5.1.1 Stipulation Of Guarantee ............................... 179
      2.5.1.1.1 First: The Opinion Of The Majority .......... 179
      2.5.1.1.2 The Second View ................................... 179
      2.5.1.1.3 Guaranteeing A Shared Laborer ............... 180
      2.5.1.1.4 The View Of Ibn Abī Laylā ...................... 183
      2.5.1.1.5 The Preferred View ............................... 184
    2.5.1.2 What Is Obligatory In Guarantee ..................... 184
    2.5.1.3 The Time For Guarantee Evaluation .................. 185
  2.5.2 Disagreement Between The Workman And The Employer Over
  The Workmanship .................................................... 186
2.5.2.1 The Hanafi Jurists ........................................... 187
2.5.2.2 Means Of Transport In The Hands Of The Employer Is A Trust .................................................. 189
2.5.3 Keeping The Asset To Recover The Fee ......................... 190
  2.5.3.1 A Workman Who Influences i.e., Who Adds Quality To The Asset ........................................... 190
  2.5.3.2 A Workman Who Does Not Add Any Quality To The Asset .................................................. 192
2.5.4 Holding Doctors Responsible For The Mistakes They Commit .................................................. 192
  2.5.4.1 Definition Of Medication .................................. 192
  2.5.4.2 Conditions Of Medication .................................. 193
  2.5.4.3 Are Doctors Responsible For Damages? ....................... 193
  2.5.4.4 Some Examples Of Medical Errors ......................... 194
  2.5.4.5 Types Of Medical Errors .................................. 194
  2.5.4.6 Cases In Which Doctors Are Not Responsible ..................... 195
  2.5.4.7 Massive Error .............................................. 196
  2.5.4.8 Judicial Verdicts Pertaining To The Responsibility Of Medical Errors ........................................... 196
    2.5.4.8.1 The Opinion Of Ibn Qayyim .................................. 196
  2.5.4.9 Medical Error In The Contemporary Jurisprudence ..................... 198
    2.5.4.9.1 Nature Of Medical Error .................................. 198
    2.5.4.9.2 Form Of Medical Error .................................. 199
    2.5.4.9.3 The View Of The Majority Of The Jurists ..................... 199

CHAPTER THREE: DAMĀN OF THE EQUIVALENT IN THE CONTRACT OF MORTGAGE ........................................... 200

3.1 SECTION ONE: DEFINITION OF MORTGAGE AND THE ORIGINAL LEGALITY OF IT ........................................... 201
  3.1.1 Definition Of Mortgage According To The Lexicographers And The Jurists ........................................... 201
    3.1.1.1 Its Literal Definition .................................. 201
    3.1.1.2 Its Juristic Term .............................................. 202
    3.1.1.3 Analysis Of The Definitions .................................. 202
    3.1.1.4 Situations Of Mortgage .................................. 203
  3.1.2 Clarification Of The Legality Of The Mortgage And The People's Need For It ........................................... 204
    3.1.2.1 The Legality Of The Mortgage .................................. 204
    3.1.2.2 The Wisdom Of The Legality Of Mortgage ..................... 209

3.2 SECTION TWO: CONDITIONS AND TYPES OF THE CONTRACT OF MORTGAGE ........................................... 211
  3.2.1 Principles Of The Contract Of Mortgage ..................... 211
    3.2.1.1 Conditions Of The Mortgage According To The Mālikis .................................................. 212
      3.2.1.1.1 Conditions Pertaining To The Parties ..................... 212
    3.2.1.2 Conditions Of Mortgage For The Hanafis ..................... 213
      3.2.1.2.1 Conditions Of Conclusion .................................. 213
      3.2.1.2.2 Conditions For Validity Are Of Three Kinds ..................... 213
      3.2.1.2.3 Condition For Obligation, Is The Possession Of The Mortgage ........................................... 214
3.2.1.2.4 Pillars And Conditions Of The Mortgage Contract .......... 216
3.2.1.3 Conditions Of Mortgage For The Shāfi‘īs ....................... 217
3.2.1.4 Conditions Of The Mortgage Contract ......................... 218
3.2.2 Types Of Mortgage ............................................. 219
  3.2.2.1 First: Formal Mortgage ...................................... 220
    3.2.2.1.1 Definition ............................................. 220
    3.2.2.1.2 Characteristics Of A Formal Mortgage .................. 221
    3.2.2.1.3 The Position Of Fiqh, Islamic Law, With Regard To A Formal Mortgage ................................................. 221
    3.2.2.1.4 Categorization Of Formal Mortgage In The Mālikis School ................................................................. 222
    3.2.2.1.5 Categorization Of Formal Mortgage In The Hanafi School ........................................................................ 223
  3.2.2.2 Second: Possessive Mortgage .................................. 223
    3.2.2.2.1 Characteristics Of Possessive Mortgage ................ 224
    3.2.2.2.2 The Difference Between A Formal And Possessive Mortgage ............................................................. 225
  3.2.2.3 Third: Mortgage On Benefit .................................... 226
  3.2.2.4 Fourth: Shared Mortgage ...................................... 227
    3.2.2.4.1 First Group ................................................... 227
      3.2.2.4.1.1 Their Evidence ....................................... 227
      3.2.2.4.1.2 Reason (Analogy) .................................... 228
    3.2.2.4.2 Second Group .............................................. 228
    3.2.2.4.3 The Preferred View ....................................... 230
    3.2.2.5 The Role Of The Mortgage In Creating Trust And Guarantee .. 230

3.3 SECTION THREE: HUKM (RULE) OF TAKING POSSESSION OF THE MORTGAGED ASSET AND CONTINUITY OF POSSESSION ............... 232
  3.3.1 Nature And Method Of Possession ................................ 232
    3.3.1.1 Method Of Possession ....................................... 233
  3.3.2 Kinds Of Possession .............................................. 233
    3.3.2.1 Conditions Of Validity Of Possessions ..................... 234
    3.3.2.2 Permission Is Of Two Kinds: Explicit And Implicit .... 235
  3.3.3 Continuity Of Possession And The Views Of The Jurists Regarding It .............................................................. 235
    3.3.3.1 Their Legal Basis ............................................ 236
    3.3.3.2 The Preferred Views ........................................ 236

3.4 SECTION FOUR: EXPENSES OF THE MORTGAGED ASSET AND THE HUKM (RULE) IF THE RĀḤIN REFUSES TO MAINTAIN IT ............... 238
  3.4.1 Who Is Responsible For Maintaining The Mortgage? .............. 239
  3.4.2 Maintenance Of The Mortgaged Asset ................................ 242
    3.4.2.1 The First View ............................................... 242
    3.4.2.2 The Second View ............................................. 243
    3.4.2.3 The Preferegd View ......................................... 244
    3.4.2.4 The Value (Hukm) If The Mortgager Fails To Maintain The Mortgage ............................................................ 245
    3.4.2.5 Observation .................................................... 246
    3.4.2.6 Hukm (Rule) Of Maintaining The Mortgage ................. 246

viii
3.4.3 Hukm (Rule) If The Mortgage Possessor Uses The Mortgage ........................................ 248
  3.4.3.1 Evidence .............................................................................................................. 248
  3.4.3.2 The First View .................................................................................................... 249
  3.4.3.3 The Second View ............................................................................................... 249
3.4.4 Second, Pertaining To The Murtahin ........................................................................ 250
  3.4.4.1 The Opinion Of The Hanbalis .............................................................................. 251
    3.4.4.1.1 Benefiting From The Mortgaged Asset That Does Not Require Expenses ..... 252
    3.4.4.1.1 Benefiting From A Milkable Mortgage ......................................................... 252
    3.4.4.1.1.2 The Hanbalis' Proof .................................................................................. 253
    3.4.4.1.2 Using The Animal, Which Can Neither Be Milked Nor Be Used For Riding ... 254
    3.4.4.1.3 Using Non-Animal Mortgages Which Require Expenses ......................... 254
  3.4.4.2 The Opinion Of The Literalists (The Zahiriyah) ...................................................... 254
  3.4.4.3 A Response To The Hanbalis And The Zahiriyah ................................................. 255
  3.4.4.4 Responses To The Claims Of The Majority ......................................................... 256
  3.4.4.5 The Preferred View ............................................................................................. 258

3.5 SECTION FIVE: GUARANTEERING THE MORTGAGED ASSET AND THE MEASURE OF THE GUARANTEE ................................................................. 259
  3.5.1 Guaranteeing The Mortgaged Thing ......................................................................... 259
    3.5.1.1 Hukm (Rule) Pertaining To The Perishing Of The Mortgage ......................... 259
    3.5.1.2 Their Proof: They Produce The Following Evidence ....................................... 262
      3.5.1.2.1 The Aspect of Proof from this Hadith ......................................................... 262
    3.5.1.3 The Third Opinion ........................................................................................... 264
    3.5.1.4 The Preferred View ......................................................................................... 266
    3.5.1.5 But The Guaranteed Assets Are Of Two Kinds ................................................. 268
  3.5.2 Method Of Estimating The Guarantee .................................................................... 270
    3.5.2.1 The Role Of A Mortgage In Creating Trust And Guarantee ......................... 272

CHAPTER FOUR: CONTEMPORARY ISSUES ON SURETY ......................................................... 275
   The Relationship Of Insurance With Guaranty ............................................................ 275

4.1 SECTION ONE: GUARANTEE LETTER ......................................................................... 276
  4.1.1 Definition Of Guarantee Letter .............................................................................. 276
  4.1.2 The Importance Of Guarantee Letters .................................................................... 276
  4.1.3 Permissibility Of Imposing A Price For A Guarantee Letter ................................ 278
    4.1.3.1 Views Of The Jurists ....................................................................................... 278
  4.1.4 Legal Effects Of The Contract Of Guarantee Letter .............................................. 280
    4.1.4.1 Guarantee Of Al-'Uhdah (Promise) ................................................................ 280
    4.1.4.2 Guarantee Of All Financial Rights .................................................................. 281
    4.1.4.3 Guaranteeing Nothing To Which Some Right Is Due ....................................... 282
    4.1.4.4 Credit With Cover .......................................................................................... 283
    4.1.4.5 Credit Without Cover .................................................................................... 284
  4.1.5 Basis Of The Shi'i Adaptation Of Guarantee Letters And The Like ..................... 286
    4.1.5.1 Hukm (The Value) Of Guarantee Letters And The Type Of Agreement With The Banks ............................................................................................................. 289
    4.1.5.2 Is The Guarantee Letter A Contract? ............................................................... 289
4.2 SECTION TWO: CREDIT CARDS AND THEIR RELATIONSHIP WITH SURETY ......................................................... 291
Definition Of Credit Card ........................................................................................................................................... 291
4.2.1 Types Of Cards According To The Guarantee Presented By Their Holders ....................................................... 292
   4.2.1.1 Cards Issued Based On A Personal Guarantee: (Without A Guarantee By Presenting An Asset) ............ 292
   4.2.1.2 Cards Issued Based On A Partial Guarantee By Assets ................................................................. 293
   4.2.1.3 Cards Issued Based On A Full Guarantee By Asset ......................................................................... 293
4.2.2 The Sharī' (Legal) Foundation Of Credit Cards ................................................................................................. 293
4.2.3 Opinions Of Contemporary Jurists On The Issue Of Credit Card In Sharī'ah ...................................................... 294
4.2.4 Evidence That The Credit Card System Is A Form Of Security Or Surety ......................................................... 295
4.2.5 Opinions Of The Jurists On The Question Of Al-Rusūm (The Fees) ............................................................... 300
4.3 SECTION THREE: INSURANCE: THE MOST IMPORTANT CONTEMPORARY SYSTEM FOR GUARANTEE .......... 304
4.3.1 Definition Of Ta'min (Insurance) ....................................................................................................................... 304
4.3.2 The Origins Of The Idea Of Insurance .............................................................................................................. 304
4.3.3 The Summary .................................................................................................................................................. 305
4.3.4 Definition Of Risks ........................................................................................................................................ 306
4.3.5 Types Of Economic Risks ............................................................................................................................... 307
4.3.6 Ways Of Averting Risks ................................................................................................................................. 311
4.3.7 The Contracts Which Are Similar To Insurance In Islamic Law .................................................................. 314
   4.3.7.1 First: The System Of Al-‘Aqilah (Family Solidarity) ........................................................................... 314
   4.3.7.2 Second: Assisting Sincere Debtors And Students From The Zakah Revenue .................................... 315
   4.3.7.3 Third: Supporting The Poor .................................................................................................................. 316
4.3.8 An Important Observation ............................................................................................................................... 318
4.3.9 Social Securities ............................................................................................................................................. 319
4.3.10 Classes And Kinds Of Insurance .................................................................................................................. 321
4.3.11 Responses To The Misgivings ......................................................................................................................... 323
4.3.12 Proofs Of The Legitimacy Of Insurance ...................................................................................................... 328
   4.3.12.1 Necessity And Insurance ....................................................................................................................... 332
   4.3.12.2 Speculation And Insurance .................................................................................................................. 332
   4.3.12.3 Securing Dangers Of The Road And Insurance .............................................................................. 333
4.3.12.4 The Contract Of Guarding And Insurance .......................................................................................... 333
   4.3.12.5 Profit And Insurance .......................................................................................................................... 334
4.3.13 Summary And Conclusion ............................................................................................................................. 334

CONCLUSION ......................................................................................................................................................... 337

BIBLIOGRAPHY ....................................................................................................................................................... 340

GLOSSARY ............................................................................................................................................................... 346
INTRODUCTION

It is appropriate to highlight that the property according to the Shari‘ah is protected especially that in which the right of man is involved as it is stated in the Sunnah of the Prophet: “The blood, property and honour of a Muslim is prohibited to his fellow Muslim.”

Thus, the property of Muslim in the Islamic state is inviolable on the basis of guarantee as the Shari‘ah protects the ownership belonging to others and as such it should not be approached except in lawful manner. The Prophet says: “It is not permissible to take from the property belonging to Muslim except in a lawful way”.

Likewise, the property of non-Muslim in the Islamic state is protected on the basis of ‘aqd al-amān (contract for protection). The Qur‘ānic āyah enacts: “Allāh does not prohibit from those who don’t kill you on religious ground and expel you from your houses to do good deed with them and do justice with them…”

The above verse commands Muslim to do justice with non-Muslim and the aim of justice and fairness is the protection of their property and honour.

The Prophet borrowed an armour from Sofwān Ibn Umayyah. Then he said,

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1 Aḥmad Ibn Ḥanbal, Musnad al-Imām Aḥmad Ibn Ḥanbal (Miṣr: Dār Al-Ma‘ārif), 2, p. 277.
2 Al-Baihaqī, Al-Sunan Al-Kubrā, (Beirut: Dār Iḥyā‘ Al-Turāth Al-‘Arabī), 6, p. 97.
“O Muḥammad you usurped it.” The Prophet (s.a.w.) said. “But it is borrowed returnable and guaranteed.” The *damān* in respect of property leads to creating confidence between the people in their social dealings, stability and security. However, lack of *damān* and usurpation of property leads to spread of non-confidence, suspicion and anxiety between the people. As a consequence, the trade is not stabilized and people do not feel safe from each other. It is the confidence which strengthens or weakens any economic system.

Therefore, we find that the proprietors think in advance of depositing their property to take adequate securities like surety, guarantor, *rahn* in immovable property and letter of guarantee from the banks. People in modern time have recourse to security system be it contractual security, social security, and it is not but for taking adequate security in advance.

Thus, we find the owner of the property that insures his employees and workers against risk and insures the building against fire and the proprietor of the planes and vehicle insure their planes and vehicle against accidents and disasters all of which are within the orbit of *damān*.

Allāh (s.w.t.) prohibits encroachment on other’s property as Allāh (s.w.t.)

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4 *Al-Ghash* literally means taking a thing unjustly and technically it is taking a property forcefully and unjustly without fighting, or it is to take possession of other’s property forcefully and unlawfully and some said it is taking of the *mutaqawwim* property belonging to others without leave. Abū Muhammad Al-Baghdādi, *Majma’ al-Damānāt* (Al-Qāhirah: Al-Maṣba’ah al-Khayriyyah, 1308H), p. 117.

says: “Do not transgress, indeed, Allāh does not like the transgressor.” Also in a
Prophetic hadīth: “It is in the hand that you have taken until you return it.”

The capitalists leave the states which does not respect individual properties in their policy and take refuge in other states which protects individual properties and accepts the practice of damān in all situations.

This topic is related to protection of property, assets, goods and wealth (amwāl) which is one of the five fundamental things protected by Sharī‘ah. It seems to be appropriate to explain the stance of Sharī‘ah on what one has shouldered on behalf of his fellow being and the extent of his rights towards such responsibilities.

Our aim and objective in all these is to gather all the relevant ideas, opinions of scholars from the jurisprudence books. This will make it easier for those that would like to further study or have more comprehensive knowledge of Sharī‘ah on this area.

The Importance of al-Ḍamān

In addition to what has been mentioned above, the importance of al-Ḍamān

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6 Al-Qur‘an, Al-Baqarah (2): 190.


8 Nationalization system is the transfer of legal ownership or company from the individual ownership to state-ownership by force without compensation and collective interest.
can be seen in the following:

1. Protection of people’s rights, especially their civil rights, with regard to property ownership, commercial benefits, and the like. It is found that people normally ignore or at least disrespect others’ civil rights and sometimes do injustice to them such as seizing and trespassing on them.

2. Settling disputes between civilians whether they occur between persons or other financial organizations and tenants.

3. The subject of *al-damān* is always needed by the people in their social and economic lives. In their social and commercial activities, people lend money and borrow it from each other and as such, need to be guaranteed. The same thing applies to tailors, blacksmiths, doctors, engineers and all those who have responsibilities to others.

4. Aircraft and ships do not move without guarantees and sufficient security to cover them and the routes along which they travel. This form of security is new.

5. Muslims need to do whatever is necessary to remove injustice from themselves and from others. That is not possible without the theory of security that protects their properties in line with the tenets of the Shari‘ah which urge people to perform their divine duties within their limits.
Methodology

We have explained the question of al-damān of in the contracts of lease and mortgage by using both classical and modern sources of Islamic jurisprudence. We started by giving the literal and technical definitions as discussed by the leading jurists of Islamic law. In doing so, we have also used a number of references from books of principles of Islamic jurisprudence. Books on Islamic economics have also been used in an attempt to discuss the views of the jurists in line with modern requirements. We have adopted inductive and analytical method in exposing the conclusions of the jurists. I have also used a deductive method to arrive at my conclusions. However, all these materials were utilized by the research through a set of linguistic strategies. Obviously, the historical and textual analysis proved to be useful for such academic exercise. Much of the comparative analysis was guided by the spirit of openness in Islamic jurisprudence.

Main Reasons for choosing the Subject

With the blessing of Allāh, We have been able to choose the subject of al-damān in the contract of lease and mortgage because of their contemporary importance in the social and economic life of people. Al-damān represents a form of dealing which realizes one of the objectives of the Sharī‘ah; the protection of property.

It is this importance that has motivated us to choose this subject as well as considering its role in the contract of mortgage. For, it is through al-damān that the Sharī‘ah creates security for the debtors, whether they are individuals or companies.
to protect people’s rights. We have explained the nature of the mortgage, its functions in modern economies and the rights and duties of both the mortgagor and the one who seeks mortgage.

The thesis has been divided into the following four chapters,

Chapter One: Nature Of ِDamān And Its Related Issues.

Section 1: Definition Of ِDamān And Its Legality.
Section 2: Elements Of ِDamān And Its Conditions.
Section 3: Object Of ِDamān And Its Types.
Section 4: Reasons For ِDamān.

Chapter Two: Equivalent ِDamān In The Contract Of Al-Ijārah.

Section 1: Definition Of Renting (Hiring And Its Legal Origins).
Section 2: Major Questions Concerning Hiring People.
Section 3: What Is Related To The Abolition Of Al-Ijārah (Hiring).
Section 4: Employees And What Is Related To Them.
Section 5: The Associate Employees And What Is Related To Them.

Chapter Three: ِDamān Of The Equivalent In The Contract Of Mortgage.

Section 1: Definition Of Mortgage And Its Legal Origin.
Section 2: The Essential Requirements Of The Contract Of Mortgage.
Section 3: The Rule Of Grasping Of Mortgage And Its Continuation.
Section 4: The Benefit Of The Mortgage And How The Mortgager Can Benefit.
Section 5: The Guarantee Of Mortgage And The Amount Of Guarantee.

Chapter Four: Contemporary Issues On Surety.
Section 1: Guarantee Letter.
Section 2: Credit Cards And Their Relationship With Surety.
Section 3: Insurance: The Most Important System For Guarantee Today.