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

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## Abstract

*Al-ḍamān* (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-ḍamān* 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-ḍamān* has become the basic pillar of the modern economies and all commercial dealings for banks, companies and individuals.

People are in a dire need of guarantee in protection of their civil rights and property. Compensation may be made in return for harm inflicted. *Al-ḍamān* 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 Sharī'ah protects all those rights in legal maxims like *al-ghurm bi al-ghurm* (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-ḍamān*, 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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## INTRODUCTION

It is appropriate to highlight that the property according to the Sharī'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."<sup>1</sup>

Thus, the property of Muslim in the Islamic state is inviolable on the basis of guarantee as the Sharī'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".<sup>2</sup>

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..."<sup>3</sup>

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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<sup>1</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal* (Miṣr: Dār Al-Ma'ārif), 2, p. 277.

<sup>2</sup> Al-Baihaqī, *Al-Sunan Al-Kubrā*, (Beirut: Dār Iḥyā' Al-Turāth Al-'Arabī), 6, p. 97.

<sup>3</sup> *Al-Qur'an, Al-Mumtaḥanah* (69): 8.

“O Muḥammad you usurped it.”<sup>4</sup> The Prophet (s.a.w.) said. “But it is borrowed returnable and guaranteed.”<sup>5</sup> The *ḍamān* in respect of property leads to creating confidence between the people in their social dealings, stability and security. However, lack of *ḍamān* 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 *ḍamān*.

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

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<sup>4</sup> *Al-Ghaṣb* 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 *mutaḡawwim* property belonging to others without leave. Abū Muḥammad Al-Baghdādī, *Majma' al-Damānāt* (Al-Qāhirah: Al-Maṭba'ah al-Khayrīyah, 1308H), p. 117.

<sup>5</sup> Al-Baihaqī, *Al-Sunan Al-Kubrā*, 6, p. 88.

says: "Do not transgress, indeed, Allāh does not like the transgressor."<sup>6</sup> Also in a Prophetic *ḥadīth*: "It is in the hand that you have taken until you return it."<sup>7</sup>

The capitalists leave the states which does not respect individual properties<sup>8</sup> in their policy and take refuge in other states which protects individual properties and accepts the practice of *ḍamān* 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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<sup>6</sup> *Al-Qur'an, Al-Baqarah* (2): 190.

<sup>7</sup> It is reported by Aṣḥāb Sunan al-Arba'ah and al-Ḥakīm. See also Al-Shawkānī, *Nayl al-Awṭār* (Bayrūt: Dār Al-Jayl, 1973), 6, p. 40. See Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, (Miṣr: Maṭba'ah Muṣṭafā al-Bābī al-Halabī, ed. 4, 1990), 3, p. 67.

<sup>8</sup> 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-ḍamān* 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-ḍamān* 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-ḍamān* in the contract of lease and mortgage because of their contemporary importance in the social and economic life of people. *Al-ḍamān* 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-ḍamān* 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 *Ḍamān* And Its Related Issues.**

Section 1: Definition Of *Ḍamān* And Its Legality.

Section 2: Elements Of *Ḍamān* And Its Conditions.

Section 3: Object Of *Ḍamān* And Its Types.

Section 4: Reasons For *Ḍamān*.

**Chapter Two: Equivalent *Ḍamān* 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: *Ḍamān* 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.